AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Appeal by Brisbane City Council

[2008] AIRC 358

Harrison and Hamberger SDPP, Smith C

22 April 2008

Apprentices — Termination of employment — Appeal — Unlawful termination — Jurisdiction — Bus operator traineeship — Whether employee engaged in "a specific task" — Workplace Relations Act 1996 [Post Work Choices] (Cth), ss 638(1)(b), 643(1)(a).

Termination of Employment — Apprentices — Appeal — Unlawful termination — Jurisdiction — Bus operator traineeship — Whether employee engaged in "a specific task" — Workplace Relations Act 1996 [Post Work Choices] (Cth), ss 638(1)(b), 643(1)(a).

Words and Phrases — "A specific task".

Section 638(1)(b) of the *Workplace Relations Act 1996* (Cth) excluded, inter alia, the seeking of relief against an employer's harsh, unjust or unreasonable termination of an employee's employment, by an employee who was engaged under a contract of employment for a specified task.

Held: A bus operator traineeship, having characteristics similar to those of an apprenticeship, is not "a specific task" within the meaning of s 638(1)(b) of the *Workplace Relationships Act 1996* (Cth).

Qantas Airways Ltd v Fetz (1998) 84 IR 52 at 65, applied.

D'Ortenzio v Telstra Corporation (1997) 78 IR 468 at 479; *D'Ortenzio v Telstra Corporation (No 2)* (1998) 82 IR 52, considered.

Cases Cited

Brown v AQA Victoria Ltd (unreported, AIRC, Senior Deputy President Williams, PR950317, 2 August 2004).

Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194; 99 IR 309.

D'Ortenzio v Telstra Corporation (1997) 78 IR 468.

D'Ortenzio v Telstra Corporation (No 2) (1998) 82 IR 52.

Qantas Airways Ltd v Fetz (1998) 84 IR 52.

SPC Ardmona Operations Ltd v Esam (2005) 141 IR 338.

Wan v Australian Industrial Relations Commission (2001) 116 FCR 481.

Application for leave to appeal and appeal

A Herbert, for the appellant.

N Henderson, for the respondent.

The Commission

1 This decision concerns an application for leave to appeal and, if leave is granted, an appeal in respect of a finding that an employee was not, at the relevant time, engaged under a contract of employment for a specified task and thereby excluded from pursuing relief pursuant to s 643(1)(a) of the *Workplace Relations Act 1996* (Cth) (the Act).

2 In this decision we will refer to the appellant, the Brisbane City Council, as the Council and the respondent Ms Tam, as the Employee.

3 The notice of appeal indicates that it "is given pursuant to s 120(1)(f) of the Act…." against the decision of Commissioner Bacon. The section relied on provides that an appeal lies against a decision of a member of the Commission that the member has jurisdiction or a refusal or failure of a member of the Commission to exercise jurisdiction in a matter arising under the Act. The decision of the Commissioner related to a notice of motion filed by the Council seeking an order dismissing the s 643 application on the ground that the Employee was engaged under a contract of employment for a specified task. This ground relied upon s 638(1)(b) of the Act.

4 There was no issue between the parties as to the approach the Full Bench should take in considering this appeal it being against a finding of a jurisdictional fact. If leave is granted it is for this Full Bench to consider for itself whether the decision made by the Commissioner below was correct. However, we first need to consider whether the Council has established an arguable case of appealable error.[1]

5 We should also indicate that neither the Council nor the Employee submitted that s 685(3) was applicable to this appeal. That section provides that certain orders or decisions made under provisions of the Act contained within Pt 12, Div 4, the Termination of Employment division, may not be the subject of an appeal under s 120. This matter proceeded however on the basis that the ruling made by the Commissioner should be considered an order under s 645(6) which section obliged the Commissioner to refuse the Council's motion to dismiss if he was not satisfied that the Employee was of the kind referred to in s 638(1)(b). Section 685(3) of the Act does not preclude an appeal against an order under s 645(6).

The facts

6 The Employee was first engaged by the Council on 13 October 2004 in the position of a casual Bus Operator. She worked in that position until 19 April 2005.

7 On 24 March 2005 the Council offered the Employee a position as a "Trainee Bus Operator". That employment was to commence on 20 April 2005. The letter of offer indicated that it was conditional on the Employee signing the "Training Agreement provided by Brisbane Transport". Brisbane Transport was described as the business unit in the Council which conducts bus operations for the Council.

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1 *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; 99 IR 309, *Wan v Australian Industrial Relations Commission* (2001) 116 FCR 481.

