

SUPREME COURT OF QUEENSLAND

CITATION: *Gramotnev v Queensland University of Technology (No 2)*
[2015] QCA 178

PARTIES: **DMITRI GRAMOTNEV**
(appellant)
v
QUEENSLAND UNIVERSITY OF TECHNOLOGY
(respondent)

FILE NO/S: Appeal No 6545 of 2013
Appeal No 7198 of 2013
SC No 6286 of 2010

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane – [2013] QSC 158

DELIVERED ON: Orders delivered ex tempore on 21 September 2015
Reasons delivered 25 September 2015

DELIVERED AT: Brisbane

HEARING DATE: 21 September 2015

JUDGES: Holmes CJ and Margaret McMurdo P and Jackson J
Judgment of the Court

ORDERS: **Delivered ex tempore on 21 September 2015:**

1. The answer to the first question is amended as follows:

“Answer: No, except that under the ~~Senior Staff Disciplinary Policy~~ Academic and Professional Staff Misconduct Policy the respondent contractually promised the appellant that an allegation of misconduct or serious misconduct against him would be dealt with by the procedures of the ~~policy~~ QUT Enterprise Bargaining Agreement (Academic Staff), cl 44.”

2. The costs of the proceeding below are costs in the cause.

3. There is no order for costs of the appeal or the application to vary the orders made on the appeal.

CATCHWORDS: APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – where an order was made allowing an appeal in part – where the order did not reflect the Court’s intention – whether the Court should vary the original orders

Gramotnev v Queensland University of Technology [2015] QCA 127, related
Queensland Pork Pty Ltd v Lott [2003] QCA 271, cited
Uniform Civil Procedure Rules 1999 (Qld), r 667

COUNSEL: The appellant appeared on his own behalf
D Kelly QC, with D de Jersey, for the respondent

SOLICITORS: The appellant appeared on his own behalf
Minter Ellison Lawyers for the respondent

- [1] **THE COURT:** These are the reasons for the orders made by the Court on 21 September 2015.
- [2] On 10 July 2015 the court published reasons (“earlier reasons”)¹ and made orders as follows:
- “1. Order that the appeals are allowed, in part.
 2. Set aside the order made on 19 June 2014 as to the answer to the first question.
 3. In lieu thereof answer the first question as follows:
Whether the provisions of the defendant’s Enterprise Bargaining Agreements and/or Manual of Policies and Procedures and/or the defendant’s statutes and policies constituted a term or terms of the employment contract between the plaintiff and the defendant entered [sic] on or about 23 November 1999 (“the Employment Contract”)?
Answer: No, except that under the Senior Staff Disciplinary Policy the respondent contractually promised the appellant that an allegation of misconduct or serious misconduct against him would be dealt with by the procedures of the policy.
 4. Set aside the judgment dismissing the proceeding.
 5. Direct that the parties make submissions on costs in writing not to exceed two pages in length within seven days.”
- [3] The respondent applied to set aside those orders and to substitute for them an order that the appeal is dismissed.
- [4] The ground of the application was that the order resulted from a slip and may be corrected pursuant to *Uniform Civil Procedure Rules* 1999 (Qld) (“UCPR”), r 388. It has been held that a “judgment ... based upon a plain misunderstanding of what the position was” meets the language of r 388(1)(b).² The parties were in agreement that if the order in par 3 did not reflect the court’s intention at the time it was made, it can be set aside. See also r 667(2)(d) UCPR.
- [5] It was common ground between the parties that the appellant does not contend that his dismissal should have been dealt with by the procedures of the Senior Staff

¹ *Gramotnev v Queensland University of Technology* [2015] QCA 127.

² *Queensland Pork Pty Ltd v Lott* [2003] QCA 271.

Disciplinary Policy, more fully described as the “MOPP B/-8.5 Disciplinary Action for Misconduct and Serious Misconduct – Senior Staff”. That is because the policy applies only to “senior staff members employed on an ongoing or fixed term appointment at classification levels SSG1 to SSG6 inclusive”. The appellant was not employed at any of those classification levels.

[6] Accordingly, the finding at par [137] of the earlier reasons that “the appellant alleges that the policy was not followed because the Vice-Chancellor did not refer the allegations against him to a Misconduct Investigation Committee”³ was mistaken because it refers to the Senior Staff Disciplinary Policy.

