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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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*Industrial Relations (Tribunals) Rules 2000*

## NOTICE

The following Agreements have been certified by the Commission:

| No/s        | Title  | Certified on and<br>certificate issued | Cancelling<br>No. |
|-------------|--|--|-------------------|
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| CA/2008/308 | U. & E.M. & U.C. Srhoj Certified Agreement 2008          | 17/11/08                               |                   |
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G.D. SAVILL,  
Industrial Registrar.

## INDUSTRIAL COURT OF QUEENSLAND

*Workers' Compensation and Rehabilitation Act 2003 - s. 561(1) - appeal against decision of industrial magistrate*

**Q-COMP AND Robin Jeffrey Foote (C/2008/13) (No. 2)**

PRESIDENT HALL

26 November 2008

## DECISION

Robin Jeffrey Foote was the successful applicant for a position as a counsellor with a Community Health Service operated by the State of Queensland. It is unnecessary to elaborate on the administrative arrangements by which the Department of Health (on behalf of the State of Queensland) delivered the Service. It is sufficient to say that though the arrangements varied from time to time, the arrangements always utilised The Prince Charles Hospital Health Service District as the administrative umbrella. It is unnecessary to dwell upon the administrative arrangements for the purposes of this case because, although Mr Foote had (or perceived himself to have) difficulties with his superiors, the relevant superiors were his immediate superiors.

Mr Foote commenced work on 27 March 1997. He worked at premises known as BIALA which are located in the near vicinity of the Transit Centre at Roma Street. He worked on the ground floor of the building in the Needle Exchange Program. The Needle Exchange Program shared the ground floor with the Detoxification and Crisis Care Clinic (Intervention) Unit (hereafter the Crisis Care Unit). It is no part of the function of this Court to comment upon the co-location of a unit concerned with harm minimisation and a unit concerned with abstinence. For fullness I note, the evidence that co-location of such units is not peculiar to Queensland. However, on any view of the evidence, it is clear that the presence of the Needle Exchange Program was a cause of some angst to those working in the Crisis Care Unit and that, on occasion, those seeking entry to the Detoxification Program were embarrassed by the presence of friends or dealers attending at the Needle Exchange Program. For completeness, I should add that while Mr Foote did not approve of co-location of the two units, he was not distressed by the co-location. I add also that the awkwardness of the situation moderated somewhat after the two units ceased to operate on a shared reception desk.

Mr Foote's difficulties with his immediate superiors (to which I have previously referred) did not dissipate with the passing of time. There is an abundance of evidence from witnesses called by Q-COMP that Mr Foote's position description should have been accompanied by advice about to whom he was to report and advice about the person or persons who had authority over him. There is no evidence that such advice was in fact given to Mr Foote. The difficulty was exacerbated by the circumstance that, on the evidence of Q-COMP's witnesses, the person on the ground floor to whom (initially) those in both the Needle Exchange Program and the Crisis Care Unit were to report to and who had immediate authority over them, was the person holding the Level 3 position. When Mr Foote commenced work at BIALA, the Level 3 position was vacant. A series of persons working on the ground floor were "promoted" on an acting basis to fill the vacancy. From Mr Foote's perspective, the chain of command was in a constant state of flux. Further, the evidence requires one to accept that (perhaps unfairly) Mr Foote was not pleased that some of those "promoted" were nurses from the Crisis Care Unit. The uncertainty came to an end some months after Mr Foote commenced work when a Mr Greg Perry was appointed to manage the Needle Exchange Program. Mr Perry's career prospered and he was subsequently (while Mr Foote was still employed in the Needle Care Program) appointed to manage both the Needle Exchange Program and the Crisis Care Unit. However, Mr Foote's difficulties with the nurses from the Crisis Care Unit did not cease with Mr Perry's appointment. Each of the Needle Exchange Program and the Crisis Care Unit operated on a 24 hour basis. Some employees worked shifts. Mr Foote was one of the employees who worked shifts. On some of the after-dark shifts, the only staff on the ground floor was Mr Foote and a nurse attached to the Crisis Care Unit. Mr Foote had difficulty with that. Ultimately, a Mr Walker called a meeting about the matter. (I take the gentlemen to have been Mr James Needham-Walker, a registered nurse who at the time of the proceedings at first instance was the Nurse Unit Manager with the Indigenous and Homeless Outreach Team and who did not commence work at BIALA (as Acting Manager of the whole service) until 2000). The purpose of the meeting was to deal with the matter of hierarchy. When confronted with the reality that he answered to the nurse, Mr Foote stormed out observing "I am not taking any orders from any bloody nurses."

