SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess Pty Ltd v President of the Industrial Court of Queensland & Anor* [2011] QSC 294
PARTIES:	**THIESS PTY LTD ABN 87 010 221 486** (applicant) **v** **PRESIDENT OF THE INDUSTRIAL COURT OF QUEENSLAND** (first respondent) and **ADAM JOHN LOW** (second respondent)
FILE NO:	5308 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	13 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2011 Supplementary written submissions on 5 October and 10 October 2011
JUDGE:	Applegarth J
ORDER:	**Declarations in accordance with paragraphs 3 and 4 of the application for review.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – JURISDICTIONAL MATTERS – where applicant was charged with two summary offences under the *Workplace Health and Safety Act* 1995 (Qld) – where offences were framed as alternatives – where applicant alleged that the charges failed to comply with s 43 of the *Justices Act* 1886, which provides that every complaint "shall be for 1 matter only" – where second respondent sought to amend the complaint under s 48 of the *Justices Act* by removing the reference to the offences as alternatives – where no power to amend under s 48 of the *Justices Act* exists in the case of non-compliance with s 43 – where Industrial Magistrate found that the offences charged as alternatives were not true alternatives – where Industrial Magistrate nevertheless ruled that the framing of the charges as alternatives was not a failure to comply with s 43 and allowed the charges to be amended under s 48 of the *Justices Act* to

remove the words "in the alternative" – where applicant appealed to Industrial Court – where Industrial Court upheld Industrial Magistrate's ruling – where Industrial Court's decision is final and conclusive within jurisdiction – whether Industrial Magistrate erred in allowing the charge to be amended under s 48 of the *Justices Act* and, if so, whether the Industrial Court's decision to uphold the Industrial Magistrate's ruling was affected by jurisdictional error

Industrial Relations Act 1999 (Qld), s 341, s 349
Justices Act 1886 (Qld), s 43, s 48
Workplace Health and Safety Act 1995 (Qld), s 28, s 31

Bauer Foundations Australia Pty Ltd v President of the Industrial Court of Queensland [2011] QSC 103 cited
Broome v Chenoweth (1946) 73 CLR 583; [1946] HCA 53 cited
Craig v South Australia (1995) 184 CLR 163; [1995] HCA 58 cited
The Electrical Trades Union of Employees Queensland v President of the Industrial Court of Queensland [2007] 1 Qd R 1; [2006] QSC 76 cited
Hayes v Wilson, ex parte Hayes [1984] 2 Qd R 114 cited
Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; [2010] HCA 1 applied
NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland [2010] QSC 373 considered
Parker v President of the Industrial Court of Queensland [2010] 1 Qd R 255; [2009] QCA 120 cited
Re Refugee Review Tribunal; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57 cited
Thiess Pty Ltd v Adam John Low (unreported, Industrial Court of Queensland No. C/2010/58, 12 April 2011) cited

COUNSEL: P J Flanagan SC, with G Del Villar for the applicant
M J Byrne QC, with P Matthews for the second respondent

SOLICITORS: Blake Dawson for the applicant
Legal & Prosecution Services, Office of Fair and Safe Work Queensland for the second respondent

[1] By an amended complaint and summons, the applicant faced two alleged summary offences under the *Workplace Health and Safety Act* 1995 ("the *WHS Act*"), which were stated to be "In the alternative". The applicant contended that the amended complaint failed to comply with s 43 of the *Justices Act* 1886 ("the *Justices Act*"), which provides, subject to limited exceptions, that "[e]very complaint shall be for 1 matter only". The applicant applied for the complaint and summons to be struck out. In response, the complainant (who is the second respondent in these proceedings) submitted that the complaint should be amended by the removal of the words "In the alternative", thus leaving two separate and distinct charges.

[2] The learned Industrial Magistrate accepted the applicant's submission that the charge founded on a breach of the obligation under s 31(1) of the *WHS Act* was not a true alternative to a charge founded on a breach of the obligation under s 28(1) of that Act. Each was a separate and distinct charge. However, he found that the defect in the complaint by the inclusion of the words "In the alternative" was not a defect arising from a failure to comply with s 43 of the *Justices Act*. As a result, the power to amend pursuant to s 48 of the *Justices Act* existed, and the power was exercised to allow the complainant to excise the words "In the alternative".

[3] The applicant appealed against this order to the Industrial Court of Queensland. The principal ground of appeal was that the learned Magistrate erred in failing to strike out the complaint on the basis that the charge contained counts alleged to have been in the alternative when as a matter of law (and as found by the learned Magistrate) the two counts were not true alternatives.

[4] The first respondent dismissed the appeal, ruling that the words "In the alternative" had no legal effect. Although those words were said by the learned President of the Industrial Court to have been consciously used in an attempt to plead in the alternative, they were found not to have this effect. The President described the words as being "ineffectual surplusage" that could not cause the complaint to fail to comply with s 43. The power to amend under s 48 to delete the words was not lost for non-compliance with s 43 of the *Justices Act*. The Industrial Magistrate was found to have taken the right course by deleting the words "In the alternative". It was "desirable in the interests of justice" (to quote the words of s 48 of the *Justices Act*) that the "ineffective and surplus language be removed".

