SUPREME COURT OF QUEENSLAND

CITATION:	*NK Collins Industries Pty Ltd v President of the Industrial Court of Qld & Anor* [2012] QSC 147
PARTIES:	**NK COLLINS INDUSTRIES PTY LTD** (applicant) v **THE PRESIDENT OF THE INDUSTRIAL COURT OF QUEENSLAND** (first respondent) **PETER VINCENT TWIGG** (second respondent)
FILE NO/S:	BS5328 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 June 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 February 2012
JUDGE:	Martin J
ORDER:	**Application dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – PREROGATIVE WRITS AND ORDERS – CERTIORARI – GROUNDS FOR CERTIORARI TO QUASH – EXCESS OR WANT OF JURISDICTION – GENERALLY – where applicant was found guilty of failing to ensure the workplace health and safety of each of its workers – where applicant appealed to Industrial Court and its appeal was dismissed – where s 349 of the *Industrial Relations Act* 1999 (Qld) immunises the decision of the Industrial Court from judicial review by the Supreme Court unless the decision is affected by jurisdictional error – whether the decision of the Industrial Court was affected by jurisdictional error and thereby susceptible to review INDUSTRIAL LAW – INDUSTRIAL SAFETY, HEALTH AND WELFARE – QUEENSLAND – WORKPLACE HEALTH AND SAFETY LEGISLATION – where applicant contends the prosecution failed to particularise acts or omissions constituting the offence – where applicant contends *Kirk v Industrial Commission (NSW) & Anor*

applies directly to the *Workplace Health & Safety Act* 1995 (Qld) – whether the President of the Industrial Court erred in not directly applying *Kirk* in his reasoning

Occupational Health & Safety Act 1983 (NSW)
Workplace Health & Safety Act 1995 (Qld), s 349

Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs) (2010) 239 CLR 521, considered
NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland & Anor [2010[QSC 373, considered
Parker v President of the Industrial Court of Queensland & Anor [2010] 1 Qd R 255, applied

COUNSEL: P F Mylne for the applicant
R J Douglas SC with him P H Major for the second respondent

SOLICITORS: Davidson & Sullivan Solicitors for the applicant
Office of Fair and Safe Work Queensland for the second respondent

Background

[1] The second respondent brought a complaint against the applicant on 1 May 2008, alleging that it had failed to discharge an obligation imposed upon it by the *Workplace Health & Safety Act* 1995 ("WH&S Act") in that it had failed to ensure the workplace health and safety of each of its workers. The complaint concerned, in particular, the death of an employee who had been engaged in felling trees in a forest south of Mitchell.

[2] The complaint led to a hearing before the Industrial Magistrate at Roma who, on 21 September 2009, found that the applicant was guilty of the charge and that the circumstance of aggravation, namely the death of an employee, had been made out.

[3] The applicant appealed to the Industrial Court of Queensland. It argued only one ground – that the applicant was not provided with sufficient particulars of the charge. During argument that ground was expanded to encompass two points:

(a) that the prosecutor had failed to disclose the acts or omissions which were alleged to constitute the offence; and
(b) that insufficient particulars of acts or omissions alleged to constitute the events were provided to the applicant.

[4] Hall P held that the complaint not only disclosed the legal elements of the offence charged, but also the essential factual ingredients.[1] The President dismissed the appeal.

[5] By an application for review filed in May 2010, the applicant sought an order in the nature of *certiorari* quashing the decision of the Industrial Court on the ground that

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1 *N.K. Collins Industries Pty Ltd AND Peter Vincent Twigg* (C/2009/56) – Decision No 2 at [17].

the Court had misconstrued provisions contained in Part 3 of the WH&S Act and thereby misconceived the extent of its powers by confirming the conviction of the applicant. The matter came before Boddice J who allowed the application and remitted the matter to the Industrial Court for further consideration in accordance with law.[2] His Honour considered, in some detail, the similarities and dissimilarities of the WH&S Act and the *Occupational Health & Safety Act* 1983 (NSW) which was the subject of consideration by the High Court in *Kirk v Industrial Relations Commission (NSW) & Anor*.[3] On the issue of the provision of particulars, the following conclusions were made in the majority judgment in *Kirk*:

