

# INDUSTRIAL COURT OF QUEENSLAND

CITATION: *State of Queensland (Queensland Fire and Emergency Services) v United Firefighters' Union of Australia, Union of Employees, Queensland* [2015] ICQ 032

PARTIES: **STATE OF QUEENSLAND (QUEENSLAND FIRE AND EMERGENCY SERVICES)**  
(appellant)  
v  
**UNITED FIREFIGHTERS' UNION OF AUSTRALIA,  
UNION OF EMPLOYEES, QUEENSLAND**  
(respondent)

FILE NO/S: C/2015/6

PROCEEDING: Appeal

DELIVERED ON: 17 November 2015

HEARING DATE: 27 April 2015

MEMBER: Martin J, President

ORDER/S: **Appeal dismissed.**

CATCHWORDS: INDUSTRIAL LAW – QUEENSLAND – OTHER MATTERS – where the respondent applied to the Commission under s 276 of the *Industrial Relations Act* 1999 seeking orders amending the contracts of service for auxiliary firefighters – where the terms and conditions of employment of auxiliary firefighters are set by the Queensland Fire and Emergency Services Commissioner under s 26 of the *Fire and Emergency Services Act* 1990 (the Fire Act) – where the appellant applied to the Commission to strike-out the respondent's application – where the Commission dismissed the strike-out application – whether the Commission erred in finding that the a determination under s 26 of the Fire Act had contractual effect and that the Commission had power or jurisdiction under s 276 of the *Industrial Relations Act* 1999

*Industrial Relations Act* 1999, s 276, s 331  
*Fire and Emergency Services Act* 1990, s 25, s 26

CASES: *Australian Film Commission v Mabey* (1985) 6 FCR 107  
*Chittick v Ackland* (1984) 1 FCR 254

APPEARANCES: A Herbert directly instructed by the appellant  
J Merrell directly instructed by the respondent

- [1] The Queensland Fire and Emergency Service (“QFES”) is established under the *Fire and Emergency Services Act 1990* (“the Fire Act”). The Fire Act provides for the appointment of a Commissioner of the QFES who has the power, among other things, to employ the persons that he or she considers necessary to perform the service’s functions (see s 25 of the Fire Act).
- [2] At the relevant time, no award or agreement existed which covered the classification of auxiliary firefighter. The terms and conditions of employment of auxiliary firefighters were set by the Commissioner under s 26 of the Fire Act.
- [3] The United Firefighters Union of Australia, Union of Employees (“UFU”) has brought an application under s 276 of the *Industrial Relations Act 1999* (“IR Act”) in which it seeks orders amending the contracts of service for the auxiliary firefighters named in its application.
- [4] The State of Queensland applied under s 331 of the IR Act for an order striking out that application on the grounds that the Commission has no “power or jurisdiction under s 276 of the IR Act to amend or declare void any of the terms and conditions determined by the QFES Commissioner under s 26 of the Fire and Emergency and Services Act 1990 to apply to the employment of auxiliary firefighters”. In the alternative, the State sought an order staying the UFU’s application until the completion of the award modernisation process in so far as that process affects auxiliary firefighters.
- [5] The strike-out application by the State under s 331 of the IR Act was dismissed in the Commission. The Commission’s dismissal of the strike-out application is the subject of this appeal.

### **Grounds of Appeal**

- [6] The gist of the appellant’s argument is that, on the face of s 26 of the Fire Act, s 276 of the IR Act does not give the Commission any power to interfere with the terms and conditions of employment fixed by the QFES Commissioner.

### **Legislation**

- [7] Section 25 of the Fire Act provides;

“The commissioner may employ the persons the commissioner considers necessary to perform the service’s functions.”

- [8] Section 26(1) of the Fire Act provides:

“(1) Subject to any applicable industrial award or industrial agreement, persons employed under section 25 shall be paid salary, wages and allowances at such rates and shall be employed under such conditions of employment as the commissioner determines.”

[9] The Commissioner has made two relevant determinations which set out the terms and conditions of auxiliary firefighters – the Standing Orders.

[10] Section 276 of the IR Act provides:

276 Power to amend or declare void contracts

(1) On application, the commission may amend or declare void (wholly or partly) a contract if it considers—

(a) the contract is—

(i) a contract of service that is not covered by an industrial instrument; or

(ii) a contract for services; and

(b) the contract is an unfair contract.

(1A) The commission must not—

(a) amend a contract (whether made before or after the commencement of this subsection) to include an accident pay provision; or

(b) declare a contract (whether made before or after the commencement of this subsection) wholly or partly void, because it does not contain an accident pay provision.

(2) In deciding whether to amend or declare void a contract, or part of a contract, the commission may consider—

(a) the relative bargaining power of the parties to the contract and, if applicable, anyone acting for the parties; or

(b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; or

(c) an industrial instrument or this Act; or

(d) the Queensland minimum wage; or

(e) anything else the commission considers relevant.

