

CITATION: *Mistero Pty Limited v Cann* [2017] QCATA 56

PARTIES: Mistero Pty Limited
(Applicant/Appellant)
v
Michael John Cann
(Respondent)

APPLICATION NUMBER: APL004 -17

MATTER TYPE: Appeals

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: **Senior Member Stilgoe OAM**

DELIVERED ON: 15 May 2017

DELIVERED AT: Brisbane

ORDERS MADE:

- 1. Leave to appeal granted.**
- 2. Appeal allowed.**
- 3. The decision of 7 December 2016 is set aside.**
- 4. The proceeding is transferred to the Magistrates Court at Brisbane for rehearing.**

CATCHWORDS:

APPEAL – LEAVE TO APPEAL – INDUSTRIAL LAW – COMMONWEALTH – terms and conditions of employment – remuneration – Fair Work Act awards – whether the Queensland Civil and Administrative Tribunal has jurisdiction over debt arising from unpaid wages – where wages are determined by reference to a national award – whether Tribunal erred in finding it did have jurisdiction – whether grounds for leave to appeal

APPEAL – LEAVE TO APPEAL – WHEN APPEAL LIES – ERROR OF LAW – where Tribunal failed to provide adequate reasons for decision

APPEAL – LEAVE TO APPEAL – WHEN APPEAL LIES – PROCEDURAL FAIRNESS –

where party had applied for appearance by remote conference – where application for appearance by remote conference granted in advance of the hearing – where Tribunal has not called the party on the record

Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 12(4)(a), 142(3)(a)(i)
Australian Broadcasting Tribunal v Bond (1990)
 170 CLR 321
Ford v Thexton trading as Family Legal and Thexton Lawyers [2014] QCATA 180

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act).

REASONS FOR DECISION

- [1] Mistero Pty Limited employed Michael Cann to work on its rural property ‘Myendetta’ outside Charleville from 12 January 2015 to 11 December 2015. Mistero owed Mr Cann some holiday pay but the parties were in dispute about how much. Mr Cann filed a claim for \$5,186.62. At a hearing in the absence of Mistero, the tribunal ordered that Mr Cann receive the full amount of his claim.
- [2] Mistero wants to appeal that decision. Because this is an appeal from a decision of the tribunal in its minor civil disputes jurisdiction, leave is necessary.¹ Leave to appeal will usually be granted where there is a *reasonable argument* that the decision is attended by error, and an appeal is necessary to correct a *substantial injustice* to the applicant caused by that error.²
- [3] Mistero says the tribunal did not have jurisdiction to hear Mr Cann’s claim. It says the tribunal did not provide reasons for its decision. It says the tribunal failed to take into account relevant considerations and evidence. It says the tribunal failed to provide procedural fairness.

Did the tribunal have jurisdiction to hear the dispute?

The tribunal, in its minor civil disputes jurisdiction, can hear a claim to recover a debt or liquidated demand.³ Although the tribunal initially took the view that a claim for wages was not within its jurisdiction, the position was clarified by the appeal tribunal in *Ford v Thexton trading as Family Legal and Thexton Lawyers*:

¹ QCAT Act s 142(3)(a)(i).

² *Pickering v McArthur* [2005] QCA 294 at [3].

³ QCAT Act s 12(4)(a).

Where the wages are prescribed by contract, the employee will be able to recover them as a debt in court, or a tribunal, of competent jurisdiction. This would include QCAT.⁴

...

