# SUPREME COURT OF QUEENSLAND

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| CITATION: | *NK Collins Industries Pty Ltd v President of the Industrial Court of Queensland & Anor* [2010] QSC 373 |
| PARTIES: | **NK COLLINS INDUSTRIES PTY LTD**<br>**(Applicant)**<br>**v**<br>**PRESIDENT OF THE INDUSTRIAL COURT OF QUEENSLAND**<br>**(First Respondent)**<br>**and**<br>**PETER VINCENT TWIGG**<br>**(Second Respondent)** |
| FILE NO/S: | 5155 of 2010 |
| DIVISION: | Trial Division |
| PROCEEDING: | Originating Application |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 14 October 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 16 August 2010 |
| JUDGE: | Boddice J |
| ORDER: | **1. The application is allowed**<br>**2. The decision and orders of the first respondent dated 27 April 2010 are set aside**<br>**3. The matter is remitted to the Industrial Court of Queensland for further consideration and to be determined according to law**<br>**4. The second respondent is to pay one half of the applicant's costs of and incidental to the application to be agreed or, failing agreement, to be assessed on the standard basis** |
| CATCHWORDS: | ADMINISTRATIVE LAW – Prerogative writs – Certiorari – Jurisdictional error – Appeal to the Supreme Court of Queensland – where alleged misconstruction of legislation – whether the Industrial Court misconceived the extent of its powers<br><br>INDUSTRIAL LAW – Workplace Health and Safety – duty of an employer to obviate an identifiable risk – where the |

prosecution contends measures should have been taken by the defendant to obviate that risk – whether the defendant is entitled to be apprised of particulars of the charge

*Criminal Code Act* 1899 (Qld)

*Industrial Relations Act* 1999 (Qld)

*Occupational Health and Safety Act* 1983 (NSW) - repealed

*Risk Management Code of Practice* 2007

*Workplace Health & Safety Act* 1995

*Workplace Health & Safety Act* 1989 (Qld)

*Bourk v Power Serve Pty Ltd & Anor* [2008] QCA 225

*Carey v President of the Industrial Court of Queensland and Anor* [2003] QSC 272

*Craig v South Australia* (1995) 184 CLR 163

*Hassett v Pauls Ice-cream and Milk Ltd; ex parte Pauls Ice-cream & Milk Ltd* [1966] Qd R 173

*John L Pty Ltd v The Attorney-General for the State of New South Wales* (1987) 163 CLR 508

*Johnson v Miller* (1937) 59 CLR 467

*Kirk v Industrial Relations Commission of New South Wales and Anor; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* (2010) 239 CLR 531

*KRM v The Queen* (2001) 206 CLR 221

*Lodhi v R* [2006] NSWCCA 121

*Parker & Anor v President of the Industrial Court of Queensland* [2008] QSC 175; on appeal [2009] QCA 120

*Parry v Woolworths Limited* [2010] 1 Qd R 1

*Schiliro v Peppercorn Child Care Centres Pty Ltd* [2001] 1 Qd R 518

*Smith v Moody* [1903] 1 KB 56

*Stanton v Abernathy* (1990) 19 NSWLR 656

*Taylor v Environment Protection Authority* (2000) 50 NSWLR 48

COUNSEL: P Mylne for the Applicant

RJ Douglas S.C. and P Major for the Second Respondent

SOLICITORS: Davidson & Sullivan for the Applicant

Crown Solicitor for the Respondent

[1] The applicant seeks to review the decision of the first respondent dismissing an appeal from a decision of the Industrial Magistrate in a complaint brought by the second respondent against the applicant alleging a breach of s 24 of the *Workplace Health & Safety Act* 1995 ("the WH&S Act").

