QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

CITATION:	*Signoretto v State of Queensland (Metro South Hospital and Health Service)* [2019] QIRC 025
PARTIES:	**Signoretto, Peter** (Applicant) **v** **State of Queensland (Metro South Hospital and Health Service)** (Respondent)
CASE NO:	TD/2017/44
PROCEEDING:	Application for Reinstatement
DELIVERED ON:	25 January 2019
HEARD AT:	On the papers
MEMBER:	Industrial Commissioner Black
ORDER:	**Application dismissed**
CATCHWORDS:	INDUSTRIAL LAW - APPLICATION FOR REINSTATEMENT - jurisdiction - applicant engaged on a series of fixed term contracts - whether employment ended by the effluxion of time or at the initiative of the employer.
CASES:	*Industrial Relations Act 2016,* s 315, s 317 *Department of Justice and Attorney General and David Carey (No. C42 of 2002)* *State of Queensland (Queensland Health) and Dr Farzana Mitra* B18 [2012]

Decision

Introduction

[1] Mr Peter Signoretto (the applicant) has applied pursuant to s 317 of the *Industrial Relations Act 2016* (the IR Act) for reinstatement in employment with the Metro South Hospital and Health Service (the respondent).

[2] The effect of the response to the application filed by the respondent on 26 May 2017 was that the Commission did not have the requisite jurisdiction to hear and determine

the application because the applicant's employment did not end at the initiative of the employer, and had ended by the effluxion of time.

[3] The applicant's application was filed on 19 May 2017. It was subject to a conciliation conference before Kaufman DP on 20 June 2017. The Deputy President issued a s 318(3)(a) certificate on 20 June 2017 stating in effect that conciliation had failed and giving the applicant six months from the date of the certificate to decide whether he wanted to progress his application to formal hearing. If no action was taken by the applicant within the six months period, the application would lapse on 20 December 2017.

[4] On 28 September 2017, the applicant requested that the consideration period be extended by 91 days. On 10 October 2017, the respondent informed the Registry that it did not object to the extension, but maintained its jurisdictional objection on the basis that the applicant's employment did not end at the initiative of the employer and that the Commission did not have jurisdiction to hear the application.

[5] On 3 October 2017 Kaufman DP granted the extension. On 26 October 2017, the Registry informed the parties that the extension had been allowed and that the applicant had until 21 March 2018 to determine if he wished to progress his application to trial.

[6] However, on 8 March 2018, the applicant emailed the Registry, informed the Registry that he had been hospitalised for some time, and requested an extension of a further three months.

[7] On 14 March 2018, the applicant was informed that his application had been allocated to the Commission as currently constituted and that the Commissioner had decided to proceed to hear and determine the jurisdictional issue on 11 April 2018. The applicant was also advised that if he was unable to attend the hearing, the Commissioner would call for written submissions and decide the matter on the papers.

[8] On 23 March 2018, the applicant emailed the Registry and expressed his concern at the matter being listed for hearing on 11 April 2018 to determine a jurisdictional objection. It was the applicant's position that the jurisdictional question had been decided. His reasoning was expressed in the following words:

> With great respect the matter of jurisdiction raised by the Respondent was clearly addressed and determined by the Hon. Deputy President Kaufman (retired) in the Certificate issued under Section 318(3)(a) of the Act and dated 20 June 2017. In that Certificate, a Deputy President of the QIRC recognised my contention that the Respondent acted with a purpose to avoid their obligations under the Act and the Deputy President gave me additional time to progress the application. This Certificate including the granting of additional time to further the application clearly shows that the Deputy President recognised my status as being protected under s 315(1)(d) of the Act, and henceforth jurisdiction has been determined.

[9] The appellant was however erroneous in all relevant respects.

[10] On 5 April 2018, the applicant emailed my associate and requested an adjournment of the hearing. He stated *inter alia* that he remained hospitalised and that there was a doubt whether he would be able or allowed to participate in the hearing in person.

[11] On 5 April 2018, the applicant also emailed the Registry with ten completed Form 32A/ Form 32B (attendances notices) and requested that the notices be issued.

[12] On 9 April 2018, the applicant was informed that the Commission had decided to adjourn the hearing scheduled for 11 April 2018 and that the jurisdictional issue would be decided on the papers. The applicant was asked to advise when he thought that he would be able to provide a written submission.

[13] On 10 April 2018, directions were issued to the effect that the respondent should provide submissions by 27 April 2018, while the applicant should provide submissions by 31 May 2018.

Jurisdiction

[14] The jurisdictional objection turns on whether the applicant has an unfair dismissal remedy in circumstances where his employment had been regulated by a series of fixed term contracts and where his employment ended at the expiration of the last of these contracts. It was the respondent's position that the applicant's employment ended by the effluxion of time, and not at the initiative of the employer. In the alternative the respondent argued that the applicant was precluded by s 315(d) of the Act from bringing an unfair dismissal application. Finally, the respondent said that it was not in the public interest for the applicant to be allowed to prosecute his application.