Unpaid award wages can be recovered as a statutory debt. Subject to any exclusion by a statute, such a debt may be recoverable in the minor civil disputes jurisdiction of the Tribunal.⁵

- [4] However, the appeal tribunal found that that the tribunal has no jurisdiction for claims under the *Fair Work Act 2008* (Cth).⁶
- [5] Mistero asserts that the tribunal did not have jurisdiction because Mr Cann's claim was a claim for unpaid wages under a *Fair Work Act* award. This information was not before the tribunal below, so it is understandable that the tribunal may have erred in deciding it had jurisdiction.
- [6] However, reference to a *Fair Work Act* award is not the end of the tribunal's consideration about jurisdiction. The appeal tribunal in *Ford* found that claims for above award payments were within the tribunal's jurisdiction.⁷ In its submissions to this appeal tribunal, Mistero says that Mr Cann's package was above the Federal Pastoral Award 2010 rate. To the extent that Mr Cann's claim is for above award payments, the tribunal had jurisdiction.⁸ It did not have jurisdiction for that part of Ms Cann's claim that was within the terms of the *Fair Work Act*.

Did the tribunal provide adequate reasons for decision?

- [7] When a respondent does not appear at a hearing, it is tempting to 'shortcut' the reasons for decision. The temptation should be avoided.
- [8] Mistero says that the reasons for decision were:

Adjudicator: So the order will be the respondent pay to the applicant the sum of \$5,186.82 on or before 4.00 pm 5 January 2017, okay.

Mr Cann: So, January, yep.⁹

- [9] The reasons for decision were slightly more expansive than Mistero claims in that it also accepted Mr Cann's calculations.¹⁰ Unfortunately, though, the tribunal did not deal with Mistero's documentary evidence at all. It did not explain why it preferred Mr Cann's oral evidence over Mistero's documentary evidence. It did not explain why it did not accept Mistero's submission that Mr Cann had taken some of his annual leave.

⁴ [2014] QCATA 180 at [11] – [12].

⁵ *Ibid* at [15].

⁶ *Ibid* at [38].

⁷ *Ibid* at [52].

⁸ *Ibid* at [25].

⁹ Transcript page 1-6, lines 3 – 6.

¹⁰ Transcript page 1-5, lines 38 – 40.

- [10] The failure to give adequate reasons is an error of law if it amounts to a denial of natural justice.¹¹ If a party cannot be confident that the case was understood and properly considered, then the failure to give adequate reasons is a denial of natural justice.
- [11] The tribunal's reasons for decision were inadequate. This is an error of law for which leave to appeal should be granted.

Did the tribunal fail to take into account relevant considerations and evidence?

- [12] Because, as I have found, the tribunal's reasons for decision were inadequate, I am unable to say whether the tribunal failed to take certain matters into account. For the reasons that follow, it is unnecessary for me to comment further on this ground of appeal.

Did the tribunal fail to provide procedural fairness to Mistero?

- [13] Mistero did not appear at any of the hearings. Mr Cann says Mistero showed no interest in appearing and 'failed' to appear by phone.
- [14] Mistero submits that, although it applied for, and was granted, leave to appear by telephone, the tribunal did not contact it and it was not given the opportunity to appear by phone. Although not provided by sworn evidence, Mistero submits that, in two hearings, it waited for a phone call from the tribunal but none was received.
- [15] The transcript records that the tribunal attempted to call Mistero at Moree but 'no one answered basically'.¹² Unfortunately, the attempts to contact Mistero are not part of the tribunal record. I do not know, for example, how many times the tribunal attempted to contact Mistero, or on what number, or what response, if any, the tribunal received.
- [16] When a party has applied for, and been given, leave to attend by phone, it is critical that a failure to facilitate that appearance is fully explored and properly recorded. In the absence of that information, I am inclined to accept Mistero's submission that the tribunal did not afford procedural fairness.
- [17] Leave to appeal should be granted and the appeal allowed. The decision of 7 December 2016 is set aside. While I have found that there is some basis for the tribunal having jurisdiction, I am of the view that the issues can be better ventilated in the Magistrates Court, which undoubtedly has jurisdiction for all aspects of Mr Cann's claim. Given the location of the parties, it may be that the Magistrates Court at Brisbane is the most appropriate jurisdiction and I order accordingly.

¹¹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.

¹² Transcript page 1-2, lines 37 – 45.