**Complaint**

[2] By complaint and summons made on 1 May 2008, the second respondent alleged:

> "… that on the 4th day of June 2007, at the Forestry Entitlement Area 5A within the Woodlands area – Mitchell / St George Road, approximately 92km South of Mitchell Qld in the Magistrates Court District of Mitchell **N.K. COLLINS INDUSTRIES PTY LTD** being a person on whom a workplace health and safety obligation prescribed by section 28(1) of the *Workplace Health & Safety Act* 1995 is imposed, did fail to discharge that obligation contrary to s 24 of the *Workplace Health & Safety Act* 1995 in that being a person who conducted business or undertaking **N.K. COLLINS INDUSTRIES PTY LTD** failed to ensure the workplace health and safety of each of it's workers was not affected by the conduct of the said business or undertaking.
>
> Business/undertaking: The harvesting of trees and the cutting of wood in sawmills.
>
> Worker: Jiandong GUO
>
> Workplace: Forestry Entitlement Area 5A within the Woodlands area – Mitchell / St George Road, approximately 92km South of Mitchell Qld.
>
> **The source of the risk emanates from:**
>
> - Falling dead cypress trees, and/or
> - System of work for the felling of dead cypress trees.
>
> **The risk is the risk of death or injury including** the risk of crush injuries to Jiandong GUO
>
> **AND IT IS ALLEGED** that the breach caused the death of one Jiandong GUO
>
> Contrary to the Acts and regulations in such case made and provided."

[3] On 21 September 2009, the applicant was found guilty of the charge.

[4] On 27 April 2010, the first respondent dismissed the applicant's appeal from that decision. That appeal relied on two grounds:

(a) the complaint failed to disclose the acts or omissions which were alleged to constitute the offence;

(b) insufficient particulars of acts or omissions alleged to constitute the offence were provided to the appellant.

[5] In dismissing the appeal, the first respondent held:

(a) s 24(1) of the WH&S Act required a person on whom an obligation is imposed to discharge that obligation;

(b) s 28(1) of the WH&S Act required the obligation-holder to ensure that the workers and other persons described are free from death, injury and illness and free from the risk of death, injury and illness;

(c) failure to discharge that obligation constituted an offence, prosecution of which may be undertaken pursuant to s 164 of the WH&S Act;

(d) the obligation holder may avoid liability for any offence by making out a defence under s 37 of the WH&S Act or by establishing discharge of the obligation as described in s 26 and 27 of the WH&S Act;

(e) the particulars in the complaint nominated the nature of the business or undertaking, the worker to whom the obligation was owed and the location of the workplace with the circumstance of aggravation explicitly raising that the failure to discharge the obligation caused the worker's death;

(f) the complaint not only disclosed the legal elements of the offence, but also identified the "essential factual ingredients" of that offence. Whilst the complaint did not specify the acts or omissions by which the applicant committed a breach of the WH&S Act, that was because the WH&S Act did not visit liability on acts or omissions;

(g) There was no requirement to particularise "the measures not taken" and "the act or omission" of the applicant as the complainant who gave such particulars was not particularising the complainant's case, but attempting to particularise the case which a defendant may choose to make. A complainant should not be at liberty to constrain a defendant's case in such a way.

## Review application

[6] By application for review filed 19 May 2010, the applicant sought an order in the nature of *certiorari* quashing the decision of the first respondent on the ground that "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 21st September 2009".

[7] In support of this ground, the applicant relied on *Kirk v Industrial Relations Commission (NSW) and Anor; Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)*[1] where the High Court held it was incumbent upon a prosecutor in a prosecution for alleged contraventions of s 15 and 16 of the *Occupational Health and Safety Act* 1983 (NSW) ("the NSW Act") to particularise the measures it was alleged should have been taken by the defendant having regard to the breach it was alleged constituted the offence.

[8] In holding that it was incumbent on the prosecutor to identify the measures which should have been taken, and that there were jurisdictional errors requiring the grant for relief in the nature of *certiorari* to quash the convictions and sentences, French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, in a joint judgment, said:

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1 (2010) 239 CLR 531.

"[11] Section 15(2) identified, in general terms, some types of measures which an employer may need to take in order to ensure the health, safety and welfare of employees. The list is not exhaustive. What measures are necessary to be taken will depend upon the particular circumstances prevailing at the workplace, what activities are there conducted, what machinery, plant or substances are involved, the tasks undertaken by the employees and the skills of the employees in question, to mention but a few factors. What the terms of subsection (2) make plain is that an employer must identify risks to the health, safety and welfare of employees at the workplace and take steps to obviate those risks. … Section 16 required similar considerations and measures to be undertaken with respect to non-employees present at the workplace.

