

TRANSCRIPT OF PROCEEDINGS

INDUSTRIAL MAGISTRATES COURT

HERLIHY, Magistrate

00241915 of 2008 (5)

BODY CORPORATE SERVICES

And

QCOMP

BRISBANE

..DATE 13/10/2009

DECISION

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

This is an appeal against a decision by QComp that Miss Farrell be paid compensation under the Workers' Compensation and Rehabilitation Act of 2003. The matter's been heard by me de novo.

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There's no dispute that Miss Farrell was a worker in terms of section 11 of the Act and I find that she suffered an injury within the terms of section 32 subsection (1) of the Act, namely, the injury Dr Hunter has just recently given evidence of. I also find that the injury arose out of or in the course of her employment and that the employment was a significant contributing factor to the injury. The injury arose out of events which occurred on the 15th of January in the office of the appellant at Southport.

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The evidence has been fully recorded and I'm not going to refer to great slabs of it, but I've listened intently and I've made assessments as to credit as we've been going along. The witness who impressed me most was Mr Gordon. He didn't come across as a vindictive person. He came across as the branch manager trying to do his job at Southport.

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He was presented with an unusual case, namely, Miss Kelly alleging an assault. Miss Kelly told Allard. Allard then went from the office, but Gordon knew that something untoward had happened. Mr Gordon then set in train procedures to keep the ladies apart. One can't fault him for that and as Mr O'Sullivan rightly points out, the whole thing was a dynamic situation. It kept evolving as the day went on and as

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13102009 D.2 T10-11/VLCR(BNE) M/T BMC40 (HERLIHY, Magistrate)
the proceeding days occurred.

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The office in Melbourne gets the email from Miss Kelly and Miss Cummins becomes involved. In my opinion, she became involved as the HR person in the company. Unfortunately for her, she wasn't given the complete facts. No fault of hers, but she had some idea that the arrangement put in place by Mr Gordon had come unstuck because Miss Farrell had somehow disobeyed something that Mr Gordon had said. As it transpires, looking at the witnesses, I don't believe that was in any way a breach of Mr Gordon's orders to Miss Farrell.

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What happened, according to Mr Gordon, and I accept him, was that there was some rudeness on the part of Miss Farrell towards Miss Kelly. That seemed to trigger Miss Cummins into action, which led to Miss Farrell being told to get out office, to leave the office on the 15th.

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Well, the only live issue in the case is whether the exception in section 32 subsection (5) comes into play. The onus of proof is on the appellant. So, they have to show that it was reasonable management action taken in a reasonable way, as Mr Atkinson said, the two-pronged test under section 32 subsection (5).

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I've given the matter some thought over the two days and on balance, I would find that the action that the company set in train, that is, Mr Gordon, Miss Cummins, looking at it globally, I'd find that it was reasonable management action.

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There were blemishes. Miss Cummins didn't have the full facts when she told Gordon to tell Miss Farrell to get out of the office, but I do bear in mind the short timeframe.

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In fact, the whole thing was spiralling and that there was miscommunication between the office at Southport and Miss Cummins in Melbourne. That happens to all of us. For me to hold that that's unreasonable in the circumstances would be an overreaction and I bear in mind what the President has said in a number of cases: you look at all the circumstances. The action doesn't have to be perfect. It can have blemishes, but is it in the circumstances reasonable. Well, in this case I would hold on balance that it was. That sends me then to how it was carried out.

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Well, I've used the word "hamfisted" in submissions from counsel in our discussions about those submissions. I don't resile from it.

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Mr Gordon, in Exhibit 8, outlines what he did and there are certain things in it that I would just say I thought were unfair to Miss Farrell. I don't know particularly how she got into that room, whether she was told, "Get in there," or whether she was politely asked. One doesn't know what was going on in the office that day, but things I do notice: the fair thing to Miss Farrell would have been to advise her by email or verbally that he wanted to talk to her about the events of the previous day, that she was entitled to have somebody with her, because the whole thing was serious and

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13102009 D.2 T10-11/VLCR(BNE) M/T BMC40 (HERLIHY, Magistrate)
some sort of form of discipline might happen to her. So, she
was entitled to be given the requirements of fairness and
natural justice. She wasn't, I think, to be told to just come
into a room where he's there with a witness. She's got no-one
and then she's fired at with these comments about, "I've got
instructions that you're to do this and what have you."

