

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION: *State of Queensland (Department of Community Safety - Queensland Fire and Emergency Services) v United Firefighters' Union of Australia, Union of Employees, Queensland* [2015] QIRC 015

PARTIES: **State of Queensland (Department of Community Safety - Queensland Fire and Emergency Services)**
(applicant)

United Firefighters' Union of Australia, Union of Employees, Queensland
(respondent)

CASE NO: B/2014/65

PROCEEDING: Application to dismiss application; application to stay application

DELIVERED ON: 21 January 2015

HEARING DATE: 22 December 2014

MEMBER: Deputy President O'Connor

ORDERS: **The application is dismissed.**

CATCHWORDS: INDUSTRIAL LAW – POWER TO AMEND OR DECLARE VOID CONTRACTS - Whether the power to amend or declare void a contract under s 276 of the *Industrial Relations Act 1999* extends to terms and conditions of employment determined by a statutory appointee under Act of Parliament - Whether the terms and conditions determined by the Queensland Fire and Emergency Services Commissioner to apply to the employment of auxiliary firefighters under s 26 of the *Fire and Emergency Service Act 1990* fall within the definition of "contract" in s 276(7)

Fire and Emergency Service Act 1990
Industrial Relations Act 1999

CASES: *Australian Film Commission v Mabey* (1985) 6 FCR 107
Chittick v Ackland (1984) 1 FCR 254
Dey v Victorian Railways Commissioners (1949) 78 CLR 62

Goldman Sachs JBWere Services Pty Ltd v Nikolich
 [2007] FCAFC 120
Jarratt v Commissioner of Police for New South Wales (2005) 224 CLR 44
Lucy v Commonwealth (1923) 33 CLR 229
Newmont Pajingo Pty Ltd v Tomac Enterprises Pty Ltd (2005) 178 QGIG 404
State of Queensland v Casaubon (C/2013/3) – Decision <<http://www.qirc.qld.gov.au>>

APPEARANCES: Mr A. K. Herbert for the applicant, directly instructed.
 Mr J. W. Merrell for the respondent, directly instructed.

Decision

- [1] The State of Queensland (Department of Community Safety - Queensland Fire and Emergency Services) ("QFES") applies for:
- (a) an order striking out the application by the United Firefighters' Union of Australia, Union of Employees, Queensland ("UFU") to amend the contract of service for auxiliary firefighters employed by the QFES, on the grounds that the Queensland Industrial Relations Commission has no power or jurisdiction under s 276 of the *Industrial Relations Act 1999* to amend or declare void any of the terms and conditions determined by the QFES Commissioner under s 26 of the *Fire and Emergency Services Act 1990* to apply to the employment of auxiliary firefighters; or alternatively
 - (b) an order that the UFU's application to amend the contract of service for auxiliary firefighters is stayed until the completion of the Queensland Fire and Emergency Services award modernisation process currently before the Commission, insofar as that process affects auxiliary firefighters

Background

- [2] The UFU applied to the Commission (matter number B/2014/47) for an amendment to the contracts of service for the auxiliary firefighters named in that application.
- [3] The application is brought under s 276 of the *Industrial Relations Act 1999* ("the IR Act"), and seeks that the Commission grant to the employee applicants amendments to their contracts of service in accordance with annexure 2 to that application.
- [4] Section 276 of the Act relevantly provides as follows:

"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.
- ...
- (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.
- ...
- (7) In this section—
 - ...
 - contract includes—
 - (a) an arrangement or understanding; and
 - (b) a collateral contract relating to a contract.
 - ...
 - 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."

[5] The UFU's s 276 application sought the following decision:

- "(a) The auxiliary firefighters' contract of service is:
 - (i) harsh, unconscionable or unfair, and/or
 - (ii) is against the public interest, and/or
 - (iii) 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 the IR Act.

- (b) That the contract of service for the auxiliary firefighters is amended by Order as outlined as annexure 2 to this application; and
- (c) That the auxiliary firefighters are subject to an Order about payment of an amount to compensate them for the unfair contract terms from the period commencing from 27th November 2013."

[6] Annexure 2 to the UFU's s 276 application sets out the relief in respect of the amendment to the contracts of service for the auxiliary firefighters.