[5] The applicant seeks judicial review under the *Judicial Review Act* 1991 by an order in the nature of *certiorari* setting aside the decision and orders of the first respondent. He also seeks certain declarations and consequential relief.

[6] The limits on judicial review by reason of s 349 of the *Industrial Relations Act* 1999 (Qld) have been described in a number of authorities. I respectfully adopt what was said in this regard by Boddice J in *NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland*:[1]

> "A decision of the Industrial Court is final and conclusive and cannot be appealed against, reviewed, quashed or invalidated by any Court.[2] However, that provision is subject to the decision being within jurisdiction. Where it is shown the decision under review involves jurisdictional error, that decision is susceptible to review under Part 5 of the *Judicial Review Act* 1991.[3] Accordingly, if it be established that the decision of the first respondent involves jurisdictional error, that decision is susceptible to judicial review notwithstanding the provisions of s 349(2) of the *Industrial Relations Act* 1999. Jurisdictional error includes misconstruction of a relevant statute

1 [2010] QSC 373, [11].
2 *Industrial Relations Act* 1999, s 349(2).
3 s 41(2); *Carey v Industrial Court of Queensland and Anor* [2003] QSC 272, applying *Craig v South Australia* (1995) 184 CLR 163, 177-178; *Parker v President of the Industrial Court of Queensland* [2008] QSC 175, [15]; on appeal [2010] Qd R 255.

> thereby misconceiving the nature of the function of that Court or the extent of its powers in the circumstances of a particular case.[4]"

[7] The applicant submits that the decision of the first respondent was affected by jurisdictional error because:

(a) Section 43 of the *Justices Act* does not authorise two matters of complaint to be joined when they are pleaded in the alternative;

(b) Section 48 of the *Justices Act* does not authorise a court to amend a complaint if there is non-compliance with s 43 of the Act; and

(c) Accordingly, s 48 of the Act did not authorise the removal of the words "In the alternative" from the complaint.

Alternatively, the applicant contends that the power under s 48 of the *Justices Act* did not authorise the removal of the words "In the alternative" from the complaint, because it could not be necessary or desirable in the interests of justice to amend the complaint in this case.

[8] The second respondent submits that there was no error, and that it was open to the Industrial Magistrate to make the order to amend the complaint. He submits that no error has been identified in respect to the first respondent's conclusion and exercise of the jurisdiction committed to him. In any event, the second respondent submits that if the first respondent erred in the conclusion that he drew, he did so in the course of exercising the jurisdiction committed to him.

Relevant provisions

[9] Section 43 of the *Justices Act* provides:

> "**43 Matter of complaint**
>
> (1) **Every complaint shall be for 1 matter only, and not for 2 or more matters, except**—
>
> (a) in the case of indictable offences—if the matters of complaint are such that they may be charged in 1 indictment; or
>
> (b) in cases other than cases of indictable offences—if the matters of complaint—
>
> (i) are alleged to be constituted by the same act or omission on the part of the defendant; or
>
> (ii) are alleged to be constituted by a series of acts done or omitted to be done in the prosecution of a single purpose; or

4 *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 573-575 [72]-[74].

(iii) are founded on substantially the same facts; or

(iv) are, or form part of, a series of offences or matters of complaint of the same or a similar character; or

(c) when otherwise expressly provided.

(2) When 2 or more matters of complaint are **joined** in the 1 complaint each matter of complaint shall be set out in a separate paragraph.

(3) At the hearing of a complaint in which 2 or more matters of complaint have been **joined** but which **does not comply with the provisions of this section**—

(a) **if an objection is taken to the complaint on the ground of such noncompliance—the court shall require the complainant to choose 1 matter of complaint on which to proceed at that hearing**; or

(b) if no such objection is taken to the complaint—the court may proceed with the hearing and may determine the matters of complaint, and may convict or acquit the defendant in accordance with such determination." (emphasis added)

[10] Section 48 of the *Justices Act* provides:

"**48 Amendment of complaint**

If at the hearing of a complaint, it appears to the justices that—

(a) **there is a defect therein, in substance or in form, other than a noncompliance with the provisions of section 43**; or

(b) there is a defect in any summons or warrant to apprehend a defendant issued upon such complaint; or

(c) there is a variance between such complaint, summons or warrant and the evidence adduced at the hearing in support thereof;

then—

(d) **if an objection is taken for any such defect or variance – the justices shall**; or

(e) if no such objection is taken—the justices may;

> **make such order for the amendment of the complaint**, summons or warrant **as appears to them to be necessary or desirable in the interests of justice**." (emphasis added)

[11] As can be seen from the words that I have emphasised, the power of amendment under s 48 is limited. The power to amend in the case of a defect in a complaint of the kind described in s 48(a) does not extend to a defect by way of non-compliance with the provisions of s 43.