8 The letter of offer of employment of 24 March 2005 had attached to it a document described as "a summary of the major terms and conditions" of employment (the T & C document). That indicated that the engagement was on a full time basis and addressed matters including hours, penalty payments and leave entitlements. In that part of the T & C document titled "Other Conditions of Employment" there was a clause titled "Employment Tenure" in the following terms:

> All existing Trainee Bus Operators who successfully complete the Traineeship, and who meet the performance standards set by Brisbane Transport throughout the traineeship period, are expected to be offered permanent employment.
>
> Trainees who do not successfully complete the traineeship or fail to meet the performance criteria throughout the traineeship period, should have no expectation of further employment with Brisbane Transport.

9 The T & C document also contained a clause titled "Traineeship". It provided that the traineeship had a nominal duration of two years and was for a Certificate 111 Transport and Distribution (Road Transport) (Certificate 111). Learning was to be a combination of classroom facilitation, on-the-job training, assignment work and assessments.

10 The letter of offer also referred to and attached a copy of "the training agreement" although we note that document is titled a Training Contract (training contract). It was described as being a binding contract between the Employee, Brisbane Transport and the Queensland Department of Employment and Training (the Department).

11 Finally the T & C document referred to the topic of probation. It provided that confirmation of the Employee's appointment as a Trainee Bus Operator would be subject to the satisfactory completion of a 60 day probationary period and if an acceptable level of performance was achieved then the Employee's appointment would be confirmed and she would continue in the traineeship.

12 The training contract was signed and registered with the Department. The traineeship commenced on 20 April 2005.

13 On 23 May 2005 the Department wrote to the Council indicating approval of the training contract with the Employee. The document identified 19 April 2007 as the nominal completion date of the training contract.

14 On 29 January 2007 the Department wrote to the Council and advised that a number of steps needed to be undertaken in order for the training contract to be completed. The matters that needed to be attended to were set out in the letter. The letter indicated that the traineeship would end on the date advised by the supervising registered training organisation.

15 On 20 March 2007 the relevant training organisation issued a certificate certifying that the requirements for Certificate 111 had been fulfilled.

16 In a notice dated 20 March 2007 the Department notified the Employee that she had successfully completed her traineeship as of that day. In a letter of the same date the Department advised the Council that the Employee had completed her traineeship and that the date of completion of the training contract was 20 March 2007.

17 The Employee drove buses for the Council from 21 March 2007 until 30 May 2007 the date on which her employment was terminated. Her name was on the Bus Operators roster during that period. The Employee also took some annual and sick leave during this time.

18 An incident occurred which led the Council to conclude that the Employee's performance as a Trainee Bus Operator had not met the required performance standards and that it would not offer the Employee a role as a permanent Bus Operator.

19 It would appear that the Employee had written a note on 6 April 2007 which note was found by another employee and then brought to the attention of the Depot Officer on 7 April 2007. A meeting occurred with the Employee about that note on 17 May 2007.

20 On 30 May 2007 the Council wrote to the Employee advising her that as a consequence of matters associated with an investigation into her note of 6 April the Council would not be offering her employment as a permanent Bus Operator. The letter of termination recorded that there had been a review of her performance as a Trainee Bus Operator and that it had not met required performance standards. Reference was made to a "recent incident" where the Employee had left a note containing inappropriate content which had upset a fellow employee. The Employee was advised that, within five days of receiving the letter, she could apply for reinstatement to her previous position as a casual Bus Operator. She was paid two weeks pay in lieu of notice.

The issues

21 Given the Employee's status as a trainee the question of the applicability of S 638(1)(e) arises. This section excludes certain trainees from pursuing an application under s 643 of the Act.

22 The Council accepted that the requirements of the exclusion necessitated employment that was for a specified period or otherwise limited to the duration of the traineeship agreement. In this case there was no date specified for the conclusion of the employment contract. Accordingly the exception referred to in s 638(1)(e) could not be called in aid by the Council. The reasoning of Senior Deputy President Williams in *Brown v AQA Victoria Ltd*[2] about this consideration was correct and s 638(1)(e) was not relevant to this appeal.

23 The exclusion which was relied on by the Council was that contained in s 638(1)(b); the specified task exclusion. The question before the Commissioner and before us is whether the Employee was engaged under a contract of employment for a specified task?