Another problem which Mr Foote faced from the commencement of his employment was disappointment. He was a recovering alcoholic who had not had a drink since Boxing Day 1983. In the period between Boxing Day 1983 and his arrival at BIALA, Mr Foote had turned his life around. At his own expense he had completed a Bachelor of Arts (Welfare) Degree with Majors in sociology, psychology and welfare at the Northern Territory University (in or about 1993-1994). He then undertook further training programs about the use of alcohol and the use of drugs. He attended an alcohol and drug training course, a personal awareness and substance abuse workshop, an "Alcohol in the Work Setting" course and a "Combating Alcohol Promotion" course at the National Centre for Research and Prevention of Drug Abuse. He had held employment as a Volunteer Counsellor at the Crisis Line within the Salvation Army in Darwin; he had been a Director of Youth Services at the Kiwanis Club in Darwin; he had worked as a Care Giver at the

St Vincent De Paul's Men's Night Shelter in Darwin; and he had worked at the Darwin City Council, carrying out research into homelessness and alcohol issues. He became a certified Counsellor with the National Association for Alcohol and Drug Addiction Counsellors. He was thrilled to be appointed as a "Counsellor" at BIALA. In fact, the "Counsellors" at the Needle Exchange Program were not employed to counsel. They were employed to provide clean needles and instructions about how to use them. It was certainly the case that "Counsellors" in the Needle Exchange Program were encouraged to interact with clients (over relatively short periods of time), in order to establish to measure a rapport which might be useful if the client ever decided to move towards detoxification. However, they were not required to counsel their clients and, indeed, were not authorised to do so. Mr Foote's attempts to counsel clients on a voluntary basis early on in his engagement lead to complaints against him. Mr Foote had been employed as a "Counsellor", though not to counsel because at an earlier time, the Needle Exchange Program had employed counsellors to counsel and, new staff profiles and position descriptions to fit the changed model not having been developed, it was convenient to employ people under the old labels.

It seems to me to be tolerably clear that Mr Foote's problems with authority/counselling ran together. Mr Foote was critical of the care model utilised by the Needle Exchange Program. He considered it to be a medical model and also considered those with a nursing background to have far too much influence over the policies pursued across the whole ground floor at BIALA. I hasten to add, that neither the Industrial Magistrate who dealt with the matter at first instance, nor this Court has sought to explore the appropriateness of the models which had been adopted. However, to understand the evidence, e.g. Mr Foote's references to "nursification", it is necessary to understand that Mr Foote had difficulty with the policies and with the nurses.

By an Incident Report dated 13 May 2002, Ms Anna Maria Cooney, a clinical nurse employed on the ground floor at BIALA in the Crisis Care Unit, laid a grievance against Mr Foote. The grievance was directed to Mr Perry, who by 13 May 2002 was managing both areas of the ground floor. The essence of the complaint was that on the morning of 13 May 2002, Ms Vanessa Fridolf (who gave evidence below) answered a telephone call from Mr Foote. Mr Foote wished to speak to Mr Perry who had gone home early. (Over a period of months Mr Perry had been affected by whooping cough). Mr Foote pressed Ms Fridolf for Mr Perry's home telephone number. When Ms Fridolf declined to give him that telephone number, he became agitated and amongst other things, accused her of being "co-dependent". Ms Fridolf, who was aware of the jargon used at BIALA, understood "co-dependency" to refer to a personality trait where a person seeks to stand in the place of another person and protect that persons feelings. Ms Fridolf had difficulty in coping with the telephone call. The telephone call was passed to Ms Cooney. Ms Fridolf, who like Mr Foote was a Counsellor in the Needle Exchange Program, understood Ms Cooney to be her line supervisor. Mr Foote pressed his request again. Ms Cooney sought to explain that there was a policy against the circulation of personal details. On Ms Cooney's evidence, Mr Foote proceeded to raise his voice and to demand the telephone number on the grounds that there was no such policy. Ms Cooney's evidence was that she ultimately put Mr Foote on hold, called Mr Perry at home and was advised by Mr Perry that he (Mr Perry) would call Mr Foote and deal with the matter. Ms Cooney's evidence was that, when she resumed the telephone conversation with Mr Foote to explain what Mr Perry was proposing to do, Mr Foote resumed his verbal assault and yelled at her to the point that she became overwhelmed and had difficulty carrying out her duties for the rest of the day. She was extremely upset by the incident.