[15] The applicant had been employed by the respondent as a temporary employee across the period from 18 August 2016 to 7 May 2017. It was his submission that the purpose of the temporary contracts was to avoid the employer's obligations under Division 2 of Part 2 of Chapter 8 of the Act. In these circumstances, notwithstanding that he had been engaged under fixed term contracts, he was able to pursue an unfair dismissal application.

[16] The effect of s 315(1)(d)(i) of the Act is that an unfair dismissal remedy is not available in the case of an employee engaged for a specific period or task unless the main purpose of engaging the employee in that way is, or was at the time of the employee's engagement, to avoid the operation of the unfair dismissal provisions of the Act.

Documents

[17] Both parties provided written submissions and affidavits in support of their respective positions. The respondent provided the following documents:

- Submissions filed on 27 April 2018;
- Affidavit of Antony Burley.

[18] The applicant provided the following documents:

- Unfair dismissal application filed on 19 May 2017;
- Submissions filed on 31 May 2018;
- Documents obtained under the *Right to Information Act 2009;*
- Application in existing proceedings filed on 30 May 2018;
- Affidavit of Peter Signoretto filed on 30 May 2018;

- Affidavit of Peter Signoretto filed on 31 May 2018;
- Affidavit of Terry Mahony filed on 5 June 2018;
- Affidavit of Peter Signoretto filed on 7 June 2018;
- Redacted version of affidavit of Peter Signoretto filed on 7 June 2018.

Applicant's employment arrangements

[19] Prior to his employment by the respondent on 18 August 2016, the appellant had been performing work for the Building, Engineering & Maintenance Services Department (BEMS) of the respondent as an employee of a labour hire company. The applicant said in his 30 May 2018 affidavit that he was employed under labour hire arrangements from 22 July 2013 to 1 August 2016.

[20] The respondent said that on 17 August 2016 the applicant was offered a temporary fulltime position as a Trades Assistant performing electrical testing and tagging functions as part of the BEMS division. The applicant was employed on a temporary basis with the respondent pursuant to section 67(4)(c) of the *Hospital and Health Boards Act 2011*.

[21] On the applicant's version of events, an industrial dispute involving the BEMS workforce resulted in an agreement that the respondent would terminate its labour hire contract. It seems that the terms of the agreement included an undertaking by the respondent to directly employ at least some of the labour hire personnel, including the applicant.

[22] In his affidavit dated 30 May 2017 the applicant said that he formed the belief after talking to other employees when he commenced work for the respondent in August 2016 that his past service for the labour hire company would be treated as service with the respondent and that, on engagement by the respondent, he was promised continuity of service.

[23] The applicant said that his employment resulted from conversations between himself and Mr O'Brien. In a telephone conversation, Mr O'Brien invited him to a meeting and said that he wanted the applicant's help in settling an industrial dispute between maintenance unions and the respondent. Mr O'Brien told the applicant that one of the reasons for the strike was that the ETU thought that the respondent was not honouring its obligations under the certified agreement in terms of the use of labour hire staff and the use of contracts.

[24] The applicant said that at a meeting with Mr O'Brien on 3 August 2016, Mr O'Brien told the applicant that the ETU wanted him "back at BEMS filling a position of trades assistant and doing the Test and Tag electrical work". The applicant said that he "understood this to be with permanency and continuity" consistent with the employment security provisions of the certified agreement. The applicant's account of the meeting is set out in his affidavit in the following terms:

> 16. On 3 August 2016 I met with Mr. Geoff O'Bryan at Eight Mile Plains and the meeting lasted more than two hours from approximately 1PM.

> 17. At that meeting Mr Geoff O'Bryan went through the employment process and asked me to email my CV or qualifications to him and he sent me a blank email to reply to, which I did at 2:53PM. We also discussed some mandatory conditions of employment.
> 18. Following that meeting I had discussion with Mr David Hall, HR Manager with the Respondent that included things like vaccinations and police checks that were required by Mr Hall before I could return to work, but were not required by PAH from Workforce Solutions over the preceding three years.
>
> 19. Based on the phone call from Mr O'Bryan, and the invitation to meet with me in person, and the time taken by Mr O'Bryan at our meeting, and the impetus for the meeting, and Mr O'Bryan's very senior role with the Respondent I formed a belief that Mr O'Bryan had power over the shape, nature and substance of my employment with the Respondent.
>
> 20. I further believe that regardless of the means by which the employment agreement was written, and regardless of any Statute empowering the Respondent, or written policy of the Respondent that Mr O'Bryan had the power and authority to act for and bind the Respondent, and that he would make my return to duty happen by being good to his word.
>
> 21. I noticed on reflection that Mr O'Bryan was careful about what was put in writing versus what was said on our phone call and at our meeting.

[25] The applicant commenced employment with the respondent on 18 August 2016. He was initially employed for a fixed term commencing on 18 August 2016 and expiring on 9 October 2016. His employment continued under a series of fixed term contracts until 7 May 2017. The temporary engagements were for the following periods:

- 18 August 2016 to 9 October 2016;
- 10 October 2016 to 30 October 2016;
- 31 October 2016 to 13 November 2016;
- 14 November 2016 to 8 January 2017;
- 9 January 2017 to 5 March 2017;
- 6 March 2017 to 7 May 2017.