[12] Subject to the exceptions set out in s 43(1), s 43 requires every complaint to be for one matter only. Justice Macrossan (as the former Chief Justice then was), in discussing s 43 and the power of amendment, explained that the principle that a complaint shall relate to one matter only has long been established.[5] His Honour stated:

> "It is said that the reason why a conviction cannot be entered in summary proceedings for a lesser offence than the one charged is because, under the ordinary summary procedure, a respondent is never called upon to answer two charges at the same time. I am excluding what might be done by consent or within the narrow exceptions expressly permitted by s. 43. In support of this proposition reference may also be made to the judgment of Lord Parker C.J. in *Lawrence v. Same* [1968] 2 Q.B. 93 especially at 97-99. For myself I would add that it must follow that not only is a respondent not called upon in the one proceeding to meet two separate summary charges expressly stated but, in a similar way, he is not called upon to meet supplementary or alternative charges not stated but lurking or hidden under the cover of a charge expressly set out.
>
> In summary proceedings the rule is against charging separate offences in the alternative although in this context it is necessary to note some special categories which are really only apparent exceptions to the rule."[6]

After considering a number of exceptions to the rule, Macrossan J continued:

> "None of these exceptional cases however obscures the main principle that in summary proceedings charges may not be brought in the alternative."[7]

Although these observations were made in the context of a "variance case", rather than one in relation to an alleged defect in a complaint, the principles discussed apply in the present context.

The first issue: did the amended complaint comply with s 43 of the *Justices Act*?

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5 *Hayes v Wilson; Ex parte Hayes* [1984] 2 Qd R 114, 139.
6 *Hayes v Wilson; Ex parte Hayes* [1984] 2 Qd R 114,140.
7 *Hayes v Wilson; Ex parte Hayes* [1984] 2 Qd R 114,141.

[13] The first substantial issue is whether the complaint as originally amended, so that it charged the applicant with two offences "In the alternative", complied with s 43 of the *Justices Act*. If the complaint did not comply with s 43, then s 48 did not authorise its amendment.

Background

[14] On 27 November 2009, the second respondent swore a complaint and summons alleging summary offences by the applicant under the *WHS Act*. That complaint and summons was issued three days prior to the expiry of the limitation period for offences of this kind.[8]

[15] On 7 May 2010 the applicant made an application to strike out the complaint and summons in the Industrial Magistrates Court. In the alternative, the applicant sought an election by the second respondent of one matter of complaint on which to proceed. Further, or alternatively, the applicant sought the deletion of charges two and three on the complaint.

[16] The application was heard by Industrial Magistrate Lee on 28 May 2010. At that hearing, the second respondent offered no evidence in relation to charges two and three on the complaint, and sought to amend the particulars of the first charge to encompass the alleged injuries to the individuals originally referred to in charges two and three. The applicant did not object to this course.

[17] The second respondent's amended complaint then consisted of two alleged offences, pleaded in the alternative as charge one. The applicant contended that such a complaint still failed to comply with the requirement in s 43 of the *Justices Act* that "every complaint shall be for 1 matter only", except in limited circumstances.

The decision of the Industrial Magistrate

[18] The Industrial Magistrate, in a carefully-considered and comprehensive reserved judgment, reviewed relevant authorities, including those dealing with the power to amend before the hearing of evidence begins. His Honour considered the legislative scheme of the *WHS Act*, including the obligations under ss 28(1) and 31(1). He concluded that it was clear that a charge founded on a breach of obligation under s 28(1) is a separate and distinct charge to a charge founded on a breach of obligation under s 31(1). The complainant sought the removal of the words "In the alternative" that appeared between the charges in charge one, and relied upon sub-paragraphs 43(1)(b)(iii) and (iv) of the *Justices Act* as allowing the two matters of complaint to be pleaded in the one complaint, on the basis that they were founded substantially on the same facts or formed part of a series of offences of the same or a similar character. The defendant in the proceedings before the Magistrate (the applicant in the present proceedings) acknowledged that it would have been allowable to plead both charges in the one complaint had the words "In the alternative" not be included. However, it submitted that the complaint as it stood was defective because it pleaded the second charge as an alternative charge, and that removing the words "In the alternative" created a new charge.

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8 *Workplace Health and Safety Act 1995*, s 165.

[19] The Magistrate identified the question as being whether the words "In the alternative" were fatal to the validity of the complaint and infringed the *Justices Act* so as to render the pleading incurable. The Magistrate agreed with the applicant's submission that the charge under s 31(1) of the *WHS Act* was not a "true alternative charge to one under s 28(1)". This was primarily because they had different elements, required different considerations as to defences and a charge under s 31(1) is not a lesser charge to one under s 28(1). Against the background that, had the words "In the alternative" not been used, the pleading would have complied with the *Justices Act*, and against the further background that a charge founded on s 31(1) of the *WHS Act* is not in substance an alternative charge to one under s 28(1), the Magistrate agreed with the complainant's submission that the complaint was "curable by deleting the words 'In the alternative' notwithstanding that the limitation has expired". The use of the words "In the alternative" was said not to contravene s 43 of the *Justices Act* and the power to amend under s 48 applied. Section 48(a) provided for amendment for defects other than non-compliance with s 43 and the use of the words "In the alternative" was found to be a defect other than non-compliance with s 43.