Mr Perry gave evidence that when he telephoned Mr Foote, it emerged that the query was about rostering and was not urgent. He said that he shifted Ms Cooney's workstation on the ground floor to avoid further discomfort and arranged a meeting with Mr Foote, the Manager of the Alcohol and Drug Service (Mr Mark Fairbairn), a representative from Mr Foote's Union (Mr Sean O'Grady) and himself. The meeting (on 1 June 2002) collapsed when Mr Foote complained of a significant period of bullying and complained that the meeting itself was a part of the pattern of bullying. Mr Fairbairn properly, in my view, closed the meeting and through his immediate supervisor (Ms ? Goodwin), referred the matter to the head of Human Resources (Mr Peter Patmore). For completeness, I should say that the burden of the evidence is - and I fully understand that at a trial five and a-half years after the events, memories might fray - that Mr Foote filed his first written complaint about bullying at that meeting.

Mr Foote did not receive an immediate reply. By a letter dated 20 September 2002 to the then Director-General of Queensland Health (Dr Rob Stable), Mr Foote sought advice about the progress into his complaint. Subsequently, the Zoning Manager of the Central Zone of Queensland Health a (Mr Dan Burgen) informed Mr Foote by a letter, the exhibited copy of which bears no date, that:

"I have been advised that The Prince Charles Hospital and Health Service District has already progressed your request to the extent of developing terms of reference for an investigation and the appointment of an appropriately trained and skilled investigation officer. Documentation to this effect will be forwarded to you in the near future, if this has not already occurred.

In view of this advice, I consider it appropriate for the arranged investigation to proceed. Accordingly, I will forward your letter and a copy of this response to the District Manager for inclusion in that investigation process."

Sometime thereafter, under cover of a letter bearing the same date as Mr Foote's letter to the Director-General, *viz.*, 20 September 2002, Mr Foote received a document over the signature of The Prince Charles Hospital Health Service District (Ms Deb Podbury) initiating an inquiry by a Ms Maree McKay of The Queensland Elizabeth II Hospital Health Service District, into allegations by and against Mr Foote. Annexure's omitted, the document was in the following terms:

"TERMS OF REFERENCE  
INVESTIGATION INTO ALLEGATIONS AGAINST

ANN COONEY &  
ROBIN FOOTE &  
THE MANAGEMENT OF THE ALCOHOL AND DRUG SERVICE

Robin Foote is a Counsellor. Alcohol and Drug Service of The Prince Charles Hospital Health Service District. Anne Cooney is employed as a Clinical Nurse at the Needle Exchange Service within The Prince Charles Hospital Health Service District.

A complaint was received on 13/05/02 from Anne Cooney alleging that:

- Mr Foote had engaged in behaviour that if proven would constitute harassment namely:
  - During a telephone conversation Mr Foote allegedly 'proceeded to raise his voice' and 'continued his verbal assault'.
- In his undated and unsigned response Mr Foote outlined that he believed he has been subjected to 'work based systematic bullying' by various members of the Brisbane Harm Reduction Centre (BHRC) Team, including a manager, supervisor and other staff, over an extended period. In this document Mr Foote names the following staff: Mr Greg Perry (Clinical Nurse Consultant), Ms Anna Cooney (Clinic Nurse), Ms Lynda Scott (Program Manager, Clinical Services) and Mr Mark Fairbairn (Manager, Alcohol and Drug Services). Mr Foote states these behaviours include:
  - Mr Perry's handling of staff rostering including Mr Perry's availability to Mr Foote to discuss the same;
  - Mr Perry's approach to making telephone numbers available;
  - Mr Fairbairn's proposal to 'diffuse the situation' with respect to Ms Cooney's complaint;
  - Ms Scott's approach to Mr Foote in relation to Ms Cooney's complaint; and
  - Ms Cooney's 'contradictory behaviour'.

In his response Mr Foote also alludes to other non-specified difficulties he has allegedly encountered with his employment including removal from an unspecified project.

Where any further allegations arise during the course of the investigation, I am to be advised of the specifics of those allegations. Where I am of the view that the additional allegations are relevant to this investigation, I may choose to amend these terms of reference to include the investigation of such allegations.

If this occurs, Mr Foote, Ms Cooney and any other relevant party will be advised of the specifics of the allegations against that party and be provided with an opportunity to respond to the allegations prior to this investigation being finalised.

I have appointed Maree McKay from Queensland Elizabeth II Hospital Health Service District, under section 52(2) of the *Health Services Act 1991* (the Act), to ascertain whether there is evidence to support or deny any of the allegations made by Mr Foote and Ms Cooney.

The investigation is to proceed in accordance with the principals of natural justice.

The Investigation Officer has the authority under section 56 and section 63(2)(f) of the Act to access any evidence under the control of The Prince Charles Hospital Health Service District, which either proves or disproves the allegations that have been made. The Investigation Officer should also make a reasonable attempt to obtain any other relevant evidence that either proves or disproves the allegations that have been made.