24 The Commissioner noted that the Council had contended that the specified task was the completion of the "Bus Operator Traineeship" and that task constituted two components. The first was submitted to be the completion of the traineeship which had a nominal term. The second was an indeterminate period after completion of the traineeship during which the Council would assess whether the Employee met the performance standards set by Brisbane Transport throughout the traineeship period so as to allow the Council to decide whether to offer permanent employment.

25 Both before the Commissioner and again before us the decision of a Full Bench in *Qantas Airways v Fetz (Qantas)*[3] was referred to. The Council submitted that the reasons for decision of the Full Bench in *Qantas* did not apply to the facts in this matter or, in the alternative, that it was incorrectly

2 *Brown v AQA Victoria Ltd* (unreported, AIRC, Williams SDP, PR950317, 2 August 2004).

3 *Qantas Airways Ltd v Fetz* (1998) 84 IR 52.

decided and should not be followed. The Employee contends the decision is correct and was properly applied by the Commissioner to the facts in this matter.

26 In the *Qantas* decision the Full Bench considered exclusions comparable to those now contained in s 638. They were then contained in regulation 30B. A question had arisen as to whether the employees in that matter who had been engaged by Qantas as apprentices, and whose employment had terminated on completion of their apprenticeship, were able to pursue applications under s 170CE of the Act, the then equivalent to the current s 643. The Full Bench said:[4]

> The appellant argued before Ross VP that the respondents were all engaged under contracts of employment for a specified task. The specified task was said to be the apprenticeship. Ross VP rejected this argument on the two bases we have noted above; namely, an apprenticeship contract is a mixture of a set training syllabus and the provision of valuable work for the employer; and the provisions of Regulation 30B(1)(e).
>
> As to the first matter, it is important to point out that an apprenticeship consists of a range of training and occupational activities. These activities include formal classroom training, on-the-job training, examinations and the performance of work which acquires significant value in the latter stages. The *New Shorter Oxford English Dictionary* gives the primary meaning of "task" as "a piece of work imposed on or undertaken by a person". The second edition of the *Macquarie Concise Dictionary* provides the following definitions: "1. A definite piece of work assigned or falling to a person; a duty. 2. any piece of work". It seems to us that there is insufficient particularity involved in an apprenticeship for it to be described as "a specified task". The phrase would normally apply to an identifiable project or job. It is straining language to treat an apprenticeship with all that the concept entails as one "task". We agree with His Honour that the mixture of training and work involved in an apprenticeship makes it difficult to describe an apprenticeship as a task and we respectfully concur with his view.

27 The Commissioner noted that the Council had submitted that the decision of the Full Court of the Federal Court in *D'Ortenzio v Telstra Corporation (No 2)*[5] had cast doubt on whether *Qantas* correctly interpreted the terms of the specified task exclusion. It was submitted that the reasons in that case should result in the Commission not following *Qantas*. The Commissioner was not persuaded by that submission.

28 In *D'Ortenzio* the contract of employment for a specified task was found to be "the task of processing applications for winback from Service provider customers". The Commissioner said that there was nothing in that decision which would lead him to a conclusion that he should not follow the decision in *Qantas*. He noted that the Full Bench in *Qantas* had found that the phrase "specified task" would normally apply to an identifiable project or job. That was consistent with the approach taken in *D'Ortenzio*. The Court had there identified and categorised what, on the evidence in that matter, constituted the specified task. The project or job there identified, as described above, was to clear the backlog of applications for winback. There was, in the Commissioner's opinion, no conflict between the decision in *Qantas* and the Full Court's decision in *D'Ortenzio*.

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4 Qantas at 65.

5 *D'Ortenzio v Telstra Corporation (No 2)* (1998) 82 IR 52.

29 We agree with each of the Commissioner's observations and conclusions. They reveal no relevant appealable error.

30 We discern no difference in the approach taken in both *D'Ortenzio* and *Qantas*. In both consideration was given, as required by the legislation, to an assessment of whether the employees in question were "engaged under a contract of employment for a specified task". Obviously the factual findings of what comprised the specified task in each case were significantly different.

31 It is clear from the Full Court decision in *D'Ortenzio* that the Appellant was unrepresented and had relied on a number of grounds of appeal only one of which is relevant to the matter here. At page 58 of its' decision the Court agreed with the finding of the primary judge that "the contract entered into on 15 January 1996 and extended from time to time until November 1996 was a contract for a specified task, that task being 'the task of processing applications for win back from Service Provider customers.'" That task was described in the same terms as the Employer had used in its' correspondence with the Employee.

