SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess Pty Ltd v Krobath* [2019] QCA 151
PARTIES:	**THIESS PTY LTD** **ACN 010 221 486** (appellant) **v** **OSKAR FRANZ KROBATH** (respondent)
FILE NO/S:	Appeal No 557 of 2019 SC No 916 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Rockhampton – [2018] QSC 309 (Crow J)
DELIVERED ON:	2 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	19 July 2019
JUDGES:	Fraser JA and Applegarth and Bradley JJ
ORDERS:	**1. The appeal is dismissed.** **2. The appellant is to pay the respondent's costs of the appeal, to be assessed on the standard basis.**
CATCHWORDS:	DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR TORT – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – RE-EMPLOYMENT OF WORKER – PARTICULAR CIRCUMSTANCES – where, after a three-day trial, the respondent was awarded damages for a personal injury sustained in the course of his employment with the appellant – where the appellant contends that the learned primary judge erred in the assessment of past and future economic loss, and related calculations, by failing to take into account an alleged failure by the respondent to maintain his qualifications and an alleged reluctance to accept short-term employment – whether the respondent failed to maintain qualifications that would affect his employability – whether the respondent demonstrated a reluctance to accept certain roles that would affect his employability at the relevant time – whether the learned primary judge erred in the assessment of damages
COUNSEL:	G W Diehm QC, with S Deaves, for the appellant

C C Heyworth-Smith QC for the respondent

SOLICITORS: Hall & Wilcox for the appellant
Macrossan & Amiet Solicitors for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Bradley J and the orders proposed by his Honour.

[2] **APPLEGARTH J:** I also agree with the reasons for judgment of Bradley J and the orders proposed by his Honour.

[3] **BRADLEY J:** This is an appeal from a judgment awarding damages to the respondent for a personal injury he sustained in the course of his employment with the appellant at the Burton Downs Coal Mine.

Background

[4] The respondent was first offered employment with the appellant in 2008, in the form of a traineeship. He was then 45 years of age. He and his wife had been married for 19 years, and had three children aged 11 to 14. In order to be ready to take up the traineeship, the respondent surrendered the lease of the kitchen at the Broken River Mountain Resort, where he operated a business in his former occupation as a chef. However, the appellant withdrew the offer of a traineeship before the respondent was due to commence.

[5] Between October 2008 and September 2010, the respondent worked as a farmhand and as a cane cutter.

[6] On 6 September 2010, the appellant engaged the respondent as a trainee operator at Burton Downs. He completed his traineeship on 11 September 2011. He was then employed by the appellant as a qualified operator.

[7] The financial effect on the respondent of entering the mining industry was significant. As the chef at the resort kitchen, he earned $12,148 gross annual income. As a farmhand and cane cutter, he earned $46,826. As a trainee for the appellant, he earned between $42,000 and $53,820 net annual income. After he qualified as an operator, the respondent's net weekly wages increased to $1,818 (equivalent to $94,536 net per annum).

[8] On 31 October 2011, the respondent suffered an injury to his lumbar spine while working as a haul truck operator, operating a 793F haul truck for the appellant.

[9] On 11 May 2012, he underwent the first of three lumbar discectomies – for a disc prolapse to his L5/S1 intervertebral disc.

[10] On 6 July 2012, he had a revision discectomy. He was to have the third procedure following a further recurrent disc protrusion about four years later.

[11] In August 2012, after the second and before the third surgery, the respondent returned to work for the appellant on suitable duties, driving a water cart.

[12] On 9 April 2013, he returned to driving haul trucks.

[13] In September 2014, the appellant made the respondent redundant, along with about 350 other employees at the mine. He applied, unsuccessfully, for operator positions at other mines, including mines conducted by the appellant.

[14] In December 2014, the respondent's family purchased a restaurant business in the Eungella National Park for $15,000. He explained this was done with the intention "to operate the business until I was able to return to the mining industry." Four months later, the respondent took over the operation of an adjacent kiosk.