[20] The Magistrate allowed the complainant's application to further amend the amended complaint by excising the words "In the alternative". He also refused the applicant's alternative application to require the complainant to elect pursuant to s 43(3)(a). He found that both charges founded on ss 28(1) and 31(1) of the *WHS Act* had been clearly identified in the complaint and that there seemed to have been a "slip or clumsiness"[9] in the insertion of the words "In the alternative" when a charge founded on s 31(1) is not an alternative charge to one founded on s 28(1). The result was that the defendant then had to face two separate charges founded on ss 28(1) and 31(1) of the *WHS Act* respectively, each reflecting the full circumstances of alleged aggravation regarding the three injured workers.

The decision of the Industrial Court

[21] Because the relevant facts and law had been so comprehensively canvassed in the decision of the learned Industrial Magistrate, the decision of the Industrial Court on appeal was relatively brief. After summarising the relevant facts, including the applicant's contention that the complaint should be struck out in its entirety, the President of the Industrial Court concluded that the Industrial Magistrate was right to exercise the power to amend the complaint under s 48 of the *Justices Act* by deleting the words "In the alternative", instead of striking out the complaint. The President stated:

> "[7] The charges were not alternatives. The words 'in the alternative' had no legal effect. Accepting that the words were neither a slip nor an inadvertent error, but words used consciously in an attempt to plea [sic] in the alternative, the subjective intention of the Complainant could not give the words an effect which they did not have. This was not a case in which the power to amend was lost for non-compliance with s. 43 of the *Justices Act 1886* (see s. 48(a) of that Act). The words being ineffectual surplusage could not cause the Complaint to fail to comply with s. 43. Where s. 43 permits

9 cf *Broome v Chenoweth* (1946) 73 CLR 583, 601 per Dixon J.

> joinder, the section does not require that the charges be numbered. Indeed, as I understand the argument, it is conceded that if the final form of the Complaint had been the form from the outset, all would be well.
>
> [8] It was not the effect of the amendment that Thiess Pty Ltd was for the first time, after expiry of the limitation period, exposed to the risk of conviction both for failure to discharge the obligation at s 28(1) of the Act and of the obligation at s 31 of that Act. Only if the words 'in the alternative' had legal effect would the original wording have so limited the Complaint. As amended, the Complaint has the meaning which it always truly carried. It was 'desirable in the interests of justice' (s 48 of the *Justices Act 1886*) that the ineffective and surplus language be removed."[10]

Was there compliance with s 43 of the *Justices Act*?

[22] The applicant maintains the concession that the matters described in the two offences alleged in charge one were within the scope of s 43(1)(b)(iii) and (iv), but submits that they were never "joined" under s 43(2). The word "joined" refers to the bringing together of two or more counts or charges in an indictment or complaint:

> "When an indictment contains more than one count each for a separate offence, the counts are said to be joined."[11]

A defendant faces the potential of being convicted upon each of the charges in the joined proceedings.

[23] Matters that are charged in the alternative differ, and involve a choice between a greater and lesser charge. A defendant facing alternative charges can be convicted of only one of the alternatives before the Court. Accordingly, the applicant submits that the charges that were said to be "In the alternative" did not involve charges that were joined.

[24] The applicant submits that if the words "In the alternative" had not been removed by amendment, the complaint was liable to be struck out because it offended the principles discussed by Macrossan J in *Hayes v Wilson*.[12]

[25] The Industrial Magistrate's decision was that the complaint should not have been brought in the form that it was by reason of the inclusion of the words "In the alternative". The complainant sought to rectify the situation by having those words removed by way of amendment. The effect of the amendment was to charge the applicant with two separate and distinct offences, rather than the charge being "In the alternative".

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10 *Thiess Pty Ltd v Adam John Low* (C/2010/58; Industrial Court of Queensland No. 12 April 2011 unreported), [7]-[8].

11 David Ross, *Ross on Crime* (5th ed) 2011, 783 [10.300].

12 [1984] 2 Qd R 114.

[26] With respect to the learned Industrial Magistrate, and the learned President of the Industrial Court, the issue of whether the complaint complied with s 43 is not resolved by pointing to the fact that the separate and distinct charges could have been joined, as the applicant acknowledged. There is nothing incongruous in the applicant submitting to the Industrial Magistrate that the complaint was defective for non-compliance with s 43 because of the inclusion of the words "In the alternative", and seeking the alternative relief of requiring the complainant to choose one of the matters of complaint on which to proceed at the hearing. This was a form of alternative relief. The primary form of relief sought by the applicant was to have the complaint and summons struck out.

[27] The fact that the applicant might have been charged originally by a form of complaint that did not include the words "In the alternative", and that, if that had happened, the complainant would have complied with s 43, does not render the words "In the alternative" ineffectual surplusage or words that had no legal effect. Their inclusion had the effect of rendering the complaint defective.

[28] One begins with the fact that the complaint was not in a form authorised by s 43. Had it not been defective, an application by the complainant to remove the words "In the alternative" would not have been necessary, and would not have been made.