The Investigation Officer has the authority under the Act to interview any person who may be able to provide further evidence, which either proves or disproves the allegations that have been made. The Investigation Officer may seek to interview persons who are not employees of Queensland Health who may be able to assist with the investigation. Where this will incur a cost to the Department, approval must first be sought from myself.

The Investigation Officer need only interview persons who can provide information that is credible, relevant and significant to the matter under investigation.

The Investigation Officer must provide the parties named in this document with the opportunity to attend an interview and the opportunity to respond verbally to the matters under investigation.

Material, which is adverse to any party, and credible, relevant and significant to the conclusions to be made by the Investigation Officer, is to be released to the respondent during the course of the investigation. This can be released verbally at interview.

The report should specifically address the allegations outlined above, and assess the evidence as to whether the evidence either supports or does not support the allegations on the balance of probabilities.

The Investigation Officer is to provide in the body of their report, an assessment in relation to the above paragraph and reasons for these conclusions. Any inferences, which are derived from hearsay, should also be clearly identified. All evidence, including signed records of interview/statements should be appended to the report. Excerpts from records of interview/statements that are credible, relevant and significant to the conclusions made by the Investigation Officers are to be quoted in the body of the report under the heading 'Assessment of Evidence'.

The report is to be finalised by 14 October 2002, unless otherwise agreed with myself.

The Investigation Officer is delegated the authority to give any appropriate lawful directions which may be required during the course of the investigation. For example to provide a lawful direction to an employee to maintain confidentiality, to attend an interview, or to provide copies of The Prince Charles Hospital Health Service District documents etc.

If necessary, the Investigation Officer should report back to me for further instructions during the course of the investigations."

Ms Podbury, who gave evidence, sought to explain the delay by asserting that Mr Foote's claims were advanced by way of a response and in those circumstances, she did not consider a reply to be necessary. I do not accept that explanation. Mr Foote's complaints were not by way of explaining or rebutting Ms Cooney's allegations about him. Mr Foote sought to advance allegations of his own. Consistently with the way in which the document set out above deals with the matter of "any further allegations", Mr Foote's complaints could only be investigated (as such) if terms of reference were developed, copies given to those against whom the allegations were made and the opportunity to reply extended to those persons. Further, even when that was belatedly done, the terms of reference did not do justice to Mr Foote's complaints. The allegations about "work based systematic bullying" are particularised in terms of Mr Perry, Ms Cooney, Ms Scott and Mr Fairbairn. On the limited detail available, at least in the case of Mr Perry, Mr Fairbairn and Ms Scott, the allegations would seem to an ordinary bystander to go to inadequacies in developing and implementing policies about bullying and naiveté in responding to complaints about Mr Foote. That was not the gravamen of Mr Foote's complaint. Mr Foote alleged systemic bullying (not "systematic" as suggested in the terms of reference) by a group described by him as "the gang of four" - to whom Ms Cooney was said to be a fast learning apprentice - and "mobbing" within the workplace. Without descending into the detail, in Mr Foote's understanding, "mobbing" is a collective movement by co-workers to exclude, punish and humiliate a targeted worker which gradually swells throughout the workplace as participation in the humiliation of the target comes to be equated with respectability. The proposition seems to have been that Mr Perry and Mr Fairbairn and Ms Scott had been drawn into the "hostile pack". The allegation against "the gang of four" not having been developed, is difficult to accept that it could have been or was pursued. All that could be pursued were the allegations against Mr Perry, Ms Cooney, Ms Scott and Mr Fairbairn which, pruned from the allegations against "the gang of four", were allegations upon which Mr Foote was highly likely to fail.

Further grievances were to be lodged against Mr Foote.

On 5 September 2002, Ms Linda Lordi, a Project Officer, lodged a written complaint against Mr Foote with Mr James Needham-Walker, Acting Nursing Director. The complaint concerned an incident which had occurred about 8.30 a.m. on the same day. Painters, who had been organised by Queensland Health to redecorate the ground floor, had arrived unexpectedly and had commenced work. Because the arrival of the painters was premature, Mr Perry sought to engage in such consultation about a colour scheme as he could. On his evidence, because Ms Lordi was the most vocal, he

"went with that choice". It was alleged by Ms Lordi that Mr Foote subsequently said to her, "Did you pick this fucking colour?", and "You should be fucking ashamed of yourself, you fucking disgust me.". By her complaint, Ms Lordi asserted that when she became distressed, she fled to her desk on the fourth floor and burst into tears. She claims, and her evidence is verified by Mr Perry, that she contacted Mr Perry by telephone to complain. Subsequently, she reduced the complaint to writing. To compound matters, the next morning Mr Foote made an unsolicited telephone call to her home to seek to repair the relationship. In the course of the conversation, Mr Foote accused Ms Lordi of being "in recovery". On Mr Foote's evidence, he was putting to Ms Lordi that she herself was recovering from an addiction and her reaction was what one might expect of people in the "recovery stage". Ms Lordi lodged a further complaint about that conversation. By an undated letter, accompanied by an amendment to the "Terms of Reference" set out above (which was dated 1 November 2002), Ms Podbury expanded the "Terms of Reference" of the investigation. The material addition to the "Terms of Reference" was:

"On 05/09/02, Ms Linda Lordi, Project Officer within the Brisbane Harm Reduction Centre, lodged a written complaint against Mr Foote with Mr James Needham Walker, Acting Nursing Director. This was forwarded to Mr Barrie Barlow, Executive Officer - Community Services.

Ms Lordi alleges that:

- Mr Foote verbally abused her and used obscene language in a conversation on 05/09/02;
- Mr Foote made inappropriate comments in relation to events in Ms Lordi's life.

On 09/09/02, Ms Lordi, lodged a further written complaint against Mr Foote alleging that:

- On 06/09/02 Mr Foote inappropriately attempted to contact Ms Lordi at her home in relation to the above two preceding events.

Mr Foote submitted a letter to the office of the Director General dated 20/09/02. In this letter Mr Foote provided information responding specifically to Ms Lordi's allegations. This response alleges in part:

- Neither Ms Lordi nor the management of the Brisbane Harm Reduction Centre attempted informal resolution;
- Ms Lordi's complaints are part of a larger pattern of harassment as per Mr Foote's earlier correspondence;
- Ms Lordi had exceeded her authority via her participation in colour selection in a redeveloped Brisbane Harm Reduction Centre;
- Mr Foote believed that he had resolved the issues with Ms Lordi to the satisfaction of all."

On 31 October 2002, Ms Cooney lodged a further grievance against Mr Foote. By an "Incident Report" of that date, Ms Cooney complained that she had been standing in the corridor on the ground floor talking to a Ms Lang, the Project Coordinator of a Queensland University of Technology Hepatitis C Project, when Mr Foote approached her from behind, bumped her on the arm with his body as he walked past and failed to say "excuse me" or otherwise to apologise. Ms Cooney said that she found Mr Foote's behaviour to be intimidating and threatening. It is plain from the report of Ms McKay that at some point the "Terms of Reference" were expanded to include that complaint, though the shortcomings in the exhibits tendered at first instance make it impossible to attribute a date to the expansion.

Finally, in the course of an interview about Mr Foote's complaints, the nurse (deceased by the time of the hearing at first instance) characterised by Mr Foote as the leader of the "gang of four", complained of an incident in which Mr Foote put his arms out toward her to physically prevent her walking past, invading her body space as he did so. It is plain that the complaint was added to the Terms of Reference and investigated though, once again, inadequacies in the material make it impossible to identify the date of the expansion of the Terms of Reference.

Whilst one must recognise that the seriousness of the complaints made against Mr Foote required investigation by his employer, one must also be conscious that from Mr Foote's perspective his employer's representatives had not been quite so helpful when he was the complainant. Very much earlier than the first exchange with Ms Cooney, Mr Foote had raised complaints with Mr Walsh (then the General Manager) and Ms Scott (the Acting Assistant Director of Nursing). Indeed, on Mr Foote's evidence, he had collapsed in tears in Ms Scott's room. The advice which he received was that any grievance needed to be reduced to writing. The greatest assistance which he received before he made a complaint in writing was from Mr Perry. In the course of a discussion after the first incident with Ms Cooney, Mr Perry assisted Mr Foote to gain access to an electronic version of the pro forma "Incident Report". One may well imagine also that, on a restless night, Mr Foote might mull over the delays in progressing his complaint and the apparent alacrity with which complaints from his detractors had been processed.

The conduct of the investigation was ponderous. It occupied the period from 20 September 2002 until May 2003. One may unreservedly accept, that Ms McKay had other issues in her life and must accept that the investigation was delayed to allow Mr Foote time to put his "evidence" and submissions together. However, there seems to have been scant concern about whether the process was stressful for Mr Foote (who was a complainant or a respondent upon every complaint), notwithstanding that there were passages in the material which were lodged by him e.g. the document entitled "The Elephant in the Clinic" and the heading of pages "It is Important That You Do Not Blame Yourself For The Bullying You Experience", which would cause a reasonable man to ponder whether Mr Foote was experiencing psychological distress.