[12] Sections 15 and 16 comprehend that the generally stated duty is contravened when a measure should have been taken by an employer to obviate an identifiable risk. That those provisions are contravened where there has been a failure, on the part of an employer, to take a particular measure, is confirmed by references in s 15 and s 16 to what constitutes an offence. Sections 15(4) and 16(3) referred to 'the act or omission concerned' which 'constituted a contravention' of section 15 or section 16 respectively. Section 49 in Pt 6, which concerned the time for instituting proceedings for offences, provided that they must be instituted within two years 'after the act or omission alleged to constitute the offence'.

…

[14] A statement of an offence must identify the act or omission said to constitute a contravention of s 15 or s 16. It may be expected that in many instances the specification of the measure which should have been or should be taken will itself identify the risk which is being addressed. The identification of a risk to the health, safety and welfare of employees and other persons in the workplace is a necessary step by an employer in discharging the employer's obligations. And the identification of a risk which has not been addressed by appropriate measures must be undertaken by an inspector authorised to bring prosecutions under the Act (s 48). But it is the measures which assume importance to any charges brought. Sections 15 and 16 are contravened where there has been a failure, on the part of the employer, to take particular measures to prevent an identifiable risk eventuating. That is the relevant act or omission which gives rise to the offence.

[15] The necessity for a statement of offence to identify the act or omission of the employer said to constitute a contravention

of s 15 or s 16 is even more apparent when regard is had to the defences which were available to employers in proceedings for offences against the provisions. Section 53 provided:

> 'It shall be a defence to any proceedings against a person for an offence against this Act or the regulations for the person to prove that:
>
> (a) it was not reasonably practicable for the person to comply with the provision of this Act or the regulations the breach of which constituted the offence, or
>
> (b) the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable for the person to make provision.'

…

[17] Section 53(a) in the context of proceedings for offences against ss 15 and 16, referred to the situation where it is not reasonably practicable for an employer to comply 'with the provision of this Act'. It is not to be understood as requiring an employer to negative the general provisions of ss 15 and 16 and to establish that every possible risk was obviated. It requires that regard be had to the breach of the provision which it is alleged constituted the offence. A breach or contravention of s 15 or s 16 is the measure not taken, the act or omission of the employer.

[18] The duties referred to in ss 15(1) and 16(1) cannot remain when a defence under section 53 is invoked. The defence allows that not all measures which may have guaranteed against the risk in question eventuating have to be taken. The measures which must be taken are those which are reasonably practicable. The term is not defined in the OH&S Act, but it may often involve a common sense assessment. An understanding of the scheme of Pts 3 and 6 precludes acceptance of the appellants' contention that it is necessary to imply the common law standard of care in ss 15(1) and 16(1). The OH&S Act delimits the obligations of employers by the terms of the defences provided in s 53.

[19] What was necessary to be done in connection with the health, safety and welfare of employees, and others at the workplace depended upon the presence of identifiable risks and measures which could be taken to address them. The question which may follow, as to what was or was not reasonably practicable for the employer to have undertaken,

> is directed to the measures so alleged. It is the employer's act or omission with respect to those measures which had to be identified in the statement of any offence charged under ss 15 and 16."

[9] On the hearing of the application to review, the applicant and second respondent agreed that the issues for determination are:

(a) Is the decision of the Industrial Court susceptible to review ("first issue");

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

(c) If the principles in *Kirk* have application, is the complaint invalid for lack of particularity ("third issue").

**Legislation**

[10] Relevantly, the WH&S Act provides:

> "**22 Ensuring workplace health and safety**
>
> Workplace health and safety is ensured when persons are free from –
>
> (a) death, injury or illness caused by any workplace, relevant workplace area, work activities or plant or substances for use at a relevant place.
>
> …
>
> **24 Discharge of obligations**
>
> (1) A person on whom a workplace health and safety obligation is imposed must discharge the obligation.
>
> …
>
> (2) Subsection (1) applies despite Criminal Code, sections 23 and 24.
>
> (3) If more than 1 person has a workplace health and safety obligation for a matter, each person –
>
> (a) retains responsibility for the person's workplace health and safety obligation for the matter; and
>
> (b) must discharge the person's workplace health and safety obligation to the extent the matter is within the person's control; and
>
> (c) must consult, and cooperate, with all other persons who have a workplace health and safety obligation for the matter.