[29] The words "In the alternative" were included in the amended complaint because the complainant attempted to charge the applicant in the alternative. The applicant's solicitors, in a letter dated 8 April 2010, submitted to the solicitor for the complainant that any alleged breach of s 31 was not properly characterised as an "alternative" charge to a breach of s 28. The applicant submitted that the alternative charges were not, as a matter of law, proper alternative charges. The complainant's solicitor, in a letter dated 4 May 2010, disagreed and contended that the alternative charge under s 31 was appropriately drafted.

[30] The fact that the inclusion of the words could not, as a matter of law, have the effect that the complainant intended does not make the words of no effect or meaningless. The words meant, and would reasonably have been understood to mean, that the applicant faced conviction for one of the two offences that were pleaded in the alternative. They have the effect, absent an application to strike out the complaint, that, upon the point being taken, the complainant would be required to choose which of the two matters of complaint would proceed.

[31] The use of the words "In the alternative" had legal consequences and, as the Industrial Magistrate observed, their removal had the effect that the applicant faced two separate charges. One of the consequences of including the words was that the complaint could not proceed in that form following the applicant's objection to it. The complaint was vulnerable to being struck out, at least in part, unless the power to amend arose, and a suitable case to exercise the power was made out.

[32] I am unable to accept the President's view that the words "In the alternative" had no legal effect. They had legal effect, though not the effect that the complainant apparently intended them to have. Absent objection by the applicant to the form of the complaint, the applicant was exposed to conviction on one of the alternative charges and, given the expiry of the limitation period, the applicant was not at risk of being convicted on the alternative summary charge. In the event of an objection by the applicant, the continuation of the prosecution of both charges depended on

the availability of amendment, and that, in turn, depended on whether the complaint complied with s 43.

[33] The resolution of the issue which is at the centre of this application for judicial review depends upon the appropriate starting point for analysis. The starting point adopted by the Industrial Magistrate and the Industrial Court was that the exercise of the power of amendment produced a result about which the applicant could not have complained. It could not have complained because the two charges were never true alternatives, the charges could not and should not have been preferred in that form, and so the words "In the alternative" were ineffectual surplusage.

[34] I do not consider that the appropriate starting point is the result that could have been achieved by the non-inclusion of the words "In the alternative", that this result might be achieved by amendment and, as a consequence, that the inclusion of the words was a defect that was curable by the deletion of those words.

[35] The appropriate starting point is the complaint, as brought, and to ask whether a power exists to amend it so as to achieve the result sought by the complainant, namely that the applicant should face two separate charges which are not cast in the alternative. The existence of the power to amend under s 48 depends, in this case, on whether the complaint complied with s 43. I accept the applicant's submission that the complaint did not comply with s 43. Because it did not comply with s 43, the defect in the complaint that arose because of a non-compliance with the provisions of s 43 was not one that attracted the power to amend under s 48.

[36] The second respondent does not submit that the complaint in the form it appeared when it included the words "In the alternative" involved the joinder of two matters. Instead, he submits that the words "In the alternative" could have no effect because the charges were not alternatives as a matter of law. However, for the reasons that I have given, I do not consider that the complaint was to be understood as if the words "In the alternative" were meaningless, of no effect or did not appear. They meant what they said, and while they remained in the complaint the two matters were not "joined" as separate and different charges which were joined in accordance with s 43. The inclusion of those words was a defect that involved a non-compliance with s 43.

[37] The remedy open to the applicant was not limited to waiting for the hearing of the complaint and to take an objection to the complaint on the grounds of non-compliance with s 43, so as to achieve the outcome dictated by s 43(3)(a), namely having the Court require the complainant to choose one matter on which to proceed. The applicant was entitled to apply at an earlier stage to have the complaint struck out, in whole or in part, or, in the alternative, to require the complainant to elect. Incidentally, the remedy under s 43(3)(a) is premised on two or more matters having been "joined", and the inclusion of the words "In the alternative" in the complaint meant that this was not the case. Their removal by way of amendment would have had the effect of the two matters being joined. But such an amendment depended on the defect not being a non-compliance with the provisions of s 43.

[38] I conclude that the complaint that purported to charge the applicant with summary offences "In the alternative" did not comply with s 43 of the *Justices Act*. The complaint purported to charge two matters in the alternative. These matters were not joined in accordance with s 43. Because the complaint did not comply with s 43

the power to amend pursuant to s 48 was not available. The first respondent erred in concluding that power existed under s 48 for the Industrial Magistrate to remove the words "In the alternative".

Was the error of the first respondent a jurisdictional error?

[39] In its application for review the applicant claims:

1. An order in the nature of certiorari setting aside the decision and orders of the first respondent made on 12 April 2011 in proceeding C/2020/58.

2. An order remitting the matter to the Industrial Court of Queensland for further consideration and to be determined according to law.

3. A declaration, with respect to the amended Complaint of Adam John Low dated 27 November 2009, that s 43 of the *Justices Act* does not authorise two matters of complaint to be pleaded in the alternative.

4. A declaration, with respect to the amended Complaint of Adam John Low dated 27 November 2009, that s 48 of the *Justices Act* does not authorise, by way of amendment, the removal of the words "in the alternative" from the said amended Complaint.

5. An order that the second respondent pay the applicant's costs of and incidental to the application to be agreed or, failing agreement, to be assessed on a standard basis.

