



Federal Court of Australia

[\[Index\]](#) [\[Search\]](#) [\[Download\]](#) [\[Help\]](#)

Sallehpour v Frontier Software Pty Ltd [2005] FCA 247 (15 March 2005)

Last Updated: 17 March 2005

FEDERAL COURT OF AUSTRALIA

Sallehpour v Frontier Software Pty Ltd [2005] FCA 247

INDUSTRIAL LAW – application for unlawful termination on grounds of temporary absence from work, mental disability and national extraction – whether termination "unfair" not a relevant consideration – stated reasons for termination not designed to disguise a prohibited reason – no basis for finding termination for a prohibited reason

Workplace Relations Act 1996(Cth) ss 170CK, 170CP, 170CQ, 170CR and 170CS

Bahonko v Moorfields Community [\[2005\] FCA 46](#) referred to
Griffiths v Freedom Furniture Pty Ltd [\[2002\] FCA 595](#) referred to

MOHAMMADALI SALLEHPOUR v FRONTIER SOFTWARE PTY LTD

V13 OF 2003

**MARSHALL J
15 MARCH 2005
MELBOURNE**

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY**

V13 OF 2003

**BETWEEN: MOHAMMADALI SALLEHPOUR
 APPLICANT**

**AND: FRONTIER SOFTWARE PTY LTD
 RESPONDENT**

JUDGE: MARSHALL J

DATE OF ORDER: 15 MARCH 2005

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The application be dismissed.
2. Costs be reserved with submissions on the question of costs to be filed by the respondent on or before 24 March 2005.
3. In the event that the respondent does file submissions on the question of costs, the applicant is to file submissions in response by 8 April 2005.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

V13 OF 2003

BETWEEN: **MOHAMMADALI SALLEHPOUR**
APPLICANT

AND: **FRONTIER SOFTWARE PTY LTD**
RESPONDENT

JUDGE: **MARSHALL J**

DATE: **15 MARCH 2005**

PLACE: **MELBOURNE**

REASONS FOR JUDGMENT

1 The applicant, Mr Mohammadali Sallehpour, has applied to the Court pursuant to [s 170CP](#) of the *Workplace Relations Act 1996* (Cth) ("the Act") for an order under [s 170CR](#) in respect of alleged contraventions of [s 170CK](#)(2)(a) and (f).

2 Mr Sallehpour alleged that his employment was terminated by the respondent, Frontier Software Pty Ltd ("Frontier") for reasons which included the following:

- temporary absence from work because of illness within the meaning of the *Workplace Relations Regulations* ("the regulations");
- mental disability; and
- national extraction.

3 The issues for determination in this matter are whether Frontier terminated Mr Sallehpour's employment for reasons which included any of those referred to in the preceding paragraph.

4 This case is a sad one. As will be seen from the factual context below, Mr Sallehpour suffers from a depressive illness. The illness manifested itself during his employment with Frontier. It affected his ability to perform his duties in a timely manner and his ability to respond to reasonable requests by Frontier to help him overcome or at least manage his illness whilst preserving his employment. Ultimately, Mr Sallehpour lost his job. He claimed that this occurred by reasons proscribed by [s 170CK](#). Unfortunately for Mr Sallehpour, as will be seen by the consideration of the issues set out below, it is the view of the Court that Frontier did not dismiss him for reasons which include the proscribed reasons alleged by him. Reasonable minds might differ

about whether the reasons which actually moved Frontier to terminate Mr Sallehpour's employment were justified in the circumstances. However, that is not an issue which is before the Court on the current application. See, for example, *Bahonko v Moorfields Community* [2005] FCA 46 at [57] per Merkel J.

Factual context

5 The central function of Frontier is the development and sale of human resources and payroll software. It also provides payroll services to other employers. Frontier's software development section is located in its Melbourne office. In that office there are four teams which specialise in certain types of programming tasks. Each team consists of up to seven programmers and a team leader. The team leaders report to the Development Manager.