[26] The applicant was informed on 26 April 2017 that he would not be offered a further contract following the expiry of his current contract on 7 May 2017.

[27] Documentation associated with the applicant's last engagement commencing 6 March 2017 was attached to the Affidavit of Antony Burley. The "Employee movement form – temporary" disclosed the following information relevant to the current proceedings:

- The form indicates that it is to be used "to document a temporary change to an employee's existing position or temporary appointment to a position either in an 'at level' or 'higher duties' capacity";
- The position title identified was "BEMS Trade Assistant";
- The form identified a start date of 6 March 2017 and an end date of 7 May 2017;
- The employment basis was "Full-time";
- The reason for vacancy was identified as "Backfill Secondment";
- The form did not include any entry in the section calling for the identification of approved qualifications which might entitle the employee to additional payment;
- The form was signed by a Line Manager, Alex McGill, Planning Manager, on 7 March 2017;
- The form included a section called "Employee certification". *Inter alia,* this section included a dedicated paragraph for "Temporary employees only" and

included a space for the employee's signature. The applicant signed the form on 7 March 2017;

- The "Temporary employees only" paragraph read as follows:

  > Your appointment is for a temporary period. Continuation or extension of employment in this position cannot be guaranteed beyond the end date stated above. Please note that your employment may be terminated prior to the end date of your fixed term appointment by either party, in accordance with the termination clause in the abovementioned Award or other industrial instrument relevant to your employment.;

- Delegate approval for the temporary appointment was provided under the signature of Antony Burley, A/Snr Director BEM MSH, on 8 March 2017.

Applicant's case

[28] The applicant's case was extensively laid out in a variety of documents that he filed in connection with either his application for reinstatement or his response to the respondent's jurisdictional objection. A review of the documents which are listed below provides a detailed understanding of the propositions that the applicant relies on in either prosecuting his application or rebutting the respondent's objection:

- Application in existing proceedings;
- Unfair dismissal application;
- Right to information material;
- Affidavits;
- Submissions.

Application in existing proceedings

[29] On 30 May 2018, the applicant filed an application said to relate to the directions order issued by the Commission on 10 April 2018. In the application, the applicant:

- Requested that the QIRC order the respondent to produce emails, internal memos and file notes etc detailed in Right to Information application (RTI Ref 242649/2018) in order to support the facts of the applicant's affidavit and expedite this matter;
- Requested that the QIRC check whether the affidavit of Antony Burley contains errors of fact or mislead the Commission through relevant omissions;
- Complained that the affidavit of Antony Burley was neither signed nor witnessed at the date of lodgment.

[30] This application was misconceived in that the process available to the applicant to seek disclosure of documents is not through an application brought in existing proceedings, but pursuant to the *Industrial Relations (Tribunals) Rules 2011*. Further, the applicant had already progressed his right to information application and it was not clear why a duplicated process to recover the same information was necessary.

[31] It is relevant however that the applicant did request that an attendance notice to produce be issued on the respondent on 5 April 2018, but this notice does not appear to have been acted on in circumstances where the hearing initially scheduled for 11 April 2018 was cancelled. It was most likely that, in this predicament, the applicant when

preparing his submissions looked to other avenues by which he might access the material he sought.

[32] The applicant revealed in the application that he had sought disclosure of the relevant material through a right to information request lodged on 10 May 2018. The difficulty for the applicant was that the information sought was not provided to him, and not filed with the Commission, until 21 September 2018 which was well outside the date fixed for the lodgment of materials by him in response to the respondent's jurisdictional objection.

[33] In fairness to the applicant, I have decided to accept the right to information material provided on 21 September 2018. He sought the material via an attendance notice to produce in April 2018 and had foreshadowed his reliance on the material in his submissions and affidavits filed at the end of May 2018. Where relevant to the matters in issue, the material will be considered in the determination of the jurisdictional issue raised by the respondent.

[34] In terms of Mr Burley's affidavit, the Commission has no investigative jurisdiction that would enable it to conduct its own enquiries into the veracity of the information included in the affidavit. It is a matter for the applicant to provide information contesting or contradicting the information provided by Mr Burley. On the face of it, there is little in Mr Burley's affidavit that appears controversial although the applicant took exception to Mr Burley stating that the applicant "reported through" to him.

[35] The issue with the reporting line was that while Mr Burley stated in his affidavit that the applicant reported through to him, the applicant was keen to point out that he had little association with Mr Burley and that he reported to Mr Walker, who reported to Mr Coomber, who reported to Mr O'Brien. It seems to me quite tenuous for the applicant to suggest that the involvement of Mr Burley in the making and communication of the decision not to renew his contract, in some way or other, supported his position that the respondent was motivated to avoid its unfair dismissal obligations under the Act.