[7] In *Newmont Pajingo Pty Ltd v Tomac Enterprises Pty Ltd*, his Honour President Hall considered the meaning to be given to the definition of "contract" in section 276(7) of the IR Act. ¹ His Honour wrote:

"Critical to the appeal at hand is the definition of "contract" at s 276(7) which provides that for s 276:

"**contract**" includes—

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

It follows from that definition that whilst s 276 applies to 'true' contracts for service, the section also applies to dealings which are not contracts under the general law. Section 276(7) is not a provision directed to enabling the Commission to have regard to associated arrangements or understandings, or to related collateral contracts in assessing the 'fairness' of a true contract. The purpose of s 276(7) is to make the remedies at s 276(1) and (5) available where what is impugned is not a 'true' contract but an arrangement or understanding or a related collateral contract."²

[8] Under s 25 of the *Fire and Emergency Service Act 1990* ("Fire Act") the Commissioner may employ the persons considered necessary to perform the Services' functions. Section 26 of the Fire Act provides as follows:

"26 Conditions of Employment

- (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.
- (2) However, if a person mentioned in subsection (1) is employed on contract for a fixed term, the conditions of the person's employment are not subject to any industrial award or agreement."

[9] The QFES submits that:

"8. Accordingly, in the case of the employee applicants, they are engaged as employees of the QFES, however the terms and conditions of their employment are set unilaterally in accordance with a statutory determination by the Commissioner, in the unfettered discretion of the

¹ (2005) 178 QGIG 404.

² Ibid, 405.

Commissioner, which determination may be altered without the consent or otherwise of any such employees at any time.

9. That is to say, the terms and conditions of the employment of auxiliary firefighters are set by a person who is not their employer, and without any form of mutuality as to agreement to those terms and conditions.
10. The applicant employees are entirely subject to the statutory determination of the Commissioner, and have no capacity to bargain, agree or disagree to the conditions determined by the Commissioner from time to time.
11. Those terms and conditions are contained in a Standing Order by the Commissioner..."

[10] The QFES contends that the determinations made by the Commissioner under Standing Orders do not constitute terms and conditions of a contract. Rather, it is argued, they are legislatively sanctioned determinations made by a statutory appointee which are imposed upon a bare contract of employment by the direct command of an Act of Parliament.

[11] The QFES submits that the consequence of what the UFU seeks to achieve by its s 276 application is to vary, block or stop the operation of the Fire Act, something which the QFES submits involves the fundamental incapacity on the part of the Commission. In particular, the QFES contends that the Commission has no power to vary or declare void the terms and conditions of the Code of Practice which apply to auxiliary firefighters by the force and effect of an Act of Parliament. It follows therefore, on the QFES's submission, that if the Commission was to purport to do so, any such order would have no effect.

[12] The UFU's case is that the QFES's contentions are misplaced. In short, the UFU argues that, objectively considered, a reasonable person in the position of an auxiliary firefighter would conclude that they are employees, are subject to a contract of employment, and that the Commissioner intended to be contractually bound by the conditions of employment as referred to in the relevant version of the standing order.

[13] The UFU draws the Commission's attention to a number of authorities to support its argument that, in respect of a person who is employed pursuant to a statute, and where the terms and conditions of service of that person are to be determined by the relevant employing authority, the terms and conditions of employment so determined by the relevant employing authority become part of the contract of employment with the person.

[14] In *Chittick v Ackland*, an employee sought to judicially review decisions related to her suspension and subsequent dismissal from the Commonwealth Health Insurance Commission. A relevant issue was the terms of her contract of employment with the Commission.³

³ (1984) 1 FCR 254.

[15] Section 28 of the *Health Insurance Commission Act 1973*, relevantly provided under s 28(1) that the Health Insurance Commission could engage such staff as it thought necessary for the purposes of that Act. Under s 28(2) the terms and conditions of employment of persons engaged as staff under s 28(1) of the Act were to be as determined by the Health Insurance Commission.

[16] Lockhart and Morling JJ held:

"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 s28 (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 become 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 members of its staff."⁴

[17] In *Australian Film Commission v Mabey*,⁵ the Australian Film Commission had power, pursuant to section 29 of the *Australian Film Commission Act 1975*, to appoint such officers and engage such employees as it thought necessary for the performance of its functions and that the terms and conditions of service or employment of such persons were as determined by the Australian Film Commission as approved by the Public Service Board.