(3) An application may be made by—

- (a) a party to the contract; or
  - (b) an inspector, for the party required under the contract to provide services; or
  - (c) an organisation of employees or employers of which a party is, or has applied to become, a member, if it is acting with the party's written consent.
- (4) The commission may consider a contract to be an unfair contract if it considers the contract—
- (a) was an unfair contract when it was entered into; or
  - (b) became an unfair contract after it was entered into because of the conduct of the parties, or a variation to the contract or for any other reason it considers sufficient.
- (5) The commission may make an order it considers appropriate about payment of an amount for a contract amended or declared void.
- (6) A person can not make an application under this section if—
- (a) an application has been made under section 74 for the same matter; or
  - (b) the person—
    - (i) is not a public service officer employed on tenure under the *Public Service Act 2008*; and
    - (ii) has an annual wage of more than \$68000 or a greater amount stated in, or worked out in a way prescribed under a regulation.
- (7) In this section—

***accident pay provision*** means a provision for accident pay, or other payment, on account of a worker sustaining an injury.

***contract*** includes—

- (a) an arrangement or understanding; and
- (b) a collateral contract relating to a contract.

***industrial instrument*** includes a federal industrial instrument.

***injury*** means an injury under the *Workers' Compensation and Rehabilitation Act 2003*.

***unfair contract*** means a contract that—

- (a) is harsh, unconscionable or unfair; or
- (b) is against the public interest; or
- (c) provides, or has provided, a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument or this Act; or
- (d) is designed to, or does, avoid the provisions of an industrial instrument.

***worker*** means a worker under the *Workers' Compensation and Rehabilitation Act 2003*.

[11] Section 331 of the IR Act provides:

331 Decisions generally

The court or commission may, in an industrial cause—

- (a) make a decision it considers just, and include in the decision a provision it considers appropriate for preventing or settling the industrial dispute, or dealing with the industrial matter, the cause relates to, without being restricted to any specific relief claimed by the parties to the cause; or
- (b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the court or commission considers—
  - (i) the cause is trivial; or
  - (ii) further proceedings by the court or commission are not necessary or desirable in the public interest; or
- (c) order a party to the cause to pay another party the expenses, including witness expenses, it considers appropriate.

### **Who is the employer?**

[12] The QFES is not a juristic entity. Although it is created by the Fire Act, the Fire Act does not go so far as to invest it with a legal personality. The employer of the auxiliary firefighters is the State of Queensland. While s 25 of the Fire Act says that the

Commissioner may “employ” the necessary persons etc., the word “employ” is being used in the sense of “engage” an employee.

### **The decision of the Commission**

- [13] The Commission held that the contract of the auxiliary firefighters was made up of the determination under s 26 of the Fire Act, but that s 276 of the IR Act could be applied.

### **The Appellant’s argument**

- [14] The Appellant’s argument is in two parts.
- [15] First, it argues that s 276 of the IR Act is confined to amending or declaring void a contract. But, it says, the UFU’s application is directed, not to the auxiliary firefighter’s contracts of employment, but to the determinations made by the QFES Commissioner under s 26 of the Fire Act.
- [16] Secondly, the State submits the contracts of employment are partly governed by the law of contract and partly by statute. As s 276 of the IR Act only operates on those parts of the contract which are governed by the law of contract to vary the entire contract would be tantamount to repealing the operation of s 26 of the Fire Act.

### **What is the contract of service?**

- [17] The relief sought in the s 276 application does not refer to the QFES Commissioner’s determinations. It concerns the “contracts of service of the named auxiliary firefighters”.
- [18] The question is: what constitutes the contracts of service of the auxiliary firefighters?
- [19] It was argued on behalf of the State that the conditions which govern the employment do not form part of a contract of employment. Mr Herbert argued:

“The parties did not reach a contract of any kind so far as these terms and conditions are concerned. They did not bargain for these terms and conditions. They were, in fact, not even prescribed by the service or the State of Queensland, but prescribed by the Fire Commissioner under the terms of an Act of Parliament, and they were made unilaterally by the Commissioner and given to whoever the employer happens to be, ... section 26 of the Fire Services Act operated upon them to make their mandatory prescription for those persons.

So the question as to whether one party has overborne the other or that something that was thought to be a good deal at the time has turned out to be a very bad deal, simply doesn’t apply because the parties have never agreed to these conditions. Neither party has agreed to the conditions, neither the employer nor the employees have agreed to the conditions; they’ve come

from another source set under a legislative requirement. So they have no characteristics of a contract whatsoever or contractual terms.”

[20] That argument is inconsistent with two decisions of the Full Court of the Federal Court of Australia, namely, *Chittick v Ackland*<sup>1</sup> and *Australian Film Commission v Mabey*<sup>2</sup>.