> "[27] The acts or omissions the subject of the charges here in question had to be identified if Mr Kirk and the Kirk company were to be able to rely upon a defence under s 53. The defendant in *Johnson v Miller* was placed in a similar position. The statute in question provided that a licensee of licensed premises would be liable to a penalty if a person was present on the premises during certain prohibited hours, unless the licensee could establish one of the justifications or excuses relating to that person's presence provided for in the statute. Dixon J observed that each of the justifications depended upon some feature pertaining to the person found in, or seen leaving, the premises and that no licensee could succeed in bringing the case within any of the grounds of excuse unless the person or persons were identified and their presence on a distinct occasion alleged.
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> [28] The statements of the offences as particularised do not identify what measures the Kirk company could have taken but did not take. They do not identify an act or omission which constitutes a contravention of ss 15(1) and 16(1). The first particular of the s 15(1) offence suggests that the Kirk company had some systems relating to the operation of the ATV in place, but that they were not sufficient. It does not identify the deficiency in the system or the measures which should have been taken to address it. The second particular does not identify what information, instruction or training was necessary to be given to Mr Palmer or the other employee of the Kirk company. The particulars of the s 16(1) offence say nothing about what should have been done to avoid exposing the contractors to risk to their health and safety from the use of the ATV. Needless to say, the appellants could not have known what measures they were required to prove were not reasonably practicable.
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> [29] Section 11 of the *Criminal Procedure Act* 1986 (NSW) provided that the description of any offence in the words of an Act creating the offence 'is sufficient in law'. In *Smith v Moody*, it was held that such a provision did not dispense with the common law rule. In *Ex parte Lovell; Re Buckley*, Jordan CJ doubted that earlier authorities such as *Smith v Moody* should be regarded as binding and that the object of the rule could be secured only by the requirement

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2 *NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland & Anor* [2010] QSC 373.

3 *Kirk v Industrial Relations Commission (NSW); Kirk Group Holdings Pty Ltd v WorkCover Austhority of (NSW) (Inspector Childs)* (2010) 239 CLR 531.

> of particulars on the face of the information. Nevertheless, in *Johnson v Miller*, Dixon J appears to have applied the common law rule and to have held that a statutory provision like that made by s 11 of the *Criminal Procedure Act* 1986 "relates only to the nature of the offence and does not dispense with the necessity of specifying the time, place and manner of the defendant's acts or omissions".
> (footnotes omitted)

[6] The conclusions of Boddice J concerning the applicability of *Kirk* are dealt with below.

[7] The matter came on for further consideration before the Industrial Court in March 2011. Hall P noted that by agreement between counsel for the respective parties at the hearing of the application for judicial review in the Supreme Court, the issues for determination by the Supreme Court had been:

(a) Is the decision of the Industrial Court of Queensland susceptible to review?

(b) Was the respondent, as prosecutor, obliged to aver or particularise acts, or omissions by the applicant, as defendant, in respect of the contravention complained of?

(c) If the principles in *Kirk*[4] have such application, is the complaint invalid for lack of particularity?

[8] Hall P then considered what the answers to those questions were and said:[5]

> "[2] …Question (a) was answered in the affirmative and question (c) was answered in the negative. To fully appreciate the answer in (b) and to understand the task now to be undertaken by this Court, it is necessary to have regard to the debate which occurred about the Orders which properly flowed from the substantive reasons published by Boddice J.
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> [3] The debate about Orders made clear what was otherwise implicit in the substantive reasons. Question (b) was not answered in the affirmative. Boddice J did not accept that the Prosecutor was obliged further to particularise acts or omissions by the Defendant in respect of the contravention complained of. Rather, what Boddice J accepted was that the Prosecutor, at least in some cases, had an obligation 'to particularise the measures not taken in order to apprise the Defendant of the case' (transcript of proceedings before Boddice J, 22 October 2010, P4 at 11.20 to 30). The same point was made at paragraph [22] of the substantive reasons for decision of Boddice J in *NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland and Anor*:[6]
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> > '[22] The complaint identified the risk and the source of that risk. There was no obligation on the prosecutor to particularise anything further to found a valid complaint. However, that does not mean that a prosecutor cannot be required, in an appropriate case, to particularise the applicable code of

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4 Ibid.