[36] The applicant also complained unnecessarily about the lodgment of Mr Burley's affidavit in an unsigned form. As a matter of convenience, the affidavit was filed with the respondent's submissions on 27 April 2018 but in circumstances where, in a covering email, the respondent drew attention to the unsworn nature of the affidavit and explained why it was filed unsigned:

> … unable to get Mr Burley to swear the affidavit today due to personal commitments. Mr Burley is coming to see me on Monday morning to swear the affidavit. I will scan and email a copy as soon as this has taken place.

[37] Consistent with this advice, a sworn copy of the affidavit was filed on 30 April 2018.

Right to information material

[38] The right to information material predominantly comprised copies of emails, images of electrical equipment and appliances used in the workplace, and copies of workplace incident reports. The approach is to identify material which is relevant to the arguments and propositions relied on by the applicant in his submissions and affidavits.

Unfair dismissal application

[39] In his application, the applicant identified two reasons for his dismissal. He said the primary reason related to his inclusion of an agenda item for a health and safety committee meeting. The applicant had been elected as the electrical workshop's representative on the safety committee and it was in this capacity that he attended safety committee meetings.

[40] A temporal connection between the date of the April safety committee meeting and the decision of the respondent not to renew the applicant's contract may have contributed to the applicant's perception of events. The safety committee meeting was held on 20 April 2017, while the applicant was informed that his contract would not be renewed around or about 26 April 2017.

[41] The applicant identified a secondary reason for the decision not to renew his contract as his supervisor's lack of understanding of his electrical safety and other safety obligations, and his supervisor's dismissive and perfunctory attitude towards safety management and the treatment of risk.

[42] The applicant developed his allegations against the respondent in his 7 June 2017 affidavit wherein he asserted that:

- He was not dismissed because of diminished performance but rather because of his workplace safety activities;
- He was discriminated against on numerous occasions for standing up for his rights and discharging his obligations as a worker and as the elected representative on the health and safety committee;
- He continually probed the failure of the Safety Department of the respondent to report serious incidents to the regulator. Examples of incidents that were not reported, and should have been reported, were included.

[43] There is no objective evidence that the applicant's practice of filing incident reports was a cause of aggravation to his supervisor or management. The right to information material disclosed that a number of incident reports had been filed by the applicant during the period that he performed work for the BEMS division. Incident reports were dated 22 December 2015; 13 September 2016; 20 September 2016; 12 October 2016; 19 October 2016; and 13 March 2017.

[44] Four incident reports were lodged by the applicant in the last quarter of 2016 and one report lodged in 2017. Across the same period, the applicant's temporary contract had been renewed on four occasions. The incident report activity did not prevent the applicant's contract being renewed on a number of occasions.

[45] The incident reports required review by the applicant's supervisor, the relevant Department Head, and the OHS Unit. There is nothing in the review section of the incident reports that suggests any controversy or difficulty was associated with the actions of the applicant in filing the reports. In the circumstances, I am unable to conclude that there was any association between the incident report activity and the decision in April 2017 to not renew the applicant's contract.

Reasons for non-renewal of contract

[46] The respondent's reasons for not renewing the applicant's contract were set out in an email sent to him by Mr Burley on 27 April 2017:

> As you would be aware the continuation or extension of temporary employment cannot be guaranteed beyond the end date of a contract.
>
> Temporary employment may be terminated prior to the end date of your fixed term appointment, by either party, in accordance with the termination clause in your Award or other industrial instrument relevant to your employment. In your case we are required to give you one weeks' notice, however, I had decided to increase this to two weeks. I note that you have agreed to work until COB Friday 28 April 2017 and will be paid the remaining time in lieu.
>
> As discussed yesterday, since commencing in the temporary Trades Assistant role in August 2016, Building Engineering and Maintenance (BEMS) Supervisors, Line Managers or I have had to have regular discussions with you primarily to do with the following workplace issues:
>
> - Failure to follow reasonable directions in regard to working within the scope of your role as a Trades Assistant; and
> - Failure to follow the correct process when reporting/escalating issues or concerns.
>
> You have been unable to demonstrate (despite being spoken with and provided with feedback on numerous occasions) that you can consistently meet the expectations of your role as a temporary Trades Assistant.
>
> Therefore, as your actions/behaviour is impacting on the Operational performance and objectives of BEMS, I have made the decision to not provide you with a further temporary employment contract.
>
> I understand that you have arranged to meet Jennifer Rossiter (A/Executive Director Corporate Services) and Ben Jenkins (A/Director Employee Relations) at the PAH tomorrow at 11am.

Non-core activities

[47] The applicant's perception of the primary reason for the non-renewal of his contract is not inconsistent in nature with the respondent's disclosed concerns about the applicant's tendency to involve himself in issues or activities that fell outside of his remit as a trades assistant. The inclusion of an agenda item which may have been misleading or may have misrepresented the facts, could have been a factor in the respondent's decision not to renew.

[48] Email exchanges included in the right to information material provide some insight into the management concern about the applicant's activities ostensibly related to participation in the safety committee.