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She becomes, rightly, upset and understandably so. She then
isn't taken by the branch manager to her friend outside, the
lady who finally comes to her aid. I have forgotten the
lady's name, but it is in the evidence. That woman could have
been asked to come in and to support her. So, basically what
I'm left with is the notion that the meeting was unfair, it
didn't comply with the requirements of natural justice.

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That being the case, I would find that the way that the
management action was carried out was unreasonable, it was
unfair, it was hamfisted, it was over the top. Having found
that, that leaves me with the only decision is that the QComp
decision must be confirmed.

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So, the appeal is dismissed and I'll leave it up to you to
work out the costs.

MR MERRILL: The costs should follow the event in the
circumstances.

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BENCH: Yes, they follow the event and you can work out the
amount.

MR MERRILL: Thank you, your Honour.

BENCH: Is there any - you got leave or something, did you, to appear? 1

MR ATKINSON: We got leave to intervene. The course of conduct was that the appellant was out of time. We got leave to lodge the appeal outside of time and after that happened, my side got leave to intervene and we seek costs as well.

MR O'SULLIVAN: Well, I'd be content to pay the costs for QComp, but whether or not we should pay the costs of the worker is another issue. 10

BENCH: All right. What's the issue?

MR O'SULLIVAN: Well, the issue is I've been fully - in this ploy in this circumstance before where they get leave to appear-----

BENCH: Yes. 20

MR O'SULLIVAN: -----not made a party to the proceedings and it's common for the employer not to be entitled to its costs in the event that it's successful.

BENCH: Common for the employer not to be entitled?

MR O'SULLIVAN: That's right.

BENCH: Oh. 30

MR O'SULLIVAN: The justification for that is, namely, it's not a party to the proceedings and in that circumstance, in my respectful submission, QComp is entitled to its costs-----

BENCH: Yes.

MR O'SULLIVAN: -----but as the worker has intervened, it's a situation where at the time of the appeal-----

BENCH: The decision - there is just a recent decision I saw on AustLII from President Hall about something to do with intervenors. He overruled something or said that some previous cases he had decided were on the 1996 Act and I have forgotten what it was now. It was in the last few days. 40

MR O'SULLIVAN: I certainly haven't checked his decisions in the last few days in that respect.

BENCH: No. 50

MR O'SULLIVAN: In the past, he has made determinations about the intervenor not being given leave to be a party to the proceedings, but has been given the right to be heard on it.

BENCH: Right, yes.

MR O'SULLIVAN: And there is a distinction.

BENCH: But what's the position here? Mr Atkinson is a party. 1

MR O'SULLIVAN: He is a party because under the legislation, the worker's entitled as of right to be a party.

BENCH: Oh, right. Well, then wouldn't it follow that if he wins, costs follow the event if you're a party?

MR O'SULLIVAN: That's my submission, your Honour. 10

BENCH: Good. Is there - there must be some law on that, is there?

MR ATKINSON: Your Honour, section 549 subsection (3) subsection (A) said just what my friend said, which is that although we made an application to be a party, we had a right to be a party.

BENCH: Yes. 20

MR ATKINSON: And we were a party in a situation where there's one person affected by the relief in all of this, it's us, it's my client and in my submission, it is entirely appropriate that she be here. It's entirely appropriate that she resist the appeal. The parliament has given her a right to appeal and, of course, as you'd expect, your Honour, the legislation says you have the discretion as to costs. We had a right to be here. We are affected by the relief and in my immodest submission, we assisted the Court to some respect by being here. For those reasons, we should have our costs. 30

BENCH: In fact, yes. Without being rude, I suppose, you carried the case for the other side basically.

MR ATKINSON: Well, not the medical evidence-----

BENCH: No, no.

MR ATKINSON: -----but certainly----- 40

BENCH: No, Mr - QComp called the medical evidence.

MR ATKINSON: But Miss Farrell has to confide in somebody, her counsel, exactly what the state of affairs was and that state of affairs has to be put to the witnesses.

BENCH: That is right, yes, and you've got a right to be here.

MR ATKINSON: Yes, your Honour. 50

BENCH: Yes. I can't see then why costs don't follow the event.

MR ATKINSON: Thank you, your Honour. Can perhaps then Mr Merrill and I should have our solicitors simply to agree with Mr O'Sullivan's solicitors what the costs are?

BENCH: Well, that's normally the case, isn't it?

MR ATKINSON: And then-----

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BENCH: You can agree and if you can't agree, you come back and they either get me or the Registrar will work out the costs.

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