5 NK Collins *Industries Pty Ltd v Peter Vincent Twigg* (C/2009/56) – decision No 2 at [2]- [4].

6 See above n 2.

> practice or other measures it asserts ought to have been taken by an employer if such particulars are necessary to apprise a defendant of the case it has to answer. For example, where there are conflicting codes of practice that may be applicable to the factual circumstance. The provision of such particulars in that event would be on the grounds of procedural fairness, not because they were necessary matters for the prosecutor to aver to found a valid complaint.'

[4] It is paragraph [22], one should add, which underpins the Order remitting the matter to this Court. The Respondent had sought an Order dismissing the Application for Judicial Review. His Honour's *ex tempore* reasons for rejecting that submission were:

> 'In relation to the matters raised in the written outline of argument, whilst there may well be merit in the respondents' submissions as to what course ultimately should flow from the way in which the case was conducted below, the way in which the case was conducted before me was to argue it, as has been conceded in the outlines, on a generic basis rather than the specific. In these circumstances, it is appropriate to remit the matter back to the Industrial Court of Queensland for further consideration according to law rather than make orders in respect of the ultimate outcome.'. [Transcript 22 October 2010, P1, 11.1 to 20]

I apprehend this to be a case in which this Court is to determine whether fairness required further and better particulars of the measures not taken."

This application

[9] In June 2011 the applicant filed a new application for review seeking an order in the nature of *certiorari* quashing the decision of the first respondent of April 2010 because:

> "(a) The Industrial Court misconstrued provisions contained in Part 3 of the *Workplace Health & Safety Act* 1995 and thereby misconceived the extent of its powers by confirming the conviction of the applicant by the Industrial Magistrate on 21 September 2009;
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> (b) The Industrial Court misconstrued the judgment of the Boddice J delivered 14 October 2010 and failed to find that there was an obligation on the second respondent to particularise in a complaint the measures not taken so as to apprise the applicant of the case it was to meet in preparing any defence. It thereby misconceived the extent of its powers by dismissing the appeal from the decision of the Industrial Magistrates Court dated 21 September 2009;
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> ..."[7]

[7] Application for Review filed 21 June 2011.

Issues on this application

[10] The two issues which were the subject of debate were:

(a) Is the decision of the Industrial Court of Queensland susceptible to review?

(b) In *Kirk v Industrial Relations Commissioner (New South Wales)* the High Court determined, in respect of similar New South Wales legislation, that the prosecuting authority was required to identify each act or omission relied upon in a prosecution of this nature. Here the question to be addressed is: Is the prosecution required to particularise acts of, or omissions by, the applicant in respect of a prosecution brought by way of complaint and summons for contravention of the relevant provision of the WH&S Act?

Is the decision of the Industrial Court of Queensland susceptible to review?

[11] Section 349 of the *Industrial Relations Act* 1999 (Qld) immunises the decision of the Industrial Court from judicial review by the Supreme Court unless the decision is affected by jurisdictional error: see *Parker v President of the Industrial Court of Queensland & anor*.[8]

[12] In *Parker*, Keane JA (as his Honour then was) referred to the observations of the High Court in *Craig v South Australia*[9] and said:

> "[37] It is, I think, with respect, clear from this passage that an error of statutory construction by a decision-maker will constitute jurisdictional error on the part of the decision-maker only where the error goes to 'a pre-condition of the existence of ... authority to make an order or decision in the circumstances of the particular case.' Even if that proposition is not abundantly clear from the passage cited above, it is made clear in relation to the position of a court, such as the Industrial Court, by the following further observations in *Craig's Case*:
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> > 'If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.
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> > 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

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8 [2010] 1 Qd R 255.

9 (1995) 184 CLR 163, 177-178.