[49] In an email dated 4 April 2017, the applicant asked that the next safety committee meeting include an agenda item about the safe standard of work of particular contractors. The issue had been raised with the applicant by electrical workers. The email was referred to Mr Burley and Mr Mcgill, before Mr Burley forwarded the email to the applicant's supervisor saying "can someone answer for me how Peter Signoretto has been able to gain access to bare conductors. His role is as a TA. If he is removing appliances to identify faults then he is in breach of the Act".

[50] As I followed the exchange between Mr Burley and the applicant's supervisor, the incident was a serious safety issue, the defective work had been identified by someone other than the applicant and that person was responsible for making the appliance or installation safe temporarily pending a rewiring of a substantial area. It was in these circumstances that the applicant's involvement was questioned. It was not disputed that the applicant's role on the safety committee required him to prepare a report on the issue for the Committee's consideration. But it appeared that applicant decided that his scope of activities went well beyond this and his conclusions and comments appeared to be ill-informed.

[51] In an email dated 19 April 2017, the applicant requested that a further issue be included on the agenda for the next safety meeting. The agenda item highlighted a failure on the part of the respondent to notify the Electrical Safety Office of a "dangerous electrical event". The issue involved an incident in which it was said that a cleaner had received an electric shock while vacuuming. No treatment had been sought, but an incident report had been completed. The applicant noted that he had not seen the incident report and said that the incident was a notifiable event. The email was forwarded to Mr Burley who copied the applicant's supervisor. Mr Burley in the forwarded email said that while the issue was not a notifiable incident, it required immediate follow up particularly if the incident had been recorded in an incident report. It was inappropriate for the applicant, in any capacity, to be alleging a breach of the reporting requirements of the electrical safety legislation, if such a proposition was not factually correct.

[52] The applicant however was not only attracting the ire of BEMS management, but also causing some management in the clinical areas of the hospital to question why the applicant was undertaking particular activities which appeared to fall outside of his understood sphere of activities. Particular email exchanges summarised below illustrate the concerns of management outside the BEMS division:

- In an email exchange on 18 November 2016, a business co-ordinator questioned why the test and tag team were, without reference to supervisors, failing equipment and recommending repairs at considerable cost;
- In an email exchange on 13 December 2016, a business co-ordinator asked the applicant's supervisor why the applicant was sending information about bed testing directly to the wards;
- An email exchange between various parties on different dates in March 2017, but mainly 28 March 2017, relating to duct cleaning in Ward 5D and the applicability of relevant procedures, included a complaint from nursing staff (Catherine Watson) to the effect that she was confused as to why the applicant contacted her team, and asked BEMS management to take the issue up with the applicant. At some point, the appellant emailed various parties, including Burley, explained his involvement in the matter and observed that "now we have a hatchet job taking place";
- An email exchange between the applicant and his supervisor, with Mr Burley, Mr McGill and others copied, dated 6 April 2017, in which the supervisor expresses concern at the applicant investigating incidents which had been raised by others and were being addressed by qualified electricians.

[53] The affidavit of Terry Mahoney was relevant to the duct cleaning issue. In his affidavit, Mr Mahoney said that he notified the applicant on 28 March 2017 about his concerns

for the safety of patients, himself, other workers and visitors in an area where mould was being cleaned from air conditioning ducts in offices near a patient lounge. He said that some workers were not wearing personal protective equipment and that there was no barricading or signage present. Mr Mahoney said that about an hour after his conversation with the applicant, the applicant attended on the scene in the company of a supervisor, Ian Patane.

[54] The discontent illustrated by the email content is to be understood in a context where the applicant was a trades assistant employed in the building, engineering and maintenance service department. His membership of the safety committee would have extended the scope of his activities to some extent, but from management's perspective, not to the extent engaged in by the applicant. It was also reasonably clear on a reading the material that many of the applicant's extra-curricular activities were engaged in without reference to his supervisor or BEMS management.

[55] An email dated 3 March 2017 from Alex McGill, with Burley and others copied, to the applicant in which Mr McGill issued a number of directions to the applicant relating to the performance of his work and the scope of his activities. The applicant replied to this email on 6 March 2017.

[56] On 3 March 2017, the respondent had been motivated to address its concerns in writing about the applicant's conduct. It did so in an email sent by Mr Mcgill to the applicant (with Mr Burley copied) where a number of directions were issued relating to the performance of the applicant's work and the scope of his activities:

> I need to bring to your attention our conversation this morning about you following proper communication protocols associated with your primary role as Trades Assistant and "test and tagging" within Metro South Health.
>
> What you may interpret as non-action on the part of your Supervisors, Client Manager or myself is that we have to take measured decisions that include professional input, technical advice, risk assessments, organisational requirements etc before we can effect any action going forward.
>
> Recently we approved your attendance at a course to undertake training in the application of AS3551, which is admirable on your part for wishing to upskill yourself but you were also advised by your Supervisor that particular standard was for test and tagging associated with medical devices – work that is not undertaken by BEMS – there is a strict demarcation. Therefore can I please ask you again;
>
> 1. To follow up issues with your work with your Trade Supervisor, myself or in our absence, the Client Manager – whom as you know is a qualified electrician with extensive experience of the PAH campus
> 2. Not to provide advice directly into the larger PAH campus without first seeking authorisation from those persons outlined in 1.0 above.
> 3. Not to go to other Units (ie Workforce Services) directly seeking technical advice that can be sourced from within BEMS.
>
> This direction is not to curb your enthusiasm for your work which I applaud, but merely to both keep you focussed on your primary tasks which we are currently behind schedule and for BEMS to be able to provide an informed and consistent message back to the Client (PAH Hospital).
>
> Lastly, and again with respect to our earlier telephone conversation regarding "Workstations on Wheels" – I am seeking advice on the matter.
>
> Your support to this direction is appreciated.

