SUPREME COURT OF QUEENSLAND

CITATION:	*David Carey v President of the Industrial Court of Queensland & Anor* [2003] QSC 272
PARTIES:	**DAVID CAREY** (applicant) v **PRESIDENT OF THE INDUSTRIAL COURT OF QUEENSLAND** (first respondent) **DEPARTMENT OF JUSTICE AND ATTORNEY-GENERAL** (second respondent)
FILE NO:	SC No 1157 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	29 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2003
JUDGE:	McMurdo J
ORDER:	**The application is dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW - where application for judicial review – where applicant unfairly dismissed from his workplace - where applicant sought reinstatement to his former position – where first respondent held it could not reinstate applicant as his former position had come to an end – whether decision involved a jurisdictional error making it susceptible to judicial review – whether decision was in error – whether court should exercise its discretion to allow application if decision was in error *Industrial Relations Act* 1999 (Qld), s 78(2), s 78(3), s 242 *Judicial Review Act* 1991 (Qld), s 43 *Public Service Act* 1996 (Qld), s 113 *Attorney-General of Queensland v Wilkinson* (1958) 100 CLR 422, cited *Blackadder v Ramsay Butchering Services Pty Ltd* [2002] FCA 603, considered *Cameron v Cole* (1943-44) 68 CLR 571, cited *Craig v South Australia* (1995) 184 CLR 163, applied *Hockey v Yelland* (1985) 157 CLR 124, cited *Houssein v Under Secretary, Department of Industrial*

Relations and Technology (NSW) (1982) 148 CLR 88, cited
Public Service Association of South Australia v Federated Clerks Union of Australia, South Australian Branch (1991) 173 CLR 132, cited
R v Commonwealth Court of Conciliation and Arbitration ex parte Ozone Theatres (Aust) Ltd (1949) 78 CLR 389, cited
Squires v President of Industrial Court Queensland & Ors [2002] QSC 272, applied

COUNSEL: The applicant appeared on his own behalf
G Martin SC for the second respondent

SOLICITORS: The applicant appeared on his own behalf
McCullough Robertson for the second respondent

[1] **McMURDO J:** The applicant is a solicitor who was employed by the Department of Justice and Attorney-General from 1993 to 26 October 2001. His employment was by a series of engagements as a temporary employee, the last of which was by the Department's letter dated 30 August 2001, in these terms:

> "I am pleased to inform you that it has been approved that the period of your engagement to perform the duties of Legal Officer, Public Law Branch, Crown Law, Department of Justice and Attorney-General, Brisbane, PO/20058 be extended until 2 November 2001, with classification and salary as at present (namely PO3(04), $1942.80 per fortnight).
>
> The extension of your engagement is based on operational convenience.
>
> However, as previously advised, except for misconduct, your services are terminable by either party at any time by the giving of two weeks notice. This temporary engagement may be terminated prior to the nomination completion date should intervening organisational circumstances require the cessation of this temporary engagement."

[2] He was thereby employed on a temporary basis pursuant to s 113 of the *Public Service Act* 1996. His employment was to cease on 2 November 2001 absent an earlier termination for misconduct, or by the giving of two weeks' notice. On 26 October 2001, he was told to stop work and leave his work place immediately.

[3] On 21 November 2001, he applied to the Industrial Commission to be reinstated, upon the basis that he had been unfairly dismissed. Its power of reinstatement is by s 78(2) of the *Industrial Relations Act* 1999 which provides as follows:

> "(2) The commission may order the employer to reinstate the employee to the employee's former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal."

[4] The Commission conducted a hearing on a preliminary issue, which was whether the events of 26 October 2001 constituted a "dismissal" in the relevant sense. Its decision that this was a dismissal was unsuccessfully appealed by the Department to the Industrial Court of Queensland. The matter then returned to the Commission, when the Department conceded that its dismissal of the applicant was unfair. The Commission was thereby satisfied that the applicant had been unfairly dismissed so as to make s 78 applicable. However, the Commission dismissed the reinstatement application, holding that reinstatement was impossible. In essence, the Commission reasoned that the effect of the order sought went beyond orders involved in a reinstatement, because it would require the Department to employ the applicant at a time beyond the agreed termination date of 2 November 2001. The applicant appealed to the Industrial Court, constituted by its President, who dismissed the appeal on 6 November 2002. He held that the applicant cannot be reinstated to his former position because the applicant's "former position had come to an end on 2 November 2001". The President left open the question of whether the applicant was entitled to an order under s 78(3) which provides:

> "(3) If the commission considers reinstatement would be impracticable, the commission may order the employer to re-employ the employee in another position that the employer has available and that the commission considers suitable."