The applicant did not seek an order in the nature of certiorari setting aside the decision and orders of the Industrial Magistrate.

[40] The applicant submits that, by misconstruing ss 43 and 48 of the *Justices Act*, the first respondent fell into jurisdictional error and, as a result, relief in the nature of certiorari may be granted. In response, the second respondent submits that if the first respondent erred, he did so in the course of exercising the jurisdiction committed to him, and that the applicant's arguments concerning the Industrial Magistrate's reliance on s 48 of the *Justices Act* do not support the conclusion that the President of the Industrial Court acted beyond his jurisdiction. The second respondent relies upon a passage from the Chief Justice's judgment in *Bauer Foundations Australia Pty Ltd v President of the Industrial Court of Queensland*:[13]

> "Carrying out the process of evaluation committed to him as an appellate body, it was open (indeed compelling) for the President to conclude as he did. In any event, if he erred in the conclusion he drew, he did so in the course of exercising the jurisdiction committed to him."

The second respondent submits that the same reasoning applies in this case, in that any error by the first respondent was made in the course of exercising jurisdiction. The applicant replies that *Bauer* is distinguishable since this case does not involve the first respondent's assessment of a factual error made by an Industrial Magistrate.

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13 [2011] QSC 103, [7].

Rather, it involves the construction of a statute that confers power on a court. The applicant complains that ss 43 and 48 of the *Justices Act*, "properly construed, never authorised the First Respondent to delete the words 'In the alternative' from the amended complaint." I am unable to accept the applicant's submission in this regard. It does not distinguish between the decision made by the Industrial Magistrate and the decision made by the Industrial Court. The first respondent was not asked to delete the words "In the alternative" from the amended complaint. Instead, in hearing the appeal made to him, the first respondent was asked to decide whether the Industrial Magistrate's decision to delete these words was in error.

[41] Section 341(2) of the *Industrial Relations Act* 1999 permits a person to appeal to the Industrial Court if dissatisfied with a decision of a Magistrate in relation to a matter for which the Magistrate has jurisdiction.[14] The applicant in this case alleged that the Industrial Magistrate erred in failing to strike out the complaint on the basis that the remaining charge contained counts alleged to have been in the alternative when as a matter of law the two counts were not true alternatives. The second ground was that the Magistrate erred in holding that the remaining charge had already specifically pleaded two separate charges in compliance with s 43 of the *Justices Act*. The application to appeal to the Industrial Court sought orders that the appeal be allowed, the decision under appeal be set aside and the complaint be struck out. Alternatively, it sought an order that the appeal be allowed, the decision be set aside and the respondent/complainant be put to his election as to which of the alternatives in the charge the complainant wished to pursue, and that the remainder of the charge be struck out.

[42] The application to appeal was properly constituted and it invited the Industrial Court to find that the Magistrate had erred. The issue of whether the Magistrate had erred was one that the Industrial Court had jurisdiction to determine.[15] Misinterpretation of s 43 and s 48 of the *Justices Act* by the first respondent cannot be regarded as an error apt to deprive him of the authority to determine the appeal which came before him. The principles discussed by the Court of Appeal in *Parker v President of the Industrial Court of Queensland* in the context of the interpretation of substantive provisions of the *Workers' Compensation and Rehabilitation Act* 2003 also apply to the task of interpreting the provisions of the *Justices Act*. The principles of jurisdictional error discussed by Keane JA (with whom Fraser JA and White J agreed) in *Parker* are apposite in the present context.[16] Simply put, in this case, the issue was whether the Industrial Magistrate erred in the respects alleged in the application to appeal. That was a matter committed to the Industrial Court to decide. Its decision that the Industrial Magistrate did not err was made in the course of exercising its appellate jurisdiction.

[43] The issue then becomes whether, in the course of exercising the jurisdiction committed to it, the Industrial Court committed a "jurisdictional error". There may be no bright line separating jurisdictional errors from errors within jurisdiction.[17]

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14 This includes appeals from magistrates in workplace health and safety prosecutions: *Workplace Health and Safety Act*, s 164(3) and (4).

15 *Electrical Trades Union of Employees Queensland v President of the Industrial Court of Queensland* [2007] 1 Qd R 1, 6; *Parker v President of the Industrial Court of Queensland* [2010] 1 Qd R 255, 270-71.

16 [2010] 1 Qd R 255, 270-73 [32]-[38].

17 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163]; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 571 [66].

The High Court in *Kirk* rejected the idea that there is "a rigid taxonomy of jurisdictional error."[18] The three examples of jurisdictional error given in *Craig v South Australia*[19] did not mark the boundaries of the relevant field. However, in this case the applicant relies upon jurisdictional error arising in respect of the third example given in *Craig*, namely misconstruction of the relevant statute thereby misconceiving the nature of the function which the inferior court is performing or the extent of its powers in the circumstances of the particular case.