Ms Podbury received a copy of the report under a covering letter from Mr John Cartwright, the then Acting Manager of Employees Services, Queensland Health, dated 10 June 2003. By a letter of 21 July 2003, Ms Podbury informed Mr Foote that on the basis of the report he might be liable to disciplinary action and gave him 14 days to state "whether you admit or deny the allegations made against you" and to furnish "any explanation in relation to this matter.". The letter of 21 July 2003, also informed Mr Foote that a copy of the report was enclosed. That information was not entirely correct. Mr Foote was provided with a part only of the report and in particular, was not provided with documents which showed that two witnesses who had been interviewed (but who were not called at the trial) had given evidence which (in broad terms) supported his allegations of systemic bullying. Mr Foote did not become aware of those statements until the very cusp of the trial in the Industrial Magistrate's Court. It was the evidence of Dr Byth, a psychiatrist called by Mr Foote, that if Mr Foote was left with the impression that no one at all had supported his version of events, he would have been further distressed.

By a letter of 17 September 2003, Ms Podbury informed Mr Foote that, having considered his response, she had decided that he was liable to disciplinary action. She allowed him 7 days from receipt of the letter to show cause why that disciplinary penalty should not be imposed. By a letter of 3 October 2003, Ms Podbury informed Mr Foote that having considered his further response, she had determined to impose a disciplinary measure by way of a "formal reprimand in accordance with the Public Service Act 1996."

On the same day that Ms Podbury wrote to Mr Foote allowing him 7 days to show cause why a reprimand should not issue, Ms Podbury wrote to him proposing to transfer him from his permanent position as "Counsellor" within the Needle Exchange Program, to "a newly created temporary position of Administrative Officer within the Alcohol and Drug Service for a period of six months.". By way of preamble to the proposal, Ms Podbury recited:

"A common theme arising from the Investigator's report was the fact that there appears to be a breakdown in the personal and professional relationships between staff within the immediate work area and yourself. Specifically, there have been suggestions that staff may be fearful of working with you and that the current working environment may not be sustainable.

These concerns, be they real or perceived, are a concern to me. I have a duty of care to all staff, including yourself, to ensure that I provide a safe work environment, free from harassment and intimidation. To this end, I feel compelled to implement strategies, both short and medium term, to assist in the resolution of these issues.

My preferred option is to address these concerns and to re-establish an appropriate workplace environment. Mediation may be an option in this regard. However, given the current level of disharmony within your work area, I do not believe that mediation will be successful at this time. Further, I am concerned that by continuing the current work arrangements, I would be placing at risk the wellbeing of both you and your co-workers."

The genesis of the proposal to transfer Mr Foote appears to be at the conclusions of Ms McKay, *viz.*:

#### "5.0 CONCLUSION

Allegations one, two, three, four and five have been substantiated and it is open for the decision maker to conclude that Mr Foote has breached Principle 2 of the Queensland Health Code of Conduct 2000 and IRM 3.1-2 titled "Workplace Harassment - Standards of Appropriate and Ethical Behaviour in the Workplace". The findings indicate that Mr Foote has demonstrated unreasonable and inappropriate workplace practice and communication. Given that a number of staff indicated that Mr Foote is not the only employee demonstrating inappropriate behaviour, this behaviour may be mitigated by the culture of the workplace and in particular conflict relating to the change in model of care.

In relation to incident three, it is open for the decision maker to conclude that Mr Foote has breached the Personal Information Privacy Principles for Queensland Health, December 1998, in regards to using personal information for the purpose not specified at the time it was given.

In relation to the allegation of systematic workplace bullying by Mr Foote, the specific examples provided did not support the allegation. However, as previously stated the decision maker may need to address the workplace culture which includes frustration, role confusion and competing views in relation to service delivery and models of care." [Emphasis added.]

The lack of particularity was breathtaking. Mr Foote was left to wonder what the "inappropriate behaviour" by others might be, if it was not the conduct which he had raised by his grievance.