[5] The applicant seeks to challenge the Industrial Court's decision, by this application made pursuant to s 43 of the *Judicial Review Act* 1991 for orders in the nature of certiorari and mandamus, for the quashing of that decision and for an order for the reconsideration of the matter by the Industrial Court according to law.

[6] By s 242 of the *Industrial Relations Act* the Industrial Court of Queensland is a superior court of record. But it is a court of limited jurisdiction, and such courts have been characterised as inferior courts for the purpose of their amenability to prerogative relief: *Cameron v Cole* (1943-44) 68 CLR 571, 585, 598-99; *Attorney-General of Queensland v Wilkinson* (1958) 100 CLR 422, 425. However, the extent to which its decisions are susceptible to review is affected by s 349 of the Act which provides as follows:

> " **349 Finality of decisions**
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> (1) This section applies to the following decisions –
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> (a) a decision of the Court of Appeal under section 340;
> (b) a decision of the court under section 341;
> (c) a decision of the full bench under section 342;
> (d) a decision of the commission under section 343 or 344;
> (e) another decision of the court, the full bench, the commission, an Industrial Magistrates Court or the registrar.
>
> (2) The decision –
>
> (a) is final and conclusive; and
> (b) can not be impeached for informality or want of form; and

> (c) can not be appealed against, reviewed, quashed or invalidated in any court.
>
> (3) The industrial tribunal's jurisdiction is exclusive of any court's jurisdiction and an injunction or prerogative order can not be issued, granted or made in relation to proceedings in the court within its jurisdiction.
>
> (4) This section does not apply to a decision mentioned in subsection (1) to the extent that this Act or another Act provides for a right of appeal from the decision.
>
> (5) In this section –
>
> **"industrial tribunal"** includes an Industrial Magistrates Court and the registrar."

This was a decision of the Industrial Court under s 341(1),[1] and accordingly s 349 applies. Although clear words are required of an enactment denying recourse to the courts, the words used in s 349(2)(c) would have been effective to oust certiorari for errors of law not going to jurisdiction: Houssein v Under Secretary, Depart*ment of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 93; *Hockey v Yelland* (1985) 157 CLR 124, 130; *Public Service Association of South Australia v Federated Clerks Union of Australia, South Australian Branch* (1991) 173 CLR 132, 141. There is a corresponding impact upon the availability of the same relief or remedy by a prerogative order under Part 5 of the *Judicial Review Act* 1991, because of the terms of s 41(2) of the *Judicial Review* Act, and because the operation of s 349 of the *Industrial Relations Act* is expressed by s 18 of the *Judicial Review Act* to be unaffected by that Act. The result is that such a decision of the Industrial Court is susceptible to review under Part 5 of the *Judicial Review Act* only for jurisdictional error: *Squires v President of Industrial Court Queensland & Ors* [2002] QSC 272.

[7] In *Craig v South Australia* (1995) 184 CLR 163 the nature of jurisdictional error was discussed in the judgment of the Court at 176-180. The references there to an inferior court have relevance here because, as I have said, the Industrial Court is characterised as an inferior court in this context.[2] In *Craig*, the Court said (at 177-178):

> "An inferior court falls into jurisdictional error if it mistakenly asserts or denies the existence of jurisdiction or if it misapprehends or disregards the nature or limits of its functions or powers in a case where it correctly recognises that jurisdiction does exist. Such jurisdictional error can infect either a positive act or a refusal or failure to act. Since certiorari goes only to quash a decision or order, an inferior court will fall into jurisdictional error for the purposes of the writ where it makes an order or decision (including an order or

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1 Because it was made upon an appeal to the Industrial Court by a person dissatisfied with a decision of the Commission