> 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.'
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> [38] A misinterpretation of s 32(1) or s 32(5) of the WCR Act cannot be regarded as an error apt to deprive the President of the Industrial Court of the authority to determine the appeal which came before his Honour. In my respectful opinion, the argument made in this Court on Ms Parker's behalf is a gallant, but nonetheless unsuccessful, attempt to dress up, as an issue of law going to jurisdiction, a dispute about the conclusions which should follow from the application of s 32(1) and (5) of the WCR Act to the evidence before the Industrial Magistrate as to the temporal and causal connections between Ms Parker's employment, including the management action taken in the course thereof, and the aggravation of Ms Parker's mental illness." (footnotes omitted)

Is the prosecution required to particularise acts or omissions etc?

[13] The argument advanced by the applicant under this heading was, for all intents and purposes, identical to that which it advanced before Boddice J when it appeared before him. The argument was dealt with by Boddice J, in particular, at [16]-[18].[10]

[14] An appeal does not lie from the decision of the Industrial Court nor may it be reviewed except in the circumstances referred to above. The requirement that the Industrial Court proceed according to law was a requirement that it revisit the matter before it in light of the reasoning of Boddice J and, in particular, what his Honour said:

> "[16] The NSW Act provides for a different statutory scheme. Sections 15 and 16 of the NSW Act, whilst imposing obligations to ensure health, safety and welfare at work, and identifying types of measures an employer may take to obviate those risks, comprehend that the generally stated duty is contravened when a measure should have been taken by an employer to obviate an identifiable risk. The fact that any number of measures may or may not have been taken to obviate that risk necessitates that the prosecutor give the defendant particulars of the measures the prosecution contends should have been taken by the defendant. This is particularly so where s 53(a) of

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10 See above n 2.

> the NSW Act made it a defence for a person charged with an offence to prove that it was not reasonably practicable to comply with the provision of the Act the breach of which constituted the offence. This defence allows that not all measures which may have guaranteed against the risk have to be taken – only those measures which are reasonably practicable.
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> [17] A defendant to any prosecution is entitled to be apprised, not only of the legal nature of the offence charged, but also of the particular act, matter or thing alleged as the foundation of the charge. Essential particulars include 'the time, place and manner of the defendant's acts or omissions'. This requirement is consistent with the definition of 'offence' in the *Criminal Code* (Qld) as it is the 'act or omission which renders the person doing the act or omission liable to punishment' which is 'an offence'.
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> [18] The complaint specified the person on whom the obligation was imposed, the obligation imposed, why the obligation was imposed, failure 'to discharge' that obligation contrary to s 24 of the WH&S Act, when that failure occurred, where that failure occurred, the source of the risk, the nature of the risk and that the breach had caused death. As such, the complaint disclosed both the legal elements of the offence and the 'essential factual ingredients' of that offence. There was no requirement for the second respondent to aver acts of, or omissions by, the applicant to found a valid complaint." (footnotes omitted, original emphases kept)

[15] Hall P identified those matters and, correctly, regarded his task as being one in which the Industrial Court was to determine whether fairness required further and better particulars of the measures not taken. The President answered that question, by reference to the decision of the Industrial Magistrate, and in doing so, found against the applicant.

[16] On the application before me, Mr Mylne said that the manner in which the President addressed the question was consistent with neither the views expressed in *Kirk* nor the reasoning of Boddice J. The President would have erred had he considered the matter before him in accordance with the decision in *Kirk* for the reasons advanced by Boddice J in his decision.

[17] The President identified the relevant legal principle, namely, that the decision as to whether particulars ought to be ordered was one to be decided against the background of the fairness of the case.

[18] That decision by the President wherein he considered the fairness of the refusal was a matter within his jurisdiction.

[19] It was advanced before me that I should reconsider the operation of the provisions of the New South Wales legislation as discussed in *Kirk* and hold that the legislation was sufficiently similar to the WH&S Act, and that, therefore, I should hold that *Kirk* applies directly to the Queensland legislation.

[20] I am in respectful agreement with Boddice J as to the differences which exist between the New South Wales and Queensland legislation and, thus, the inapplicability of *Kirk* to the circumstances of this case.

[21] The application is dismissed.