6 Mr Sallehpour commenced employment with Frontier, in January 1997, as a programmer. His job involved the writing of computer code to adapt or update the software system used by Frontier. It is critical for the success of Frontier's operations that programmers be allocated tasks which they can complete within certain estimated timeframes. Timeframes and schedules are set by team leaders and the Development Manager having regard to staff availability, the estimated length of a job and the hours available to particular programmers.

7 Programmers work to deadlines and are expected to raise any concerns about the deadlines set with their team leaders. It is important for programmers to complete their tasks in a timely fashion and with minimal inaccuracies.

8 After commencing in January 1997, Mr Sallehpour was subjected to a performance appraisal in May 1997. That appraisal referred to difficulties Mr Sallehpour was experiencing in completing tasks on time. The appraisal also referred to Mr Sallehpour as "hard working" and "being prepared to put in the hours".

9 In the May 1998 performance appraisal, Mr Sallehpour's team leader made the following comments:

"Ali tries very hard but is struggling. He doesn't handle pressure well. He is also rather slow with jobs. He is enthusiastic and agreeable but probably too much so."

Under the heading "project management", in the May 1998 appraisal, the team leader wrote "keeps missing deadlines".

10 In assessing his own performance in May 1999, in the appraisal conducted at that time, Mr Sallehpour referred to:

"tight deadlines which stresses me and it is not good for my health..."

11 In the May 2000 appraisal Mr Sallehpour's supervisor said that:

"Ali has always shown a willingness to take on any job given to him. He is very affable and certainly not difficult to work with from this aspect. Ali has great trouble understanding job

requirements associated with each job, as he tends to get side-tracked easily and not focus on the issues at hand. This is one reason why his jobs blow out past their scheduled times..."

Mr Sallehpour, at the time of that appraisal, disagreed with his supervisor's comments.

12 In a performance review dated 31 July 2001, Mr Sallehpour's team leader said that:

"Ali's programming times have improved slightly over the past six months... but his programming times still need some improvement to meet reasonable deadlines."

13 Mr Sallehpour's comments in the same document were:

"I believe I did my best based on my current condition (health wise) and expect to do much better as I improve health wise and then can concentrate on my duties better."

14 Mr Ebb is Frontier's General Manager for Australasia. He has held that position since January 2001. He gave evidence that he became aware of problems with Mr Sallehpour's employment shortly after that time. In his first few weeks in his position Mr Ebb had meetings with the then Human Resources Manager, Ms Howard, about Mr Sallehpour's performance. At about this time, Mr Ebb became aware that Mr Sallehpour was being treated for depression. He was aware that Mr Sallehpour's treating practitioner, Dr Tan, considered that Mr Sallehpour's depression had been aggravated by "certain aspects of his work situation."

15 Mr Ebb requested Ms Howard to take steps to manage any issues concerning Mr Sallehpour and to engage professional support where necessary.

16 In or about September 2001, Ms Howard informed Mr Ebb that Mr Sallehpour was not coping with his work load and the deadlines set for him by his team leader.

17 On 26 September 2001, Ms Howard wrote to Mr Sallehpour about the development of a plan to manage mutual concerns. The letter stated that Frontier was concerned about Mr Sallehpour's health issue. It went on to offer him two weeks paid leave to consider his position. It said that Frontier would make available the services of an independent facilitator to assist in helping him "develop a way forward". The letter concluded by advising Mr Sallehpour that if after the 2 week period there was no sign of progress his on-going employment would be reviewed.

18 During October 2001, Mr Sallehpour met with Ms Howard about Frontier's on-going concerns about his employment situation and his health. In late October 2001 an action plan was agreed upon between Mr Sallehpour and Ms Howard concerning certain tasks which Mr Sallehpour would attempt to achieve within a given time frame. Mr Sallehpour later expressed concerns about whether the timeframe was realistic.