2 At [5]

> decision to the effect that it lacks, or refuses to exercise, jurisdiction) which is based upon a mistaken assumption or denial of jurisdiction or a misconception or disregard of the nature or limits of jurisdiction.
>
> Jurisdictional error is at its most obvious where the inferior court purports to act wholly or partly outside the general area of its jurisdiction in the sense of entertaining a matter or making a decision or order of a kind which wholly or partly lies outside the theoretical limits of its functions and powers. An inferior court would, for example, act wholly outside the general area of its jurisdiction in that sense if, having jurisdiction strictly limited to civil matters, it purported to hear and determine a criminal charge. Such a court would act partly outside the general area of its jurisdiction if, in a matter coming within the categories of civil cases which it had authority to hear and determine, it purported to make an order of a kind which it lacked power to make, such as an order for specific performance of a contract when its remedial powers were strictly limited to awarding damages for breach, Less obviously, an inferior court can, while acting wholly within the general area of its jurisdiction, fall into jurisdictional error by doing something which it lacks authority to do. If, for example, it is an essential condition of the existence of jurisdiction with respect to a particular matter that a certain event or requirement has in fact occurred or been satisfied, as distinct from the inferior court's own conclusion that it has, there will be jurisdictional error if the court or tribunal purports to act in circumstances where that event has not in fact occurred or that requirement has not in fact been satisfied even though the matter is the kind of matter which the court has jurisdiction to entertain. Similarly, jurisdictional error will occur where an inferior court disregards or takes account of some matter in circumstances where the statute or other instrument establishing it and conferring its jurisdiction requires that that particular matter be taken into account or ignored as a pre-condition of the existence of any authority to make an order or decision in the circumstances of the particular case. Again, an inferior court will exceed its authority and fall into jurisdictional error if it misconstrues that statute or other instrument and thereby misconceives the nature of the function which it is performing or the extent of its powers in the circumstances of the particular case. In the last-mentioned category of case, the line between jurisdictional error and mere error in the exercise of jurisdiction may be particularly difficult to discern."

(and that 179-180):

> "In contrast, the ordinary jurisdiction of a court of law encompasses authority to decide questions of law, as well as questions of fact, involved in matters which it has jurisdiction to determine. The identification of relevant issues, the formulation of relevant questions and the determination of what is and what is not relevant evidence are all routine steps in the discharge of that ordinary jurisdiction. Demonstrable mistake in the identification of such issues or the

> formulation of such questions will commonly involve error of law which may, if an appeal is available and is pursued, be corrected by an appellate court and, depending on the circumstances, found an order setting aside the order or decision of the inferior court. Such a mistake on the part of an inferior court entrusted with authority to identify, formulate and determine such issues and questions will not, however ordinarily constitute jurisdictional error. Similarly, a failure by an inferior court to take into account some matter which it was, as a matter of law, required to take into account in determining a question within jurisdiction or reliance by such a court upon some irrelevant matter upon which it was, as a matter of law, not entitled to rely in determining such a question will not ordinarily involve jurisdictional error."

[8] The applicant's case is that the Industrial Court misconceived the extent of its powers in the circumstances of this particular case, which infected its refusal to order reinstatement. The Court apprehended that it could not reinstate the applicant to his former position or, put another way, that the order sought was one it did not have jurisdiction to make. Its jurisdiction to reinstate was defined by the terms of s 78(2). The applicant contends that by misinterpreting that provision, it misconceived the extent of its own jurisdiction.

[9] The President's reasoning was relevantly as follows:

> "The outcome of the first appeal was that the matter was remitted to the Commission in order that it might be heard and determined according to law. When the matter was recalled in the Commission it was conceded by junior counsel for the Department that the dismissal of 26 October 2001 was unfair. Counsel for Mr Carey then pressed for reinstatement. The Commission rejected that submission. The Commission was right to do so. By s 78(2) of the *Industrial Relations Act 1999* the Commission's power to order reinstatement is limited to a power to "reinstate the employee to the employee's former position". Mr Carey's former position had come to an end on 2 November 2001. It is contended for Mr Carey that he had been given a temporary appointment pursuant to s 113 of the *Public Service Act 1996* because a decision had been made not to fill a vacant permanent position. It is submitted that upon appointment Mr Carey had a temporary appointment to that vacant position which relevantly became his "position" for the purpose of s 78(2) of the *Industrial Relations Act 1999*. It is contended that if it may be shown that the permanent position continues to exist, unfilled by either a temporary appointment or the appointment of an officer, Mr Carey is entitled to reinstatement of the "position". It is not necessary to decide the issues about whether a "position" for the purposes of a departmental budget or staffing chart may properly be described as a "position" for the purposes of s 78(2) of the *Industrial Relations Act 1999*. The "position" was not "his", i.e. Mr Carey's. For reasons already given, if Mr Carey had not been dismissed on 26 October 2001, his appointment would have come to an end on 2 November 2001 and he would have been unable to enforce a claim to the position or matter under Chapter 3 Part 2 of the *Industrial*

> *Relations Act 1999* because he would not have been able to point to a dismissal at the initiative of the employer."