At a meeting between Mr Foote (and his support person, Ms Julie King), Mr John Cartwright (the then Acting Director, Human Resources) and Mr Mark Fairbairn (Manager, Alcohol and Drug Service), Mr Foote indicated that he was not prepared to consider the proposed transfer as he considered it "punitive" and because it would result in a significant reduction in his salary. Subsequently, the District was advised that Mr Foote had lodged an appeal with the Office of the Public Service Commissioner. It was decided not to progress the temporary transfer until the outcome of the appeal was known. (The evidence at first instance does not allow one to determine whether Mr Foote was ever informed of that decision). Prior to the outcome of the appeal, Ms Podbury moved on and an Acting District Manager, *viz.*, Dr Michael Cleary, was appointed. One of Dr Cleary's first initiatives was to write to Mr Foote (on 14 November 2003) to inform him that after full consideration of Ms McKay's report Ms Podbury had concluded that the allegations made by him had not been substantiated and that she proposed to take no further action in relation to his allegations. Dr Cleary also apologised (as well he might) for the delay in informing Mr Foote in writing that his grievance had been dismissed. (There is evidence that Mr Foote had been informed orally on 21 July 2003). On the same day, Dr Cleary dispatched another letter to Mr Foote informing him that because his appeal was not to be heard, the matter of a transfer had been revisited and he was to be transferred to position of Counsellor, Health Services Information Line within the Alcohol and Drug Information Service as from 1 December 2003. He was informed that the position was classified his current level of Operation Officer, Level 3, that he would continue to operate as a shift worker and the decision would be reviewed in six months time. Once again the description "Counsellor" is misleading. The counselling offered by the Information Service was telephone counselling. Because Mr Foote had not received training for the telephone counselling, he was not permitted to counsel. On the evidence of Ms Denim, (the other party to the "water bottle" incident shortly to be described), by October 2004, Mr Foote had still not received training to counsel by telephone.

The transfer seems to me to have been a serious matter. The evidence is that Mr Foote sought employment at BIALA in order to further pursue his career as a counsellor. In the event, all role as a counsellor had been denied him. Further, the transfer occurred in circumstances in which it was known to the District that Mr Foote regarded it as a punitive matter and in circumstances in which the District had access to the prolix and discursive materials about "mobbing" which Mr Foote had forwarded to Ms McKay in support of his allegations of bullying. Since no one seems to have suggested that Mr Foote was (and is) living a lie, I put that hypothesis to one side. Once that hypothesis is put to one side, it seems to me, that any reasonable man who had access to the materials would have concluded that Mr Foote would have treated the transfer as an instance of the outcast staff member being clinically moved to placate the aggressors or, alternatively, would have treated the transfer as an indication that the District Manager had joined in the "mobbing".

Because the proceedings at first instance were focused on the issue whether Mr Foote's psychological malady arose out of or in the course of reasonable management action reasonably taken (being the investigation and its aftermath), the evidence about Mr Foote's experiences on the fifth floor of BIALA in the Information Service was somewhat sparse. I therefore move forward to the incident of 3 October 2004 which led to Mr Foote's departure from BIALA on extended leave during which time he was, *inter alia*, subject to psychiatric assessment.

On Sunday, 26 September 2004, Ms Denim was rostered on the 7.00 a.m. to 3.00 p.m. shift. The phones were quiet. Ms Denim took the opportunity to clean the kitchen, including the refrigerator. She located a 1 litre bottle of water at the back of the refrigerator. It was frozen to the back plate of the refrigerator. Although it had Mr Foote's name upon it, she assumed that it had been forgotten, placed it in the sink to defrost and threw it away at the end of her shift. On Saturday, 2 October 2004, Ms Denim was again rostered on the 7.00 a.m. to 3.00 p.m. shift. Mr Foote was rostered on a 10.00 a.m. to 6.00 p.m. shift. Mr Foote did not speak to her about the bottle of water. On 3 October 2004, each of Ms Denim and Mr Foote were rostered on the same shifts as on the Saturday. When Mr Foote arrived at work, pleasantries were exchanged and he seemed happy. As Ms Denim was about to leave for lunch, Mr Foote came out of the kitchen and enquired "Who cleaned out the refrigerator?". When Ms Denim informed him that she had cleaned out the refrigerator, he commenced to shake and said "You have no right to interfere with my belongings. Where is my water bottle?". As the conversation progressed he became more agitated and his mouth began to move uncontrollably. Ms Denim apologised. Initially, the matter appeared to her to be resolved. However, during the course of the afternoon Mr Foote again raised the matter, again began to shake uncontrollably and again began to raise his voice. Ms Denim stated that Mr Foote became angry very quickly. He started to shout and accused her of "messing with my head" and being "co-dependent". It was the evidence of Ms Denim that she began to cry and that Mr Foote began to cry. Ms Denim became concerned for Mr Foote's welfare and gradually calmed him down. There was some exchange of views, but Mr Foote ultimately became angry again, shouted to another person on the fifth floor and shortly thereafter stormed out.

He was not to return. Substantially, Counsel who appeared for Mr Foote at first instance did not challenge Ms Denim's evidence. Indeed, the case seems to have been that on 3 October 2004, Mr Foote had clearly and demonstrably de-compensated. Certainly, Ms Denim (who gave evidence) did not dispute that he was unwell and manifestly unwell.

In time, Mr Foote submitted an application for Compensation under the *Workers Compensation Rehabilitation Act 2003* (the Act). It was dated 19 February 2005 and was lodged on 1 March 2005. It was a claim for a psychological injury asserted to have been suffered over a period of time from the commencement of his employment on 27 March 1997. By a statement dated 8 March 2005, Mr Foote further advised WorkCover that he had been subject to "mobbing", "bullying and harassment" throughout his period of employment.