…

**26 How obligations can be discharged if regulation etc made**

(1) If a regulation or ministerial notice prescribes a way of preventing or minimising exposure to a risk, a person discharges the person's workplace health and safety obligation for exposure to the risk only by following the prescribed way.

(2) If a regulation or ministerial notice prohibits exposure to a risk, a person discharges the person's workplace health and safety obligation for exposure to the risk only by ensuring the prohibition is not contravened.

(3) If a code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation for exposure to the risk only by –

(a) adopting and following a stated way that manages exposure to the risk; or

(b) doing all of the following –

(i) adopting and following another way that gives the same level of protection against the risk;

(ii) taking reasonable precautions;

(iii) exercising proper diligence.

**27 How obligations can be discharged if no regulation etc made**

(1) This section applies if there is not a regulation or ministerial notice prescribing a way to prevent or minimise exposure to a risk, or a code of practice stating a way to manage the risk.

(2) A person discharges the person's workplace health and safety obligation for exposure to the risk by doing both of the following –

(a) adopting and following any way to discharge the person's workplace health and safety obligation for exposure to the risk;

(b) taking reasonable precautions, and exercising proper diligence, to ensure the obligation is discharged.

**27A Managing exposure to risks**

(1) To properly manage exposure to risks, a person must -

(a) identify hazards; and

(b) assess risks that may result because of the hazards; and

(c) decide on appropriate control measures to prevent, or minimise the level of, the risks; and

(d) implement control measures; and

(e) monitor and review the effectiveness of the measures.

(2) To properly manage exposure to risks, a person should consider the appropriateness of control measures in the following order -

(a) eliminating the hazard or preventing the risk;

(b) if eliminating the hazard or preventing the risk is not possible, minimising the risk by measures that must be considered in the following order -

(i) substituting the hazard giving rise to the risk with a hazard giving rise to a lesser risk;

(ii) isolating the hazard giving rise to the risk from anyone who may be at risk;

(iii) minimising the risk by engineering means;

(iv) applying administrative measures;

(v) using personal protective equipment.

(3) However, this Act also specifies particular ways in which workplace health and safety must be ensured in particular circumstances.

(4) Compliance with subsection (1) does not excuse a person from an obligation to ensure workplace health and safety or a particular obligation imposed on the person under this Act.

**28 Obligations of persons conducting business or undertaking**

(1) A person (the **relevant person**) who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking.

(2) The obligation is discharged if the person, each of the person's workers and any other persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking.

(3) The obligation applies –

(a) whether or not the relevant person conducts the business or undertaking as an employer, self-employed person or otherwise; and

(b) whether or not the business or undertaking is conducted for gain or reward; and

(c) whether or not a person works on a voluntary basis.

**29 What obligations under s 28 include**

Without limiting section 28, discharging an obligation under the section includes, having regard to the circumstances of any particular case, doing all of the following –

(a) providing and maintaining a safe and healthy work environment;

(b) providing and maintaining safe plant;

(c) ensuring the safe use, handling, storage and transport of substances;

(d) ensuring safe systems of work;

(e) providing information, instruction, training and supervision to ensure health and safety.

…

**37 Defences for div 2 or 3**

(1) It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove –

(a) if a regulation or ministerial notice has been made about the way to prevent or minimise exposure to a risk – that the person followed the way prescribed in the regulation or notice to prevent the contravention; or

(b) if a code of practice has been made stating a way or ways to manage exposure to a risk -

(i) that the person adopted and followed a stated way to prevent the contravention; or

(ii) that the person adopted and followed another way that managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention; or

(c) if no regulation, ministerial notice, or code of practice has been made about exposure to a risk - that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention.

(2) Also, it is a defence in a proceeding against a person for an offence against division 2 or 3 for the person to prove that the commission of the offence was due to causes over which the person had no control.

(3) In this section, a reference to a regulation, ministerial notice, or code of practice is a reference to the regulation, notice, or code of practice in force at the time of the contravention."

**First issue**

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

[12] Whether the decision of the first respondent did involve jurisdictional error requires a consideration of the second and third issues as the applicant contends that should they be determined in its favour, the complaint the subject of the appeal to the Industrial Court was a nullity, rendering the first respondent's decision in relation thereto subject to jurisdictional error.