The President regarded the fact that the applicant's employment would have come to an end on 2 November 2001, had he not been dismissed, as precluding an order for reinstatement. To have "reinstated" the applicant on 6 November 2002 would have been to impose an employment relationship which would have been inconsistent with the terms under which the applicant had been employed. The effect of this reasoning is fairly described as a conclusion that what was sought in this case was beyond what could be ordered by the Commission, and in turn the Court, pursuant to s 78(2). The Court did not misconstrue the letter of appointment or misapprehend the terms and conditions of the applicant's employment. Its alleged error was in holding that in the circumstances of this admitted unfair dismissal, it lacked power to make an order pursuant to s 78(2).

[10] The dispute before the court concerned an issue of law, which was whether according to s 78(2) an order could be made under that subsection for the re-engagement of a person who had been employed for a limited time which had already expired. This may be an example of that category described in *Craig* where it is "particularly difficult to discern" the dividing line between jurisdictional error and error in the exercise of jurisdiction. But in my view, that issue of law involved the limits of the Court's powers and went to its jurisdiction. In consequence, I am prepared to proceed on the basis that the decision is susceptible to review.

[11] The next question is whether the decision was in error. This requires a consideration of the expression "reinstate the employee to the employee's former position". The applicant's submission is in effect, that his former position is that defined by his particular duties and responsibilities as at 26 October 2001. It is a position identified by what he was employed to do, and reinstatement involves his re-engagement with like duties and responsibilities. But his employment was on a temporary basis, and upon any view of what constituted his former position, it was as a temporary employee, appointed pursuant to s 113 of the *Public Service Act*. His former position was one defined not only by the work he did but by a time limitation. The effect of this purported reinstatement would impose an employment relationship, but with different entitlements because of a different period of employment. In *Blackadder v Ramsay Butchering Services Pty Ltd* [2002] FCA 603, Madgwick J described reinstatement as an order which "restores the employment relationship with all, but only the rights and entitlements to treatment in good faith which existed between the parties prior to the termination … whatever mutual rights and liabilities as to transfer, removal from active work or termination of employment pre-existed his termination, they will exist again after reinstatement.". The applicant could not be re-engaged without some change to the respective rights and entitlements expressed in the letter of appointment of 30 August 2001. In my view the decision of the President was correct. Accordingly, there is no error which provides any ground for judicial review.

[12] Alternatively, if I am wrong in that conclusion, this application should be refused upon discretionary grounds. The orders sought are to quash the Industrial Court's decision and to require it to consider the matter according to law. In that event, the Industrial Court would not be obliged to order reinstatement. If the Court was persuaded to order reinstatement it would have to restore the employment relationship, so far as possible, with the rights and entitlements which existed as at

26 October 2001. That would not require a change to the term which permitted the termination by either party of the employment relationship upon two weeks' notice. Accordingly, the applicant seeks judicial review to the ultimate end of being re-engaged for perhaps no more than a fortnight. Nevertheless he says that judicial review should be granted because of matters of principle involved in his case. The availability of judicial review is discretionary. The lack of utility of the relief sought is relevant: see e.g. *R v Commonwealth Court of Conciliation and Arbitration ex parte Ozone Theatres (Aust) Ltd* (1949) 78 CLR 389, 400. The applicant has not demonstrated any utility from the orders sought, beyond some vindication of his stance. In the Commission's decision reviewed by the President, the applicant was refused compensation because in fact he had been paid until 2 November 2001 plus an additional three weeks' pay. He has been more than paid for the one week's employment which he lost. Had I been of the view that the President's decision was in error, I still would have refused this application.

[13] The application will be dismissed. I shall hear the parties as to costs.