Reporting arrangements

[57] The applicant's complaint that he was not supported by his supervisor in so far as the exercise of his safety committee functions are concerned raises broader issues associated with the relationship between the applicant and BEMS management.

[58] In his affidavit dated 31 May 2017, the applicant draws particular inferences from the fact that Mr Burley had some interaction with him in relation to the decision not to renew his contract. He said that he had spoken to two permanent employees of the respondent who told him that the usual practice was for the supervisor to notify the worker that his contract was not being extended and to have the discussion with the worker. The two permanent employees had not previously observed the Director or Senior Director of Building and Engineering being involved in such discussions.

[59] The effect of the applicant's position was that his reporting line was limited to his supervisor and there was no association between him and any of the BEMS management team. All of this seems to me to be peripheral to the determinative issues, but some of the applicant's propositions are also factually incorrect. It is clear on review of the emails provided, that both Mr Mcgill and Mr Burley maintained an active involvement or oversight of the applicant's activities over time, and their involvement was not limited to the point in time where the decision was taken not to renew his contract.

[60] While the applicant complained about his supervisor's lack of support, it was Mr Mcgill who was the pivotal figure in bringing to the applicant's attention management's dissatisfaction with the manner in which he was conducting himself in the workplace, and in putting him on notice that he must take corrective action. While the applicant tried to characterise his differences as differences arising from unreasonable action on the part of his supervisor, it is clear that management both in the BEMS division and in other areas of the hospital were concerned about the applicant's activities.

[61] Further, despite disputing any interaction with Mr Burley, the applicant did take the step of emailing Mr Burley on 27 March 2017 and telling Mr Burley that he appreciated that, under Mr Burley's auspices, the risk management process was followed and a meaningful outcome achieved, in reference to a particular electrical safety issue.

[62] The claim of negligible involvement with Mr Burley was also contradicted by the applicant in his 7 June 2018 affidavit where he discussed a meeting that he said that he held with Mr Burley in January 2017. The applicant said that in the meeting he was told by Mr Burley that if he withdrew complaints involving workplace safety breaches said to have occurred at the Redland Hospital, he would be returned to the Princess Alexandra Hospital, put on the safety committee, and have all the issues raised by him addressed. The applicant said that shortly after this meeting he sent Mr Burley an email informing him that pursuant to the terms of their agreement, he had withdrawn all complaints.

[63] There is insufficient information to form conclusions about the veracity of the applicant's version of events and about the relevance of the matter to his rebuttal of the respondents jurisdictional submission. However, I note that Mr Burley would have been

obliged to address all legitimate concerns articulated by the applicant about safety issues, and if he delivered on this assurance, it would be necessary for the applicant to progress his concerns. Further, it is unlikely that the applicant could have been placed on the safety committee by management. The more likely course would be, as was stated by the applicant in other parts of his material, that he was elected to the safety committee by electrical workers.

Applicant's submission

[64] In his submission, the applicant variously argued:

- That regardless of the written form of any employment offer by the respondent, his contract of employment should be made up of both written and oral terms or undertakings;
- That he understood that when he was first employed by the respondent that he was being given permanency;
- That when he was first employed he had been promised continuity in employment and that his service with the labour hire firm would be deemed to be service with the respondent;
- That the promise of continuity was consistent with the employment security provisions of the relevant certified agreement which included provisions restricting the use of labour hire staff and "promised tenure" for persons working in-house;
- That the offer of continuity was related to the resolution of an industrial dispute and to the renegotiation of a certified agreement which resulted in the making of the *Queensland Health Building, Engineering & Maintenance Services Certified Agreement (No 6) 2016*;
- That there was a permanent vacant trades assistant position available which should have enabled the appellant's appointment on tenure;
- That there was ample evidence of his diligent, thorough and exemplary performance of duties, and little evidence of performance issues being raised with him;
- That his employment had been terminated at the employer's initiative;
- That his employment was terminated as an act of retaliation for his involvement in the reporting of electrical safety issues and the discharge of his duty as a designated competent person under the *Electrical Safety Act 2002* and regulations and the *Work Health and Safety Act 2011*;
- That he was suffering an impairment or lacking capacity to give consent to, or to repudiate, any employment contract entered into between 2013 and 2017 by reference to continual bullying, harassment and intimidation in the workplace or by reference to pre-existing post-traumatic stress disorder and anxiety.