[18] In that case, a document was issued by the Australian Film Commission entitled "Terms and Conditions of Employment of Persons Appointed or Engaged under section 29 of the Australian Family Commission Act 1975."

[19] Bowen CJ and Fox J found that those terms and conditions were or became part of the contract of employment between the Australian Film Commission and the relevant employee.⁶

[20] It is submitted that the wages and allowances for auxiliary firefighters as determined by the Commissioner and as set out in the Auxiliary Firefighters' Standing Order Version 5 and the 2014 Auxiliary Firefighters' Standing Order form part of the contract of employment between the Commissioner and the relevant auxiliary firefighters.

[21] The test to be applied in determining whether a written policy or other document or statement is incorporated by reference into a contract of employment is an objective one. In this regard, the UFU directed the Commission's attention to *Goldman Sachs JBWere Services Pty Ltd v Nikolich*, where Black CJ wrote:

"The principles to be applied in determining whether any, and if so what, parts of WWU were terms of the contract of employment are not in doubt. It is well established that if a reasonable person in the position of a promisee would

⁴ Ibid, 264.

⁵ (1985) 6 FCR 107.

⁶ Ibid, 109.

conclude that a promisor intended to be contractually bound by a particular statement, then the promisor will be so bound. This objective theory of contract has been repeatedly affirmed as representing Australian law by the High Court. Thus, in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179, the Court said:

'It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.'"⁷

[22] I accept that a reasonable person in the position of the QFES and in the position of an employee auxiliary firefighter would have understood the Auxiliary Firefighters' Standing Order Version 5 and the 2014 Auxiliary Firefighters' Standing Order to have contractual effect and that the parties would be contractually bound in respect of the conditions of employment guaranteed in it.

[23] In coming to that conclusion, I have had regard to the following evidence before the Commission:

- As part of the auxiliary firefighters induction process, auxiliaries are given a Participant Guide which provides that "A Standing Order is a rule that must be complied with and has been brought into the organisation as an interim measure until it becomes a formal part of the Operational Doctrine or is found to be no longer valid."⁸
- The Record of Induction instructs candidates "to access the QFRS Standing Order SO-Q-BM-3.7 Auxiliary Employment Conditions and read it in order to fully understand the conditions by which they are employed";⁹
- The document entitled "Standing Order - Auxiliary Employment Conditions (SO-Q-BM-3.7)" contain matters which one might reasonably expect to be covered by a contract of employment;¹⁰
- The stated purpose of SO-Q-BM-3.7 is to "detail the employment conditions of Auxiliary firefighters. It is intended to ensure that the responsibility of the Queensland Fire and Emergency Services (QFES) to provide emergency response, community education and other activities is

⁷ [2007] FCAFC 120 [23].

⁸ Statement of John Spreckley, attachment "JBS5", p 14.

⁹ Statement of Jason Hall, attachment "JLH2", p 6.

¹⁰ Statement of John Spreckley, paras [5]-[9] and attachments.

supported by Auxiliary firefighters who are properly trained, equipped and remunerated";¹¹ and

- In the application filed by QFES (B/2014/65), Mr Mark Roche swears that an auxiliary firefighter's letter of appointment states that "the person is employed with the QFES and the Standing Order QBM3.7 Auxiliary Employment Conditions will form the basis of your employment."

[24] The evidence supports the view that the terms and conditions in the Auxiliary Firefighters' Standing Order Version 5 and the 2014 Auxiliary Firefighters' Standing Order have contractual force and effect.

[25] In my view, the determinations made by the Commissioner under Standing Orders constitute terms and conditions of a contract of service. The authorities relied upon by the UFU support the conclusion that the Commission has jurisdiction to consider whether the contracts of service between the QFES and the auxiliary firefighters are unfair within the meaning of s 276 of the IR Act.

[26] The application under s 276 seeks to determine if the contracts of service for auxiliary firefighters are unfair and if so, to make consequential orders. It does not, as the QFES contends, attempt to vary or declare void the terms and conditions of the Code of Practice which apply to Auxiliary Firefighters by the force and effect of an Act of Parliament.