32 The Court's judgment was limited to the specific facts as found at first instance. We respectfully discern no principle of general application nor other discussion about the construction to be given to the words of the relevant exclusion. We can read nothing in the Full Court decision that assists the Council in this appeal or could be said to be a basis upon which we might be persuaded that *Qantas* was wrongly decided.

33 In reaching this conclusion we have also given consideration to the reasons for decision of the primary judge in *D'Ortenzio* which decision was confirmed on appeal.

34 The predominant consideration in Justice von Doussa's decision was to the jurisdictional challenge referable to the contract there being said to be one for a fixed term. His Honour's finding that the employee was on a contract for a fixed term meant there had been no termination of employment at the initiative of the employer and accordingly no jurisdiction for the matter to proceed. His Honour said that on that ground the employee's case failed.[6]

35 His Honour then commented that the Judicial Registrar, whose decision was the subject of review before him, had not expressly addressed the alternative argument of Telstra that the employee was engaged under a contract of employment for a specified task. He said that in his opinion the evidence supported such a finding. The reason for employment, as explained to the employee, was the requirement to remove a backlog of applications over a period until the introduction of a new automated process. This was the specified task. The fact that in achieving that task the specific duties performed by the employee altered (data processing/telephone enquiries) was not such as to change the nature of the contract. All the duties performed were "part and parcel" of the task of manually processing the winback applications. The contract came to an end when the specified task had come to an end.[7]

36 If a principle is to be discerned from this judgment it is that a change in the specific duties comprising the specified task will not necessarily alter the character of the contract of employment.

37 In his decision the Commissioner noted that the Council had not contended that the mixture of training and on the job work of an apprentice in *Qantas* was

6 *D'Ortenzio v Telstra Corporation* (1997) 78 IR 468 at 479.

7 *D'Ortenzio v Telstra* at 490.

not also present in a traineeship. The Commissioner said, correctly in our opinion, that the evidence before him was that the traineeship in question comprised characteristics similar to those identified in *Qantas*. These had been the key considerations in reaching its conclusion that the contract of employment for an apprenticeship was not a contract of employment for a specified task. *Qantas* was not distinguishable and it was appropriate for the Commissioner to find that the Employee's contract of employment was not for a specified task.

38 Finally, we note that the comments of the Full Bench in *Qantas* have subsequently been approved and followed in the Full Bench decision in *SPC Ardmona Operations Ltd v Esam*[8] That Full Bench also considered *D'Ortenzio* and there was no suggestion in its reasons for decision that it was inconsistent with *Qantas*.

39 For the foregoing reasons we are not persuaded the Commissioner's decision reflects any appealable error. However, before disposing of the appeal we should briefly refer to some additional matters.

40 In his concluding remarks the Commissioner indicated that the issue of the proper characterisation of the employment relationship between the Council and the Employee at the time of the termination of her employment was not a matter that was before him other than to the extent necessary to determine whether the traineeship was for a specified task. He noted that it was not necessary or proper for the Commission to make any other determination concerning the employment relationship.

41 In light of our decision on the primary ground of appeal we need only make some brief comments about this consideration. The Employee submitted that if we were persuaded to grant leave to appeal, decide the matter for ourselves and, in doing so accept the Council's submission that the specified task was the completion of the Bus Operator Traineeship then several other considerations would arise.

42 First, it would be necessary to consider whether that contract of employment had ceased prior to the date the Employee was dismissed. The traineeship period certainly had come to an end on 20 March 2007. A Certificate 111 was awarded effective that date. And, on that same date, the Council was advised the training contract had also been completed. From the next day onwards the Employee drove buses in accordance with the roster and participated in no more training or assessments.

43 The only other aspect which the Council relies on to assert that the specified task had not then concluded was to submit there was a further period for it to consider if Brisbane Transports performance standards had been met. Had it been necessary for us to rule upon this submission we would not have accepted it. It is not consistent with the terms of the Employee's contract of employment.

44 The Employment Tenure clause in the contract limited the time during which consideration of whether performance standards had been met to a time during or throughout the traineeship period. In our opinion it is at least arguable that period had ceased on 20 March 2007, and, although employment did not cease a new contract, the terms of which differed to the Bus Operator Traineeship contract had commenced.

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8 *SPC Ardmona Operations Ltd v Esam* (2005) 141 IR 338.

45 We are not persuaded that the grounds of appeal raise matters warranting, in the public interest or otherwise, the grant of leave to appeal. Leave is refused.

Leave to appeal refused

DR RJ DESIATNIK