[7] In fact, the appellant alleges in par 95 of the ASOC that the respondent “breached the express terms of the EBA” for reasons including, by sub-paragraph 95(o), “the events and circumstances associated with, and during, and prior to, and as a result of the Plaintiff’s dismissal from his tenure [sic] academic position at the Defendant on 3 July 2009”. Further, by par 106 of the ASOC, the appellant alleges that the breach within par 95(o) “includes the breaches of ... Sections ... 44.2.1, 44.2.2, and 44.2.7 of the EBA2005”. As well, in par 107 of the ASOC the appellant alleges that “The facts, matters and circumstances of how the Defendant breached the express terms of EBA2005 listed at paragraph 106 hereof are particularised in paragraphs 23 to 442 of Particulars 1...”.

[8] Paragraphs 369 to 371 of Particulars 1 allege:

“The Defendant committed another breach of EBA – particularly, of its Clause 44.2.7 – by proceeding with the disciplinary action against the Plaintiff – which ended with the termination of the Plaintiff’s employment – without forming a Misconduct Investigation Committee (MIC) and without referring the matter to MIC.

This was another breach of the employment contract of the Plaintiff by the Defendant associated with the breaches of EBA during the disciplinary action against the Plaintiff.

As a result of these breaches of EBA by the Defendant, the Plaintiff was deprived by the Defendant of an opportunity to argue and respond in any reasonable way to any allegations of misconduct – which had never been put to him by the Defendant – and defend himself during a fair and non-prejudicial investigation and detailed legal analysis of his conduct by MIC.”

[9] Paragraph 111 of the ASOC alleges that the respondent breached the express terms of the MOPP during the employment until 3 July 2009 and refers to par 95(o) of the ASOC. Paragraph 118 of the ASOC alleges that the breach of the MOPP in par 95(o) includes breaches by the respondent of express terms of the MOPP outlined in identified paragraphs of the appellant’s particulars. The identified paragraphs did not include the policy described as MOPP B/8.4 “Academic & Professional Staff Misconduct”.

[10] However, that policy is in the evidence and provides, in part:

“Definitions of misconduct and serious misconduct and the procedures to be followed are contained in the relevant enterprise bargaining agreements:

³ *Gramotnev v Queensland University of Technology* [2015] QCA 127, [137].

- QUT Enterprise Bargaining Agreement (Academic Staff), clause 44...”

- [11] The appellant submits that he was a member of academic staff to whom the Academic & Professional Staff Misconduct policy applied.
- [12] A summary of the requirements of cl 44 of the EBA2005 is set out in par 36(f), (g) and (h) of the earlier reasons.⁴ In substance, they are the same as the requirements that apply to senior staff under the Senior Staff Disciplinary Policy as set out in par [141] of the earlier reasons.⁵
- [13] The upshot is that as a result of our mistake as to the applicable policy, we wrongly concluded in the earlier reasons that the detailed procedures to manage allegations of misconduct or serious misconduct made against the appellant were those set out in the Senior Staff Disciplinary Policy, when the applicable policy was the Academic and Professional Staff Misconduct Policy. As a matter of substance, by its cross-reference to cl 44 of EBA2005, that policy contained very similar provisions.
- [14] The errors in the earlier reasons which flow from the mistake as to the applicable policy are as follows:
- (a) “the policy” referred to in par [137] should have been the Academic and Professional Staff Misconduct Policy;
 - (b) the discussion in par [141] from the beginning of the third sentence to the end of that paragraph is misplaced, because the Senior Staff Disciplinary Policy is irrelevant. However, the same observations apply, *mutatis mutandis*, to the provisions of cl 44 of EBA2005; and
 - (c) the exception referred to in par [187] of the reasons should have been an exception under the Academic and Professional Staff Misconduct Policy.
- [15] From the foregoing, it followed that the answer to the first question required amendment as set out below:
- “Answer: No, except that under the ~~Senior Staff Disciplinary Policy~~ Academic and Professional Staff Misconduct Policy the respondent contractually promised the appellant that an allegation of misconduct or serious misconduct against him would be dealt with by the procedures of the ~~policy~~ QUT Enterprise Bargaining Agreement (Academic Staff), cl 44.”
- [16] The parties made submissions as to the appropriate costs orders at first instance and of the appeal. The interlocutory nature of the proceeding below, in the light of our orders, warranted an order that the costs of that proceeding be costs in the cause. As both parties had mixed success in the appeal no order was made as to the costs of the appeal. The need for the application to vary orders made on the appeal did not arise from any fault on the part of either party. In those circumstances no order for the costs of that application was made.

⁴ *Gramotnev v Queensland University of Technology* [2015] QCA 127, [36].

⁵ *Gramotnev v Queensland University of Technology* [2015] QCA 127, [141].