[27] It must be accepted that the auxiliary firefighters who are employed by the Commissioner are employees and the relationship is a contractual one.

[28] In *State of Queensland v Casaubon*, Hall P wrote:

"One has to accept that the question, whether, at common law, the appointment of a civil servant under an Act is correctly characterised contractual in nature, is something of a moot point, compare *Director-General of Education v Suttling* at 437 per Brennan J with whom Mason ACJ and Deane J concurred. However, it has to follow from s 276(6)(b)(i) of the *Industrial Relations Act* 1999; that the relationship between a public servant and State of Queensland is contractual for the purposes of s 276."¹²

[29] The nature of the relation between an employee of the Crown and its officers was discussed in *Jarratt v Commissioner of Police for New South Wales*.¹³ In that case, McHugh, Gummow and Hayne JJ referred to the reasoning of Starke J in *Lucy v The Commonwealth*:

"The relation between the Crown and its officers is contractual in nature. Service under the Crown involves, in the case of civil officers, a contract of service - peculiar in its conditions, no doubt, And in many cases subject to statutory provisions and qualifications - but still a contract. And, if this be so, there is no

¹¹ Ibid, attachment "JBS4".

¹² *State of Queensland v Casaubon* (C/2012/3) – Decision <<http://www.qirc.qld.gov.au>> [5].

¹³ (2005) 224 CLR 44.

difficulty in applying the general law in relation to servants who are wrongfully discharged from their service."¹⁴

[30] I accept that the Auxiliary Firefighters' Standing Order Version 5 and the 2014 Auxiliary Firefighters' Standing Order form part of or are evidence of the terms of the contract of employment of the auxiliary firefighters.

Strike Out

[31] It is not in contention between the parties that the Commission has the power pursuant to either s 274 or s 331 of the IR Act to summarily intervene to strike out the application.

[32] Section 274 of the Act provides:

"274 General powers

- (1) The commission has the power to do all things necessary or convenient to be done for, or in connection with, the performance of its functions.
- (2) Without limiting subsection (1), the commission in proceedings may—
 - (a) give directions about the hearing of a matter; or
 - (b) make a decision it considers appropriate, irrespective of the specific relief sought by a party; or
 - (c) make an order it considers appropriate.

[33] Section 274(2) of the Act is one of a number of provisions which authorises the Commission to dismiss an application where an application may not succeed on any view of the facts or law.

[34] Section 331(b) of the 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."

[35] In considering the application and exercise of the power to strike out, I am mindful of the fact that if the Commission was to exercise its discretion to strike out, the UFU

¹⁴ Ibid, 63, quoting *Lucy v The Commonwealth* (1923) 33 CLR 229, 253.

would be denied an opportunity to argue its case before the Commission on its merits. As was observed by Dixon J in *Dey v Victorian Railways Commissioners* (a summary judgment case):

"A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff from submitting his case for determination in the appointed manner by the court with or without a jury."¹⁵

[36] I am satisfied that there are matters of law and fact which require the Commission's determination. This is not a case which warrants the summary intervention of the Commission under either s 274 or s 331 of the IR Act to strike out the UFU's s 276 application.

Stay

[37] The UFU has brought an application in separate proceedings before the Commission for the making of a modern award to cover the employment of auxiliary firefighters. The QFES contends that, upon the making of that award, either in conjunction with full-time QFES employees or as a standalone award, the auxiliary firefighters will be covered by a modern award. As a consequence, they submit, any order made by the Commission in relation to the application under s 276 will be of no effect.

[38] The QFES argues that it is on this basis that the application is made to stay the s 276 proceedings until the modern award process has been determined.

[39] The UFU concedes that at some point in time a modern award may apply to auxiliary firefighters. Nevertheless, they submit that even if a modern award were made for auxiliary firefighters, it would not have retrospective effect and could not compensate the relevant employees in respect of any period of time during which the Commission concludes that the contracts of service were unfair. I agree.

[40] I do not accept that this is an appropriate matter for the granting of a stay of the s 276 proceedings.

Order

[41] The application (B/2014/65) is dismissed.

¹⁵ (1949) 78 CLR 62, 91.