19 In November 2001, Ms Howard sought to meet with Mr Sallehpour to discuss performance issues but Mr Sallehpour did not make himself available to meet with her at the times she had suggested for the proposed meeting.

20 On 22 November 2001, Mr Sallehpour advised Ms Howard, by facsimile transmission, that he was unable to attend work until 30 November 2001, when Dr Tan would be reviewing his "current health situation". He also asked that his employment status be clarified.

21 On 23 November 2001, Ms Howard wrote to Mr Sallehpour. She advised him, amongst other things, that he was still employed by Frontier and requested that he speak to her about issues concerning his work.

22 In early December 2001, Frontier received a workers compensation claim form from Mr Sallehpour, in which Mr Sallehpour referred to his condition as "depression/anxiety". That condition was said to be caused by "repeated bullying/harassment and victimisation in the course of employment." No coherent or acceptable evidence was given which made out that claim in this proceeding.

23 By letter dated 6 December 2001, Ms Howard informed Mr Sallehpour that Frontier would lodge the claim form with its insurers. She also informed him that his leave entitlements would expire that day and that from the next day (7 December) onwards he would be on leave without pay unless he returned to work.

24 On 31 December 2001, Frontier's insurer rejected Mr Sallehpour's claim.

25 Mr Sallehpour attended for work in January 2002 for a few days but did not attend for work at all in February 2002 or thereafter.

26 On 24 January 2002, Mr Sallehpour proposed to Frontier that he work part-time on Mondays and Fridays on a trial basis, until his mental health improved. Ms Howard rejected that proposal. She considered that Mr Sallehpour should discuss with her a basis for a return to work, rather than dictating to her the times at which he would make himself available for work.

27 On 13 February 2002 a conciliation conference was held concerning the rejection of Mr Sallehpour's workers' compensation claim. No resolution occurred. Mr Sallehpour did not apply to the County Court or the Magistrates Court of Victoria in respect of that matter.

28 A receptionist at Frontier allegedly told Ms Howard who then passed on the information to Mr Ebb, that Mr Sallehpour had spoken to her in an inappropriate manner on 10 July 2002. Mr Ebb considered that that incident was the final straw in an unacceptable state of affairs. However, despite that fact, Frontier did not threaten Mr Sallehpour with the termination of his employment until late July 2002. I am not satisfied, in any event, that Frontier has established that Mr Sallehpour did act in an inappropriate way to a receptionist on 10 July 2002. Mr Sallehpour denied being present at Frontier's offices on that day and was not strongly pressed in cross-examination on that denial. Further, Frontier did not seek to call evidence from the receptionist in question, although its counsel, Mr R Dalton, did suggest that it was unaware of her current whereabouts.

29 In late July 2002, by letter dated 22 July but not received by Mr Sallehpour until after 29 July, Ms Howard wrote to Mr Sallehpour and amongst other points made the following salient points:

- Mr Sallehpour had provided doctor's certificates concerning his unfitness for work from 22 November 2001 until 28 August 2002.

- as at 22 November 2001 she had been involved in discussions with him concerning his work performance, specifically and "solely", his inability to complete required tasks and his refusal to attend meetings with her to discuss his performance;
- unless he informed her when he intended to attend work by 25 July 2002, his employment would be terminated.

30 On 29 July 2002 Ms Howard wrote to Mr Sallehpour advising that she needed his response to her letter dated 22 July by 5 pm on 1 August 2002 or he would be dismissed.

31 By letter dated 31 July 2002 addressed to Ms Howard, Mr Sallehpour's then solicitors, Messrs Clark and Toop, wrote to Frontier advising that Mr Sallehpour was not in a position to return to work or answer her questions.

32 In her response of 7 August 2002, Ms Howard told Clark and Toop that she was:

"quite prepared to listen to Mr Sallehpour's reasonable submissions in relation to his on-going employment but I do not understand how it is asserted that Mr Sallehpour cannot answer our questions... If he is unable to deal with these questions I would appreciate you explaining why."