Respondent's submission

[65] The respondent submitted that either of the following three propositions supported the dismissal of the applicant's application:

- The applicant was not dismissed at the initiative of the employer. Rather, his employment ended with the effluxion of time pursuant to a contract entered into on 6 March 2017;
- The applicant was engaged for a specific period of time and therefore he is excluded from bringing an unfair dismissal application pursuant to s 315(d) of the Act;
- It is neither necessary nor desirable in the public interest for the applicant's application to proceed.

Public interest

[66] The respondent relied on a decision of Hall P in submitting that it was not practicable to consider the reinstatement of the applicant in the respondent's employment in circumstance where a reinstatement cannot be effected in respect to a temporary position that no longer exists. In *Department of Justice and Attorney General and David Carey*[1] Hall P concluded*:*

> It cannot be the effect of s. 113 [Public Service Act 1996] that any employee other than a casual employee appointed to perform work of the type ordinarily performed by an officer is appointed for a limited term in the first instance with a right to relief if a failure to offer a further engagement by be shown to be unfair, What relief one may ask is the Queensland Industrial Relations Commission to grant? Is the Commission to order reinstatement or re employment in circumstances in which there are no longer "temporary circumstances" to be met? Is the aggrieved ex employee to be given compensation for loss of an engagement which he did not hold and which could not be given because s 113 did not allow it?

[67] Consistent with the reasoning in *Carey,* the respondent submitted that the effect of reinstating the applicant to a non-existent temporary role would have the effect of giving the applicant permanent employment in circumstances where he had never been engaged on that basis and in respect of which a position did not exist.

Specific period of time

[68] The effect of the respondent's submission was that the applicant, at all times, was engaged under temporary contacts which were for limited periods of time. In these circumstances, his application for reinstatement could not be entertained pursuant to the relevant provisions of the Act.

Employment ended by the effluxion of time

[69] The respondent submitted that the applicant's employment did not come to an end at the initiative of the employer, but ended with the expiry of a fixed term contract. It said that there was a line of authority from the Commission to the Queensland Court of Appeal which supports the position that an employee is not terminated where the temporary contract expires by the effluxion of time.

[70] The respondent relied on a decision of Bloomfield DP in *Mitra*[2] where the Deputy President was required to consider the employment arrangements of Dr Mitra who had

---

[1] *Department of Justice and Attorney General AND David Carey (No. C42 of 2002).*
[2] *State of Queensland (Queensland Health) and Dr Farzana Mitra* B18 [2012].

been employed on a number of temporary contracts and whose employment ended when the last of the temporary contracts expired. In dealing with an application for reinstatement by Dr Mitra, Bloomfield DP concluded:

> (33) In relation to the fact that Dr Mitra's employment may have continued on four occasions after a particular temporary contract ceased and a fresh one was signed, nothing in any of the decisions emanating from this Commission, the Industrial Court of Queensland, the Supreme Court of Queensland and the Queensland Court of Appeal concerning Mr Carey suggested that that was a cause for concern or that it might have, somehow, affected Mr Carey's status as a temporary employee.
>
> …
>
> (35) Accordingly, in circumstances where Dr Mitra was not dismissed at the initiative of the. employer, in that her final temporary contract expired by the effluxion of time on 16 November 2011, the Commission does not have jurisdiction to consider her application for reinstatement. In those circumstances I have come to the conclusion that it is not in the public interest for the Commission to further entertain her application. As such, I now act pursuant to s. 331 (b)(ii) of the Act to dismiss Dr Milra's application for reinstatement.

[71] It was the submission of the respondent that the following circumstances support a finding that the applicant's employment ended by the effluxion of time:

- The applicant was not employed on tenure and there was no guarantee that at the conclusion of one contract another would naturally flow;
- In signing the last employment movement form, the applicant agreed that there was no guarantee of a further contract being provided past the expiry date of his final contract;
- In signing a separation form, the applicant agreed that he was not required to be paid after 5 May 2017.

Reasoning

Offer of permanent employment

[72] At paragraph 26 of his affidavit, the applicant stated that Mr O'Brien "implied permanency filling the position number" formerly occupied by another employee. Nowhere does the applicant say that Mr O'Brien told him that he was being offered permanent employment. Rather the applicant said that he "understood this to be with permanency and continuity" consistent with the employment security provisions of the certified agreement. However, the applicant's case is not supported by the operation of the terms of the certified agreement.

[73] The applicant conflates his understanding on what was said by Mr O'Brien with the operation of the employment security provisions of the certified agreement to develop a proposition that somehow, he was being offered a permanent position with the respondent. The difficulty for the appellant however is that the facts are completely inconsistent with such a claim, particularly given that very soon after this conversation the applicant accepted a two month temporary contract which was followed by another temporary contract for only three weeks duration. The offer and acceptance of contracts for this duration is inconsistent with the applicant's claims that he would be employed by the respondent on a permanent basis.