[15] On 28 August 2016, the respondent suffered a further disc prolapse. This was causally related to the injury he sustained on 31 October 2011.

[16] On 18 November 2016, he underwent the third discectomy.

[17] At the trial on 10, 11 and 12 December 2018, the appellant contested both liability for the respondent's injury and the quantum of the damages he claimed.

[18] On 20 December 2018, the learned primary judge gave judgment for the respondent in the sum of $719,698.15 and ordered the appellant's insurer to pay the respondent's costs.

Ground of appeal

[19] The appellant appeals on the ground that the learned primary judge erred in the assessment of past and future economic loss and related calculations of interest, loss of superannuation and subsidised meals. There is otherwise no challenge to his Honour's findings below.

[20] Although the notice of appeal was broadly framed, in the written outline and in the oral submissions, the appellant raised only two points. The appellant described each as a "substantial impediment" to the respondent's hypothetical return to the mining industry. It suggested a further discount of up to 75 per cent of the damages assessed for past and future economic loss.

Maintaining qualifications

[21] The appellant's first contention on appeal is that the learned primary judge failed to discount the sum assessed as damages for the respondent's past and future economic loss to take account of the effect of the respondent's "failure to maintain his qualifications" after September 2014, when he was made redundant.

[22] In its written outline, the appellant put the contention in these terms:

> "Following his redundancy, the Respondent did nothing about renewing his mining competencies and qualifications.
>
> …
>
> … not only did the Respondent fail to maintain qualifications and competencies that would make him a more attractive candidate for employment, he failed to understand that he could overcome this barrier to employment by going to a training organisation."

[23] The appellant submitted that the learned primary judge ought to have further discounted the respondent's damages to take account of a likely delay in the

respondent resuming work in the mining industry while he found out that he could renew some of his capabilities through a private training organisation.

[24] The appellant relied on one of its own documents entitled "Capability Transcript" and dated 12 August 2014 (**exhibit 12**). By reason of its date, the exhibit does not record the fact, not disputed at the trial or in this appeal, that on 11 September 2014 the respondent underwent a Coal Board Medical, which was in aid of his application for work as an operator at another mine conducted by the appellant, and after retrenchment the respondent updated his Standard 11, which included capabilities exhibit 12 showed as having earlier expiry dates, such as "UV Solar Radiation and Heat Stress" and "Action to be taken if Fire is Discovered".

[25] The date of exhibit 12 also explains why it does not reflect the respondent's evidence that he maintained the qualifications necessary for him to return to work in open cut mining after he was made redundant. In his Quantum Statement, the respondent explained:

> "These qualifications were required to be kept up to date as I wanted to be able to undertake future work if it was offered to me. I spent my own money doing this."

[26] In any event, exhibit 12 does record that at 12 August 2014 the respondent had capabilities to operate plant and equipment with the following expiry dates:

Capabilities	**Level**	**Received**	**Expires**
Water Truck CAT 777D	CO	23-Dec-2013	23-Dec-2018
Water Truck Komatsu 785-7	CO	23-Dec-2013	23-Dec-2018
Water Truck CAT 773E	CO	23-Dec-2013	23-Dec-2018
Water Truck CAT 773B	CO	19-Mar-2013	19-Mar-2018
Haul Truck CAT 793C	CO	11-Feb-2013	11-Feb-2018
Water Truck CAT 777F	CO	03-Jan-2013	03-Jan-2018
Haul Truck CAT 797F	CO	26-Mar-2012	26-Mar-2017
Haul Truck CAT 797F Back to Basics Training Observation	CO	26-Mar-2012	26-Mar-2017
Light Vehicle Parking on the Mine Site	CO	02-Feb-2012	02-Feb-2017

[27] It also records that he had a number of additional capabilities which did not have any expiry dates:

Capabilities	**Level**	**Received**
Cardinal Rules Assessment	CO	26-Mar-2012
Maintenance and Watering of Roads	CO	12-Feb-2012
Servicing, Refueling and Lubrication of Mobile Plant	CO	12-Feb-2012
Conduct Haul Truck Operations	RIIMP0311A	30-Jan-2012
Operate Light Vehicle	RIIVEH201A	30-Jan-2012
Participate in environmentally sustainable work practices	BSBSUS201A	30-Jan-2012
Conduct local risk control	RIIRIS201A	30-Jan-2012
Comply with site work processes/procedures	RIIGOV201A	30-Jan-2012
Communicate in the workplace	RIICOM201A	30-Jan-2012
Incident Management	CO	12-Mar-2011
Safety of Persons on Stockpiles or Coal Waste Dumps	CO	01-Oct-2010

Works Adjacent to Highwalls, Lowwalls and Endwalls	CO	01-Oct-2010
Load Haul Dump	CO	01-Oct-2010
Maintenance and Servicing of Plant and Equipment	CO	01-Oct-2010

[28] In support of this point, the appellant also cited passages from the respondent's oral evidence at the trial, in response to cross-examination about telephone calls and text messages he received from Legra Mining Services in October 2015 and in January 2016.

> "… Majority of the time I couldn't get hold of the initial person which left the message on it. Spoke to somebody else in the office and inquired about the position in question, and majority of the time I – I didn't have additional tickets they were looking for like dozer operator or dig operators or the position was only for a short period for talking about four or six weeks up to two or three months at a time.
>
> …
>
> … I responded to all my text messages, but the majority of the time is I did not have those additional tickets they were looking for - - -
>
> I see?--- - - - to fill the position or the position was only for a short term, three, four, six weeks up to two or three months."

[29] In re-examination, the respondent had explained:

> "…[On] some occasions they were looking – they asked me if I have a ticket for digger operator or for dozer operator which I didn't have, and the main concern for me was the time of employment, because it was just too short. It was not worthwhile to terminate my lease, and be told after four or six weeks or whatever, 'Sorry, this is it. We don't need you any more.'"

[30] When questioned, he did not know whether he could obtain a dozer ticket or a digger ticket through a training organisation.

[31] The respondent also gave evidence that he thought some of the capabilities listed in exhibit 12 were such that they "can only be renewed on site."

[32] The appellant relied on evidence from another witness, Mr Saunders, a consultant for a labour hire agency who had worked in labour hire in the mining industry for about 20 years. Mr Saunders gave the following evidence in chief in response to the question, "what do [job seekers] need in order to be accepted on the mines?":

> "You've got to have a generic induction. Standard 11, they call it. And then you've got to have a Coal Board Medical and it's got to be current within the five years it goes for, and – yeah, competent – competency certificate for – or a letter from the SSE to say you are competent and can operate the equipment."

[33] In cross-examination, Mr Saunders was asked about "qualifications and competencies". The question was posed in this exchange:

> "Now you mentioned that what the mines are looking for are workers who can just get going straightaway, that don't need to be trained? --- That's right. Contractors and – and mine sites, yeah.
>
> Indeed. And therefore someone looking for work in the mines needs to keep their qualifications and competencies up to date, don't they? --- Not really. You can get them after, yeah, or recognitions – recognition for prior learning. Like, if you've got a competency for a rear dump truck, for instance - - -
>
> … – it's in vogue for about five years when you – after you leave the mine.
>
> … - if you come back in, say, seven years they'll say, 'Yeah, you've got your rear dump truck competency here, but it's not current' and they will test you just to make sure you're competent again. They'll familiarise you with the equipment and then give you a bit of a run with an operator. Then you'll go yourself and if you pick it up again you'll – you'll be signed off as competent again by the SSC of the mine site."