[44] I have found that the Industrial Court fell into error in upholding the Industrial Magistrate's construction of ss 43 and 48 of the *Justices Act*, or his application of those sections to the facts. To the extent that the Industrial Court can be said to have misconstrued s 43 and s 48, it incorrectly decided something which it was authorised to decide. It was not a decision outside the limits of the functions and powers conferred on the Industrial Court, which would thereby render it a jurisdictional error. Any misinterpretation of ss 43 or 48 of the *Justices Act* did not involve a misconception by the President of the nature of the function that he was performing or the extent of the Industrial Court's powers in the circumstances of the particular case. The President of the Industrial Court decided points raised on appeal, including the proper interpretation of ss 43 and 48 of the *Justices Act* and their application to the circumstances at hand. The decision of the Industrial Court was one which the Industrial Court was authorised to decide and was an error within jurisdiction.

[45] Mr Flanagan SC for the applicant cited the following statement from *Craig*:[20]

> "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"

and submitted that "the Industrial Magistrate and the Industrial Court misinterpreted the precondition to the exercise of the power under section 48."

[46] I accept the applicant's submission that the learned Industrial Magistrate misinterpreted a precondition to the exercise of the power to amend under s 48. In doing so, the Industrial Magistrate made a jurisdictional error because he made a decision outside the limits of the power to amend conferred on him. The Industrial Court can be said to have made the same error of interpretation in respect of the relevant provisions. However, the error that it made in this regard was about something which the Industrial Court was authorised to decide. It was an error within jurisdiction.

[47] After the hearing before me, I referred the parties to the decision in *NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland*[21] and invited submissions in relation to it. In that case, an applicant sought to review a decision of the President of the Industrial Court dismissing an appeal from a decision of an

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18 (2010) 239 CLR 531, 574 [73].
19 (1995) 184 CLR 163, 177-8.
20 (1995) 184 CLR 163, 177-8.
21 [2010] QSC 373.

Industrial Magistrate in a complaint brought against the applicant alleging a breach of the *WHS Act*. The issue related to the validity of the complaint. Justice Boddice found that the complaint was not a nullity but that, in dismissing the appeal, the President of the Industrial Court, whilst accepting that there are occasions when a complainant may be required to particularise inadequacies in precautions or lapses in diligence, erroneously held that there was no obligation on a complainant to particularise "the measures not taken" so as to apprise a defendant of the case it was to meet in preparing any defence.[22] Justice Boddice continued:

> "That finding did not involve the application of established law to the facts as found by the first respondent. That finding constituted a misconstruction of the relevant statute and a misconception of the extent of the Court's powers in the particular case in relation to a matter which was specifically the subject of a ground of appeal before the first respondent. As such, the finding constitutes a jurisdictional error as that term is identified in Kirk."[23]

This passage suggests that a jurisdictional error will occur in a case in which the Industrial Court misconceives the extent of *its* powers in the particular case in relation to a matter which is specifically the subject of a ground of appeal before it. I accept that proposition and also the general proposition that a jurisdictional error will occur if the Industrial Court misconceives the extent of its powers. I do not understand the passage to mean that the Industrial Court falls into jurisdictional error whenever it misinterprets or misapplies statutory provisions that are the subject of a ground of appeal to it.

[48] It is appropriate to note the procedural and substantive differences between the present case and *Kirk*. Mr Kirk and the Kirk company applied to the New South Wales Court of Appeal for orders in the nature of certiorari quashing the decisions of the Industrial Court at first instance and orders in the nature of certiorari quashing two decisions of the Full Bench. The ultimate question in the appeal to the High Court was whether the Court of Appeal erred in refusing orders in the nature of certiorari to quash the orders for the convictions of the appellants. The High Court concluded that an order in the nature of certiorari could, and should, have been directed to the Industrial Court in respect of its decisions at first instance. That remedy should have been granted for jurisdictional error by the Industrial Court. Because both the order at first instance finding the offences proved and the order passing sentence should have been quashed, the orders subsequently made by the Full Bench of the Industrial Court were also quashed.[24]

[49] The course of proceedings in the present matter is of a different kind. The applicant did not seek an order in the nature of certiorari quashing the decision of the Industrial Magistrate. Instead, it first sought an order in the nature of certiorari setting aside the decision and orders of the President of the Industrial Court in dismissing an appeal from the Industrial Magistrate. The applicant then sought an order remitting the matter to the Industrial Court for further consideration. I have found that the error made by the Industrial Court was not a jurisdictional error and, in the circumstances, an order in the nature of certiorari should not be made. If the

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22 [2010] QSC 373, [28] (footnotes omitted).
23 [2010] QSC 373 [29] (footnotes omitted).
24 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 583 [108].

proceeding had been differently constituted and an application had been made to quash the Industrial Magistrate's decision on the grounds of jurisdictional error, then I would have found that such an error had been made by the Industrial Magistrate.

[50] In the end result, the Industrial Court made an error concerning the exercise of the Industrial Magistrate's power to amend in relation to a matter of substance. It was something about which the Industrial Court was authorised to decide. It was not an error about the extent of the Industrial Court's functions and powers. It was an error about the extent of the Industrial Magistrate's powers and whether the power to amend under s 48 arose in the circumstances. It was not, however, a jurisdictional error by the Industrial Court.