**Second issue**

[13] The applicant was charged that it, being a person on whom a workplace health and safety obligation prescribed by s 28(1) of the WH&S Act is imposed, did fail to discharge that obligation contrary to s 24 of the WH&S Act, and thereby caused the death of a worker. There is a breach of a workplace health and safety obligation where an employee is injured subject to the employer establishing a defence for contravention of that obligation by reference to the discharge of that obligation pursuant to s 26, 27 and 37 of that Act.[5]

[14] Whilst the applicant contends there is no relevant distinction between the scheme of the WH&S Act and the NSW Act considered in *Kirk*, there are significant material differences between those schemes.

[15] The WH&S Act provides that a person on whom a workplace health and safety obligation is imposed <u>must</u> discharge the obligation,[6] that a person has an obligation to ensure the workplace health and safety of the person,[7] that that obligation is discharged if persons are not exposed to risks to their health and safety arising out of the conduct of the relevant person's business or undertaking,[8] and that discharging the obligation under s 28 includes doing <u>all</u> of the matters specified in s 29 of the Act. The WH&S Act does not give a range of measures that <u>may</u> be undertaken in discharging the obligation. <u>All</u> of the matters specified in s 29 must be complied with by the defendant. Further, the WH&S Act does not impose an obligation based on practicability.[9] Under the WH&S Act, the offence of a failure

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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 at 177-178; *Parker v President of the Industrial Court of Queensland* [2008] QSC 175 at [15]; on appeal [2009] QCA 120.

4 *Kirk v Industrial Relations Commission (NSW) and Anor; Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2010) 239 CLR 531 at 573-575 [72]-[74].

5 *Bourk v Power Serve Pty Ltd* [2008] QCA 225 per Muir JA at [32]. See also *Parry v Woolworths Limited* [2010] 1 Qd R 1 at 15 [30].

6 s 24.

7 s 28(1).

8 s 28(2).

9 cf *Workplace Health & Safety Act* 1989 (Qld), s 9.

to discharge the obligation is complete when a person suffers an injury to their health and safety in the workplace subject to any defence which may be proven by the defendant pursuant to s 37 of the Act.[10]

[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.[11] 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 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.[12]

[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.[13] Essential particulars include "the time, place and manner of the defendant's acts or omissions".[14] This requirement is consistent with the definition of "offence" in the *Criminal Code* (Qld)[15] as it is the "act or omission which renders the person doing the act or omission liable to punishment" which is "an offence".

[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.

[19] The applicant contended that support for its entitlement to particulars of the "acts or omissions" of the employer could be gleaned from the contents of s 164 and 166 of the WH&S Act. Those provisions, which relate to a prosecution for an offence against the WH&S Act, specifically contain reference to "acts or omissions". Whilst that is so, there is substance in the second respondent's contention that the use of those words, in the context of those sections, does not take any further the question of whether there is a requirement under the WH&S Act to particularise "the measures not taken, the act or omission of the employer". The inclusion of those words in those sections is necessary to give due reference to the fact that more

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10 See, generally, *Schiliro v Peppercorn Child Care Centres Pty Ltd* [2001] 1 Qd R 518.

11 *Kirk v Industrial Relations Commission (NSW) and Anor; Kirk Group Holdings Pty Ltd v WorkCover Authority (NSW)* (2010) 239 CLR 531 at 552 [11].

12 *Kirk* at 554 [18].

13 *Johnson v Miller* (1937) 59 CLR 467 at 489-490; see also *KRM v The Queen* (2001) 206 CLR 221.

14 *Johnson v Miller* at 486; *Smith v Moody* [1903] 1 KB 56 at 61, 63.