[34] On the evidence before the learned primary judge, the respondent took steps to maintain the qualifications he needed to return to work in the industry, including his Standard 11 and his Coal Board Medical. There was no evidence that the respondent had allowed any "qualification" or "ticket" to lapse at any time before he lost the ability to undertake such work in the second half of 2016. A number of apparently relevant "competencies" had not expired before the respondent suffered the prolapse that led to his third surgery. There was no evidence that any expired competency was essential for him to obtain re-employment. There was no evidence that he ever held a dozer ticket or a digger ticket.

[35] The differences between "capabilities", "qualifications" and "tickets" were not clarified. The appellant sought to use the respondent's evidence that he was unable to accept certain positions because he did not have a "dozer ticket" or a "digger operator ticket" to show that the respondent had failed to maintain his qualifications and competencies. There is no necessary connection between the two. It matters not that, after he was made redundant, the respondent did not obtain such "tickets" that, on the evidence, he may never have held.

Casualisation of the mining workforce

[36] The appellant's second contention was that, since the respondent was made redundant, the increased use of casual workers and labour hire contractors in the mining industry would have precluded or delayed the respondent re-entering the industry, because he was "unwilling to engage with the mining industry in the way the industry had changed."

[37] The appellant relied on this evidence of Mr Saunders:

> "Now when they're placed through a labour hire agency, are the operators put on as permanents or casuals? --- No, casuals to start off with, and some – some of them stay casual but other mines, some mines and some contractors, put them on permanent when they find out they're good operators. They want to keep them themselves. So, yeah,

> usually around three to six months you'll – they'll – the company will ring up and say, 'No, look, we're talking [sic] them on board with us now.'"

[38] In cross-examination, Mr Saunders agreed that there are far fewer people employed on a permanent basis in operator roles than there were about "half a dozen years ago". He accepted that mine operators are engaging labour hire companies and do not make long-term commitments to either the labour hire company or the workers on the labour hire payroll.

[39] The appellant relied on the passages of the respondent's evidence, noted at [28] and [29] above, to submit that the respondent was opposed to leaving his position at the restaurant to accept a short-term employment in the mining industry. The appellant submitted the respondent's attitude was a significant barrier to him re-entering the industry.

[40] There are three difficulties with the appellant's contention.

[41] The respondent's evidence about his reluctance to leave the restaurant and kiosk business for a short-term job was the view he had in October 2015 and January 2016. At that time, the mining industry was in a substantial down-turn. In assessing the damages for economic loss, his Honour was considering the respondent's employment prospects from January 2017, when the evidence established an up-turn in the industry was underway. There is no reason to assume the respondent would have adhered to his earlier view after the change in the fortunes of the mining industry.

[42] Next, the respondent's evidence about his view in 2015 and the start of 2016 should be understood in the context of the questions that adduced it. The questions sought an explanation for him not following up roles requiring a "dozer ticket" or a "digger ticket", which he did not have. The short-term nature of the employment then on offer was a factor in the respondent's explanation, but so was the absence of the required "tickets".

[43] Lastly, the appellant's contention failed to distinguish between casual and fixed-term employment. Casual employment – through a labour hire firm or directly with a mining company – does not come to an end on any fixed date. As Mr Saunders explained, some employees remain casually employed for longer than six months, but others are offered permanent employment with the labour hire firm or the mine. The evidence of the respondent's view in 2015 and early 2016 was about short fixed-term employment for periods up to three months. It was not about his attitude to casual employment.

[44] Given the respondent's efforts to obtain employment in the mining industry between 2008 and 2010, and the very substantial increase in income that would have followed his return, there was no reason for the learned primary judge to infer that the view the respondent took in 2015 and January 2016 would have precluded or delayed the respondent's return to the industry from January 2017. The evidence did not support a finding that there was any significant likelihood the respondent would have declined to work in the industry, after the up-turn, if he was offered casual employment through a labour hire firm or a mine.

Disposition of the appeal

[45] I would dismiss the appeal and order that the appellant pay the respondent's cost of the appeal, to be assessed on the standard basis.