The Court's supervisory jurisdiction

[51] As noted, the applicant did not seek certiorari against the Industrial Magistrate in the exercise of the Court's supervisory jurisdiction over inferior courts and tribunals. If it had done so, and if the decision of the Industrial Magistrate had been quashed, then the orders made by the Industrial Court upholding that decision would have been quashed as well. Instead, the applicant sought declaratory relief. No submissions were made concerning the discretion to grant such declaratory relief where there was no separate application to quash the decision of the Industrial Magistrate. It may be that the availability of an appeal to the Industrial Court is a powerful discretionary ground not to grant certiorari against an Industrial Magistrate even if it were otherwise available, and that similar discretionary considerations apply in relation to declaratory relief in respect of alleged errors. The exercise of the discretion to decline relief assumes importance where the Parliament has enacted a system for appealing the decisions of a Magistrate and has placed significant restraints upon proceedings by way of review of decisions in the Industrial Court. As Chesterman J (as his Honour then was) observed in a different context:

> "If judicial review were available and prerogative orders were made in every case where the Supreme Court disagreed with the Industrial Court on a point of law which determines not only the outcome of the appeal but the jurisdiction of the Industrial Court with respect to the appeal, there would come into existence a right of appeal in every case from the Industrial Court to the trial division of the Supreme Court and thence to the Court of Appeal. Such an outcome was clearly not intended by Parliament when it enacted the *Industrial Relations Act*."[25]

The statutory restrictions upon the review of decisions of the Industrial Court do not affect the supervisory jurisdiction of the Court over inferior courts and tribunals in respect of jurisdictional error. The powerful discretionary considerations that apply in refusing relief, including an order in the nature of certiorari, in circumstances in which a party has yet to pursue and exhaust a remedy by way of appeal do not apply in the present circumstances. In this case, the applicant appealed to correct an error by the Industrial Magistrate which I have characterised as a jurisdictional error. The

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25 *Electrical Trade Union of Employees Queensland v President of the Industrial Court of Queensland* [2007] 1 Qd R 1, 6 [21].

appeal was dismissed because, as I have found, the Industrial Court erred in concluding that the Industrial Magistrate was right to exercise the power to amend. In this matter, the consequence of the jurisdictional error made by the Industrial Magistrate concerning the availability of his power to amend pursuant to s 48 is to expose the applicant to two charges in circumstances where the Industrial Magistrate should have refused the application to amend, and proceeded to consider whether to strike out the complaint, or put the complainant to his election as to which of the two charges he wished to pursue, following which the other charge and the words "In the alternative" would have been struck out.

[52] I consider that it is an appropriate exercise of the supervisory jurisdiction of the Court to make orders that have the effect of not exposing the applicant to a conviction by reason of a jurisdictional error by the Industrial Magistrate. The applicant should not be exposed to conviction on two separate and distinct offences in circumstances where it finds itself in that position by reason of a jurisdictional error.

[53] Because I have not made an order in the nature of certiorari setting aside the decision and orders of the first respondent, I do not consider that it is presently appropriate to make an order remitting the matter to the Industrial Court for further consideration. Instead, I am inclined to make declarations substantially in the form sought in paragraphs 3 and 4 of the application for review. If those declarations are made, then the Industrial Magistrate can consider the future course of the proceedings, having heard the submissions of the parties. One possible course would be to strike out part of the complaint after the second respondent/complainant has been required to choose upon which of the two matters of complaint in the amended complaint and summons it wishes to proceed.

[54] I will provide the parties with an opportunity to make submissions concerning the granting of declaratory or other relief and the form of declaratory orders.

[55] In its supplementary submissions, the applicant made a final and alternative submission that if I found that an order in the nature of certiorari cannot be made against the first respondent because any error was made by him within jurisdiction, then I should join the Industrial Magistrate and make appropriate orders against him in the exercise of the Court's supervisory jurisdiction. I am not inclined to do so, at least at this stage. My preference at this stage is to make appropriate declaratory orders, following upon which I expect that the second respondent will not seek to proceed with both charges, will elect upon which charge he wishes to proceed and will invite the Industrial Magistrate to strike out the other charge. The Industrial Magistrate can deal with such an application according to law. I will make provision for liberty to apply, but the joinder of the Industrial Magistrate at this late stage may be an unnecessary exercise. Instead, I will exercise the supervisory jurisdiction by making appropriately worded declaratory orders.

Conclusion

[56] The applicant has established a jurisdictional error by the learned Industrial Magistrate. It has not established a jurisdictional error by the learned President of the Industrial Court of Queensland and, as a result, I decline to make an order in the nature of certiorari against the decision and orders of the first respondent.

[57] The form of declaratory relief sought by the applicant appears to invoke the supervisory jurisdiction of the Supreme Court in an instance of jurisdictional error by an inferior court, namely the Industrial Magistrate, being an error that was not corrected on appeal to the Industrial Court. Given the nature of the error, and the fact that the restrictions on reviews in s 349 of the *Industrial Relations Act* 1999 do not affect the Court's supervisory jurisdiction over jurisdictional error by an inferior court before which a party is facing criminal charges, this is an appropriate case for declaratory orders of the kind sought by the applicant. I will hear the parties in relation to appropriate forms of order. I will also hear the parties in relation to the issue of costs.