15 *Criminal Code* (Qld), s 2.

than one contravention of an obligation may occur, or that contraventions of the Act other than of obligations imposed under the Act, are possible.[16]

[20] The applicant further contends it was entitled to the particulars sought in order to be able to rely upon the defence in s 37 of the WH&S Act. Whilst that defence places the onus of proof upon the defendant, that fact in itself would be no reason for a refusal to give particulars if they ought properly to be given so as to apprise a defendant of the case it has to answer.[17]

[21] Section 37 of the WH&S Act provides that a defendant may defend a proceeding for the contravention of an obligation imposed on that defendant by proving specified matters to prevent, minimise or manage exposure to a risk. Exposure to risks are to be managed having regard to the provisions of s 27A of the WH&S Act. That section mandates what a person must do to properly manage exposure to risk but provides:

> "(3) However, this Act also specifies particular ways in which workplace health and safety must be ensured in particular circumstances.
>
> (4) Compliance with subsection (1) does not excuse a person from an obligation to ensure workplace health and safety or a particular obligation imposed on the person under this Act."

[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 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.

[23] Contrary to the findings of the first respondent, the ordering of particulars of such matters, in an appropriate case, would not constrain the defendant in its defence of that complaint. The provision of such particulars informs the defendant of the respects in which it is contended by the prosecution that it failed to manage exposure of the risks as required under the WH&S Act. If the defendant, in mounting a defence pursuant to s 37 of the WH&S Act, asserts those measures were not required to be taken by it because it adopted another more appropriate way to manage exposure of the risk, it may assert that contention as part of its defence.

**Third issue**

[24] There is a distinction between a complaint which is so equivocal as to make it impossible to identify the occasion, transaction or occurrence to which it refers and a complaint which identifies the "essential factual ingredients" of the offence but requires further particularisation so as to ensure that a defendant can properly

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16 See, generally, s 171 – 176 of the WH&S Act.

17 *Hassett v Paul's Ice-cream and Milk Ltd; ex parte Pauls Ice-cream and Milk Ltd* [1966] Qd R 173.

prepare a defence. The former is defective and liable to be struck out as being insufficient in law.[18] The latter is a valid complaint but may be subject to further particularisation.[19]

[25] To be valid, a complaint must at least condescend to identify the essential factual ingredients of the actual offence,[20] although practical difficulties result from the fact that there is no "technical verbal formula of precise application which constitutes an easy guide, in the circumstances of any given case, as to whether the common law has been infringed to such an extent … to save the information".[21]

[26] In the present case, the complaint identified the "essential factual ingredients" of the offence. Any further particularisation, if considered appropriate to apprise the defendant of the case alleged against it so that it could prepare a defence, could not be considered to be essential particulars going to the validity of the complaint itself. Accordingly, the complaint was not invalid.

**Conclusion**

[27] The first respondent correctly found that the complaint not only disclosed the legal elements of the offence, but also identified the "essential factual ingredients" of that offence. There was no requirement that the second respondent aver anything further to establish a valid complaint. The complaint was not a nullity. The appeal before the first respondent was a valid appeal.

[28] However, in dismissing the appeal, the first respondent, whilst accepting there are occasions where a complainant may be required to particularise inadequacies in precautions or lapses in diligence,[22] erroneously held 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.

[29] That finding did not involve the application of established law to the facts as found by the first respondent.[23] 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.[24] As such, the finding constitutes a jurisdictional error as that term is identified in *Kirk*.

**Orders**

[30] The application is allowed

[31] The decision and orders of the first respondent dated 27 April 2010 are set aside

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18 *Johnson v Miller* (1937) 59 CLR 467 at 491.

19 *Taylor v Environment Protection Authority* [2000] 50 NSWLR 48 at 57.

20 *John L Pty Ltd v The Attorney-General for the State of New South Wales* (1987) 163 CLR 508 at 520.

21 *Stanton v Abernethy* (1990) 19 NSWLR 656 per Gleeson CJ at 666; see also *Taylor v Environment Protection Authority* (2000) 50 NSWLR 48; *Lodhi v R* [2006] NSWCCA 121 at [103]-[104].

22 Affidavit of David Noel Meare, Exhibit DNM-1 at [24].

23 cf *Parker & Anor v President of the Industrial Court of Queensland* [2009] QCA 120 at [24], [25]; special leave refused [2010] HCA trans 53.

24 Affidavit of David Noel Meare, Exhibit DNM-2, transcript 1-2/40.

[32] The matter is remitted to the Industrial Court of Queensland for further consideration and to be determined according to law

[33] The second respondent is to pay one half of the applicant's costs of and incidental to the application to be agreed or, failing agreement, to be assessed on a standard basis.