[21] In *Chittick* the court was concerned with the provisions of the *Health Insurance Commission Act 1973* (Cth) which provided that the terms and conditions of employment of persons engaged as staff under that Act were to be determined by the Health Insurance Commission. The *Health Insurance Commission Act* excluded the operation of other Commonwealth legislation in relation to the employment of the staff of the Health Insurance Commission. In considering the determination made by the Health Insurance Commission on the terms and conditions, Lockhart and Morling JJ said:

“The provisions of the document embodying the *Conditions of Employment* constitute a comprehensive code of the terms and conditions of employment of the Commission's staff. The effect of s. 28(2) of the Act is to make the provisions of the document the terms and conditions governing the employment of those persons who agree to be employed by the Commission. The document is a statement of the conditions upon which the Commission is prepared to engage such persons. Persons who enter the Commission's service must be taken to accept employment on the terms set out in the document. **The document therefore either forms part of, or at least evidences, the contracts of employment made by the Commission with the members of its staff.**”<sup>3</sup> (emphasis added)

[22] In *Mabey* a similar provision for the creation of terms and conditions existed. The majority observed:

“There followed the issue to Mr Mabey by the Commission of a lengthy document entitled ‘Terms and Conditions of Employment of Persons Appointed or Engaged under s. 29 (of the Act)’. This document bore the prominent notation on the cover sheet: ‘Australian Film Commission Determination No I of 1981.’ It is accepted that these were, or became, part of the contract of employment.”<sup>4</sup>

[23] The absence of negotiation between parties does not preclude the existence of a contract. At its simplest, a contract is an offer by one party which is accepted by the other. Such contracts can be found in award-free employment as they can in contracts such as the purchase of a ticket entitling the holder to park in a particular space for a nominated time. There is no negotiation. It is a take it or leave it proposition. Just as it is in this case. It makes no difference that the determination is made by the QFES Commissioner – the Standing Orders are the terms upon which employment is offered by the State.

<sup>1</sup> (1984) 1 FCR 254.

<sup>2</sup> (1985) 6 FCR 107.

<sup>3</sup> *Chittick* at 264.

<sup>4</sup> *Mabey* at 109 per Bowen CJ and Fox J.

- [24] The contract of employment of an auxiliary firefighter is created by the acceptance of the worker of the terms contained in the Standing Orders. Upon acceptance, the contract is formed, it becomes a distinct legal relationship and is subject to the operation of s 276 of the IR Act.
- [25] It was also argued by the appellant that s 276 could not be applied in this case because:
- “... if the Commission were to make a determination based on the fact they were dealing with the contract and not the statutory obligation, and the Fire Commissioner made another determination the next day to reverse everything the Commission had done, the State of Queensland would be obliged to follow what the [QFES] Commissioner said and not what the Industrial Commission said.”
- [26] That argument, with respect, assumes that the QFES Commissioner can reverse a determination made under s 276 of the IR Act. I do not accept that. The power given to the QFES Commissioner in s 26 of the Fire Act is to determine “salary, wages and allowances” for persons employed under s 25 of the Fire Act. To construe s 26 in a way that would allow the QFES Commissioner to overturn a decision of the Industrial Commission made under s 276 of the IR Act would require construing s 26 as giving the QFES Commissioner power to set “salary, wages and allowances” for the past. Section 26 does not allow the QFES Commissioner to make a determination which alters “salary, wages and allowances” of employees for work done prior to the making of a determination. It would require the clearest of words to allow the QFES Commissioner to, for example, raise (or lower) salaries for a period which has already past. Such words are not present in s 26.
- [27] On the other hand, s 276 of the IR Act does envisage the possibility of an order being made which amends a contract of employment from its inception. The Industrial Commission can amend or declare void a contract if it is satisfied of certain things. It could, for example, amend a contract of employment by inserting a provision for the payment of penalty rates for particular hours of work. The financial effect of that would depend upon the facts of the particular case. That the Industrial Commission can look at what has occurred in the past is made clear in s 276(4) where reference is made to a contract being unfair when it was entered into. Further, the definition of “unfair contract” includes a contract that has provided a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument or the IR Act. Section 276 allows the Industrial Commission to make an order for payment of an amount for such a contract.
- [28] The important difference between s 26 of the Fire Act and s 276 of the IR Act is that the former only operates for the future whereas the latter can operate on the past. It is correct, as was argued for the appellant, that an amendment of a contract by the Industrial Commission could be stymied, for the future, by a determination of the QFES Commissioner under the Fire Act. But such a determination could not affect an order made under s 276 so far as it applied to the past.
- [29] Neither the conclusion reached by the Industrial Commission nor anything said in these reasons requires that, should the s 276 application proceed, the application should be



granted. One of the matters which the Industrial Commission would take into account when assessing such an application is the statutory framework referred to above. Section 276 of the IR Act allows the Industrial Commission a discretion as to whether any order is made and, in deciding whether to amend or declare void a contract, the Industrial Commission would ordinarily consider the intention of the legislature as evidenced in s 26 of the Fire Act.

### **Conclusion**

- [30] No error in the reasoning of the Deputy President has been demonstrated. The appeal is dismissed.