INDUSTRIAL COURT OF QUEENSLAND

CITATION:	*Workers' Compensation Regulator v Langerak (No 2)* [2020] ICQ 014
PARTIES:	**WORKERS' COMPENSATION REGULATOR** (appellant) **v** **JADE LANGERAK** (respondent)
FILE NO:	C/2019/8
PROCEEDING:	Appeal
DELIVERED ON:	22 June 2020
HEARING DATE:	29 April 2020
MEMBER:	Martin J, President
ORDERS:	**1. Application dismissed.** **2. The respondent is to pay the appellant's costs (to be assessed if not agreed) incurred with respect to the application made by the respondent after the decision given on 5 March 2020.**
CATCHWORDS:	INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where the court allowed an appeal from the Queensland Industrial Relations Commission – where counsel for the respondent contacted the court after the judgment was delivered to seek an order that the matter be remitted to the Queensland Industrial Relations Commission – where the court invited further submissions from the parties – where there was a further hearing – where the respondent sought to be heard on the issue of whether the court should vary the decision below to find that the operation of s 32(5) of the *Workers' Compensation and Rehabilitation Act* 2003 was not enlivened on the basis of lack of adequate training – whether the court can make such an order after an order has been made to allow the appeal and set aside the decision of the Queensland Industrial Relations Commission INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO INDUSTRIAL COURT – OTHER MATTERS – where an application was brought after the court delivered judgment – whether the respondent ought to pay the appellant's costs incurred with respect to the application *Industrial Relations Act* 2016 *Workers' Compensation and Rehabilitation Act* 2003

CASES:	*Langerak v Workers' Compensation Regulator* [2019] QIRC 035 *Workers' Compensation Regulator v Langerak* [2020] ICQ 002
APPEARANCES:	CJ Clark instructed by the Workers' Compensation Regulator for the appellant DLK Atkinson QC instructed by Murphy Schmidt Solicitors for the respondent

[1] On 5 March 2020, I gave judgment[1] in an appeal by the Workers' Compensation Regulator against a decision of the Queensland Industrial Relations Commission given on 22 February 2019.[2] In that decision, I:

(a) granted leave to the appellant to amend its notice of appeal, and

(b) allowed the appeal.

[2] The reasons I gave conclude with this paragraph:

> "[90] The appeal is allowed. I will hear from the parties about what further orders should be made."

[3] After publishing the reasons to the parties present in the courtroom, I made these further orders:

(a) the decision of the Queensland Industrial Relations Commission of 22 February 2019 was set aside,

(b) the costs order made by the Queensland Industrial Relations Commission on 22 February 2019 was set aside.

[4] Soon after the judgment was delivered, the respondent sent a message to my associate to this effect:

> "In view of the determination above, the Respondent seeks an order that the matter be remitted to the Commissioner pursuant to section 424[3] so that the jurisdiction is exercised according to law. It is submitted that it is a matter for the Commissioner to give the clearer articulation that was found to be lacking."

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1 *Workers' Compensation Regulator v Langerak* [2020] ICQ 002.
2 *Langerak v Workers' Compensation Regulator* [2019] QIRC 035.
3 Apparently s 424 of the *Industrial Relations Act* 2016.

[5] The reference to the "determination" was a reference to paragraph [87] of the decision of 5 March 2020:

> "[87] Without a clearer articulation of the relative weight given to each factor I am unprepared to accept the submission that, if the failure to act in respect of allegations of bullying was entirely excluded from consideration, then the Commissioner would nevertheless have still found in favour of the respondent."

[6] The matter came on for mention on 29 April 2020. At that hearing, counsel for the respondent withdrew the informal request made on 5 March 2020.

[7] At that hearing, counsel for the respondent said:

> "Your Honour, I understand by the invitation to suggest further orders that there might be room for directions as to what should happen. And certainly one understands under section 562 of the Act[4] your Honour has the power, not just to set aside, but to vary the decision below, and I seek to be heard on that issue."

[8] Later, it became apparent that what was being sought was not a variation of the decision below, but a variation of a different kind.

[9] The case which was conducted in the Commission was concerned with a number of matters but, in particular, whether s 32(5) of the *Workers' Compensation and Rehabilitation Act* 2003 (the Act) was engaged so that the respondent's injury was not compensable.

[10] One of those issues was whether the respondent had been provided with appropriate training.

[11] The respondent submitted that this court should now consider whether the failure to afford appropriate training was sufficient to remove the operation of s 32(5) of the Act.

[12] In order to truncate the time that might be taken to decide this matter, the parties were directed to file submissions with respect to that matter. It was understood that they would be taken into account in the event that I acceded to the respondent's oral application made during the mention.

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4 *Workers' Compensation and Rehabilitation Act* 2003.

[13] No submissions were made at the mention about whether or not, upon making the orders of 5 March 2020, I became *functus officio*. The orders made on 5 March were made pursuant to s 562 of the Act. I have decided to proceed on the basis that I will consider the application because, for the reasons set out below, I will not accede to the application made.

[14] I have had regard to the submissions filed on behalf of both the appellant and respondent on the issue of training. What the respondent seeks is set out in her submissions of 6 May 2020:

> "12. The Court found on 15 March 2020 that the appeal should be allowed and indicated that it would hear the parties as to what further orders should be allowed. It is submitted that the Court should determine the issue identified at [83] to [84] of its Reasons, and do so in Ms Langerak's favour. It would find that the decision below is varied so that the operation of section 32(5) is not enlivened on the basis of the lack of adequate training. Otherwise, it would find, the claim for worker's compensation is one for acceptance and the Regulator should pay Ms Langerak's costs of and incidental to the appeal. All other orders should be vacated." (emphasis in original)

[15] What the respondent is seeking is not a variation of the order made by the Queensland Industrial Relations Commission, but what would amount to a variation of the reasons. That is, of course, not available. More remarkably, what is also being sought is a variation of the decision given on 5 March 2020 which allowed the appeal. The variation sought would reverse the decision given in this court and have the appeal dismissed. That is, with respect, an extraordinary application.

[16] An examination of the detailed submissions made on the issue of inadequacy of training leads to one conclusion. All of the arguments made by the respondent on this application were open to be made and could have been put before this court when the appeal was heard. It was obvious during the hearing of the appeal that an issue about the capacity to consider bullying as part of the conduct of the employer was alive and, if a finding were made contrary to the respondent's interests, then she would need to argue in support of a finding based on inadequacy of training. That should have been done during the appeal. It cannot be done after an order is made allowing the appeal and setting aside the decision of the Commission.

[17] The indication that "I will hear from the parties about what further orders should be made" relates to orders which may be consequent upon the substantive order such as costs or the setting aside of other orders.

[18] This application was misconceived. It is dismissed. I order that the respondent pay the appellant's costs (to be assessed if not agreed) incurred with respect to the applications made by the respondent after the decision given on 5 March 2020.