[74] It may be that Mr O'Brien pointed out to the applicant that there was nothing to preclude him applying for permanent positions or that under the legislation or directives he would be eligible to seek conversion from temporary status to permanent status after completing a two year qualifying period. Either way, evidence that the applicant knew that he was **not** engaged on a permanent basis is provided by the fact that, in late 2016, he formally applied for a permanent trades assistant position in BEMS.

[75] This development is referenced in Mr Mcgill's email of 16 March 2017, but also by the applicant in Schedule 1 of his application for reinstatement. In this regard the applicant said:

> Subsequently, I was approached by management Geoff O'BRYAN to return to work as a temporary full-time employee and encouraged to apply for the positions when they were advertised. However, I believe I was overlooked by the interview panel for a permanent appointment as my responses made my supervisor appear embarrassed when I gave an example of how I would deal with workplace conflict.

[76] When viewed retrospectively, the duration of all the contracts entered into by the applicant were short and it is difficult to construe an engagement on this basis to in any way indicate that the true nature of the employment was continuous and permanent, rather than short term or temporary.

Avoidance of obligations

[77] It is difficult, on the factual scenario, to conclude that the main purpose of engaging the applicant on a temporary basis in August 2016 was to avoid the unfair dismissal provisions of the Act. The objective evidence suggests that the applicant was engaged on a temporary basis in August 2016 to backfill a permanent employee who had been seconded to another role. It is not apparent that circumstances were any different when the applicant was subsequently offered contract renewals on five further occasions.

[78] The main purpose therefore of the engagement on a temporary basis was to backfill a permanent trades assistant on secondment, not to avoid the unfair dismissal provisions of the Act.

[79] The last contract was entered into on 6 March 2017. This renewal followed close after the despatch of an email to the applicant by Mr McGill on 3 March 2017. Notwithstanding the nature and content of Mr McGill's communication, the respondent proceeded to extend the applicant's contract.

[80] The extension of the contract was entirely consistent with previous practice of in effect, extending the applicant's employment by a period of two months. While the 3 March 2017 email expresses concern at the applicant's conduct, it was not crafted in any disciplinary context but was rather a communication to get the applicant back on track and to get him focussed on his primary tasks.

[81] There is no reason to suggest at this time when deciding to extend the applicant's contract that the respondent anticipated that the applicant would not respond positively to Mr Mcgill's intervention, and no reason to anticipate that an unfair dismissal application might be likely to be lodged within the terms of the new contract.

[82] The respondent was entirely transparent in informing the applicant why his contract was not going to be renewed. There was no attempt to characterise the reasons for non-renewal as something other than performance related, and no attempt to avoid any detailed discussion on the real reasons for non-renewal. These circumstances are not consistent with an approach that was concerned to avoid an unfair dismissal remedy.

[83] It is more likely in my view that, in offering the applicant a two month contract on 6 March 2017, the respondent was acting consistently with past practice and was not motivated by a desire to avoid the operation of the relevant Act provisions.

Respondent's approach to non-core activities

[84] Mr McGill put the applicant on notice in his 3 March 2017 email that his predominant role was as trades assistant within the BEMS unit, that he had no unrestricted freelancing role, and that he needed to follow the advice and direction of those supervising him. There was nothing unreasonable, unfair or vindictive in the expression of Mr Mcgill's email, nor did it result in a decision to not renew the applicant's contract only a few days later on 6 March 2017. The content of the email, and the expression of the email, does not support the applicant's claim that he was being victimised by the respondent for engaging in safety activities.

[85] The problem for the applicant was that he did not adequately heed the advice of Mr Mcgill, and further problems of a similar nature were identified on 28 March 2017 and 6 April 2017. The respondent's decision not to offer a new contract was based on an overall view of the applicant's contribution to the organisation across his employment period.

[86] It is true that in an email dated 17 March 2017, the applicant complained to Mr Mcgill that he had not got an appropriate response from his supervisor to an incident report that he had made on 13 March 2017. Apparently, the supervisor had not been sympathetic to the applicant's complaint that he had been working in an area in which he was exposed to noxious fumes. This may have been an incident where the supervisor should have handled the issue differently, but it is not an issue which persuades me that, in the overall, the applicant has not been treated fairly and reasonably by the respondent.

Order

[87] I am satisfied that the applicant's employment ended by the effluxion of time and did not end at the initiative of the employer. The facts and circumstances in this matter are analogous to the facts and circumstances in *Mitra*[3] and I see no reason to depart from the reasoning of Bloomfield DP in that matter.

[88] I also accept that, on Hall P's reasoning in *Carey*[4] that there is a significant doubt about the legality and practicability of reinstating the applicant in circumstances where his temporary position may no longer exist and where temporary circumstances may not permit his re-engagement.

---

[3] *State of Queensland (Queensland Health) and Dr Farzana Mitra* B18 [2012].
[4] *Department of Justice and Attorney General AND David Carey (No. C42 of 2002).*

[89] I am satisfied on the facts and circumstances of this case, that the applicant's services were ended by the effluxion of time, and that as a consequence, he has no unfair dismissal remedy.

[90] The applicant's application for reinstatement is dismissed.