33 Ms Howard concluded her letter by saying:

"...I remain of the view that I have ample grounds for terminating his employment but...I am prepared to listen to any reasonable submissions put on his behalf."

34 By letter dated 8 August 2002, Clark and Toop stated that Mr Sallehpour is "undergoing psychiatric treatment at a hospital" and was not in a position to provide the information sought by Ms Howard.

35 On 14 August 2002, Ms Howard ceased to be employed by Frontier. Ms Louise French replaced her as human resources manager.

36 On 9 September 2002, after a lack of response to the issues raised by Ms Howard in late July 2002, Mr Ebb decided to terminate Mr Sallehpour's employment, after consulting Ms French, the Development Manager (Mr White), and team leaders who had supervised Mr Sallehpour.

37 Mr Ebb gave the following reasons as the reasons for his decision:

- Mr Sallehpour's below par work performance;
- Mr Sallehpour's failure to co-operate with Ms Howard;
- The failure of the process in October-November 2001 referred to at [18] when Mr Sallehpour was set certain goals ("the facilitative process");
- Mr Sallehpour's lack of "contribution to the company since 2001" and his being "off work" completely on unpaid leave since early 2002, a period of over 7 months, with his workers

compensation claim rejected;

- The submission by Mr Sallehpour of monthly certificates covering up to and including 11 May 2005 showing that he had little or no prospect of returning to work in any capacity; and
- Mr Sallehpour's alleged conduct on 10 July 2002.

Unfairness not in issue

38 The proceeding before the Court does not call upon the Court to determine whether Mr Sallehpour was unfairly dismissed. The question for the Court is whether the dismissal occurred for reasons which included a prohibited reason under [s 170CK](#). It may be that an employer will attempt to disguise a prohibited reason by dressing up a termination as having been taken for some reason which was not a real reason or a justifiable reason for the termination. To the extent that it is necessary to consider, it is my view that Frontier was entitled to terminate Mr Sallehpour's employment for his failure to co-operate with Ms Howard's reasonable requests to discuss a mutually satisfactory basis for a return to work by him in some capacity. He was not entitled to dictate to her when he would or would not return to work.

39 The Court has serious doubts whether it was reasonable for Frontier to terminate Mr Sallehpour's employment on the basis of the other issues relied upon by Mr Ebb. This especially applies to the alleged incident on 10 July 2002, the question of the failure of the facilitative process and the alleged below par work performance. The latter two issues may have been capable of being addressed had Mr Sallehpour co-operated with Ms Howard's reasonable requests for further discussions.

Consideration

40 Most importantly, I do not consider that Mr Ebb's stated reasons for Mr Sallehpour's termination to be reasons designed to disguise prohibited reasons. To paraphrase, and adapt for current purposes the observations of Mansfield J in *Griffiths v Freedom Furniture Pty Ltd* [\[2002\] FCA 595](#) at [53], they are more in accord with an employer being genuinely concerned about the employee's performance and genuinely trying to improve that performance.

41 The prohibited reasons alleged by Mr Sallehpour are his national extraction, his mental disability and his temporary absence from work because of illness.

42 The evidence in the proceeding does not support a finding that Mr Sallehpour's national extraction had any bearing on Mr Ebb's decision to dismiss him. Mr Sallehpour is from Iran but he made no suggestion to Mr Ebb, in cross-examination, that Mr Ebb took his national extraction into account in the termination decision. Mr Ebb denied that he did take that consideration into account. I accept that denial.

43 The next question which arises is whether the termination occurred in part because of Mr Sallehpour's temporary absence from work within the meaning of the regulations.

44 Regulation 30C(1) deems an absence from work to be temporary if the employee provides a medical certificate within 24 hours after the commencement of the absence or such longer period as is reasonable in

the circumstances. However, Regulation 30C(2) provides that:

Subregulation (1) does not apply if:

"(a) the employee's absence extends for more than 3 months, unless the employee is on paid sick leave for the duration of the absence; or

(b) the total absences of the employee, within a 12 month period, whether based on a single or separate illnesses or injuries, extend for more than 3 months, unless the employee is on paid sick leave for the duration of the absences."

45 Mr Sallehpour's absence extended for in excess of three months; during a time at which he did not have the benefit of paid sick leave. Consequently the prohibited reason based on Mr Sallehpour's leave of absence cannot be established.

46 Whilst there is no basis upon which it could be alleged that Mr Sallehpour's absence from his employment or his national extraction formed any part of Frontier's reasons for the termination, Mr Dalton conceded that his client bore the onus under [s 170CQ](#) of disproving that the "mental health reason" was a reason for the termination. I am satisfied that Frontier has discharged that onus. Mr Ebb gave evidence, which I accept, that Mr Sallehpour's mental health was not a reason for the termination. That evidence is consistent with Frontier's general approach to Mr Sallehpour's work problems. In particular, Ms Howard attempted to accommodate Mr Sallehpour's health issues and safeguard his continued employment. In that regard Mr Sallehpour was his own worst enemy. He failed to reasonably cooperate with Ms Howard or discuss with her issues concerning his employment when she was genuinely trying to help him. The Court accepts that Frontier, certainly at management level, was a caring employer which did its best to try to help an employee who was experiencing difficult health issues. It defies reality to contend that Mr Sallehpour was terminated for the reason of his mental health, or because of or on account of his mental health. Consequently, it is unnecessary to decide the correctness of Mr Dalton's alternative submission that it was an inherent requirement of Mr Sallehpour's job that he not suffer from mental health problems.

Order

47 Having regard to the foregoing it is appropriate to order that the application be dismissed. If the respondent wishes to agitate the question of costs under [s 170CS](#), it may do so in accordance with the timeframe set out in the accompanying order.

The disqualification/ adjournment application

48 This matter was heard by the Court on 8, 9, 10 and 11 March 2005 and today, 15 March 2005. The evidence concluded on 10 March 2005. Mr Dalton finished his submissions on the morning of 11 March 2005. The Court then adjourned to 15 March 2005 to enable Mr Sallehpour to have the benefit of Friday afternoon and the long weekend to prepare his final submissions. Although Mr Sallehpour had earlier stated that he may require a lengthy period of time to prepare his final submissions, he did not seek an adjournment in Court on 11 March 2005. On the contrary, he informed the Court that his submissions should take no more than two

hours and that he expected to conclude them by 12.15 pm on 15 March 2005. Despite failing to apply for an adjournment on 11 March 2005, Mr Sallehpour this morning applied to adjourn today's hearing to enable him to seek advice on the prospect of making a disqualification application. Mr Sallehpour claimed that he had not been given a reasonable opportunity to present his case. When pressed to provide particulars of that assertion Mr Sallehpour was not able to develop that claim at all, but merely wished to seek an adjournment to obtain advice as to how to develop that claim. As no proper basis was put to me for my disqualification from the proceeding, and given that no complaint was raised at any stage in the proceeding by Mr Sallehpour about my conduct of the proceeding prior to this morning, I dismissed the disqualification application and refused the adjournment which Mr Sallehpour sought to search for a basis upon which to support such an application.

49 As it turned out Mr Sallehpour came prepared today with written submissions in support of his case. I considered those submissions before giving judgment in the matter but did not find them persuasive on the central issues concerning [s 170CK](#) of [the Act](#).

I certify that the preceding forty-nine (49) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Marshall.

Associate:

Dated: 16 March 2005

The Applicant appeared for himself.

Counsel for the Respondent: Mr R Dalton

Solicitor for the Respondent: Tress Cocks & Maddox

Date of Hearing: 8, 9, 10, 11 and 15 March 2005

Date of Judgment: 15 March 2005