By a letter dated 29 June 2005, WorkCover advised Mr Foote that his application for compensation had been refused. The Claims Assessor advised Mr Foote that though she was satisfied that he was a "worker" she was not satisfied that he had suffered an "injury" because he had failed to establish that his psychological condition was not withdrawn from the definition of "injury" by the operation of s. 32(5) of the Act.

By an Application dated 25 September 2005 and lodged the following day Mr Foote sought a review of WorkCover's decision. By a letter dated 7 November 2005, Q-COMP advised Mr Foote that they had decided to confirm the decision of WorkCover. Once again, the substantial ground was that Mr Foote had failed to negate the operation of s. 32(5) of the Act. From that decision, there was a successful appeal to the Industrial Magistrate. The circumstances in which that decision was set aside appears sufficiently from the report at 189 QGIG 539, as do the reasons for hearing the matter on the record.

I am not, on the basis of Mr Foote's evidence, prepared to find affirmatively that he had been subjected to "mobbing" or "systemic bullying". However, neither am I prepared to find that there was "reasonable management action reasonably taken" so as to trigger the operation of s. 32(5) of the Act. The investigation was allowed to take far too long. It is not to the point that there was a delay in waiting for Mr Foote to prepare his materials. He was not, in fact, assisted by the provision of that time. The materials which he prepared and lodged, lacked cogency. Neither was Mr Foote, (whose career prospects were at risk) given advice about the progress of the investigation (or indeed its conclusion) in a timely way. In the translation of his grievance into the Terms of Reference, attention was deflected from the gravamen of his complaint and focussed on issues upon which his prospects of success were poor. His complaints were dismissed largely on the basis of "absence of detail", without any apparent attempt to meet with him and press for detail. The dismissal of his complaint must be viewed against the background in which increasingly serious complaints by Mr Foote, e.g. to the Assistant Director of Nursing (Ms Hottham), comparatively early in his engagement were met by the response that he needed to reduce his complaints to writing, and a failure of any servant or agent of the District to provide Mr Foote with a copy of the pro-forma Incident Form until after Ms Cooney had made her complaint. There was the additional factor that a complaint by his nemesis (the leader of the "Gang of Four") in the course of the investigation interview was rapidly translated into a Term of Reference. Whilst the evidence does not show what it was that Mr Foote did after being transferred to the fifth floor, and one cannot safely conclude that he was anything more than a spare handbag, it is clear that the transfer wholly separated him from his chosen work as a counsellor. And as Counsel for Mr Foote articulated the matter at first instance, knowing that Mr Foote was complaining of bullying (and I add generating documents which indicated that he was disturbed) no attempt was made to assist him over what became quite an extended period.

The difficulty which I have is with the point which each of the Claims Assessor and the Review Officer were able to avoid; *viz.*, whether Mr Foote's employment at BIALA was a significant contributing factor to his psychological disorder for the purposes of s. 32(1) of the Act. The problem lies in the evidence of Mr Foote. On a global reading of his evidence, I am disposed to treat Mr Foote as (substantially) an honest witness. I put the matter in that understated way because there is some indication of embellishment. It is, for example, disturbing that Mr Foote told the Industrial Magistrate that his relationship with Ms Lordi was basically sound and that he thought that he had rebuilt that relationship after the incident about "re-painting", whereas he told the psychologist, to whom he had been referred (Mr Morgan), that Ms Lordi had tried to destroy him over a period of 12 months. To take another example, it is disturbing that Mr Foote fixed the commencement of his deterioration as very shortly after the commencement of his employment, whereas his son (who was living with him at the time), identified the commencement as some 2 years later. However, some measure of embellishment (whether inadvertent or intentional), is not unusual in cases such as this and is no basis for entirely ignoring a claimant's evidence. More concerning is Mr Foote's claim that his memory falters under stress; his claim that he was stressed in the witness box and his further (entirely credible) claim, that he was being asked to recollect incidents which he had deliberately sought to repress in his memory. The problem is not one of credibility but of reliability. It is a problem which, of course, infects also the evidence of the psychiatrist (Dr Andrew Byth) and the psychologist (Mr Stephen Morgan). Each of the experts based his opinion on the history which had been given.

An additional problem with the evidence of Mr Foote, possibly born of his on-going recovery from alcoholism and his interest in counselling, Mr Foote's disposition to reflect upon and analyse human conduct (including his own). There is a high level of risk that in the course of the analysis, he has found nuances in behaviour which were not there. A good example is to be found in one of the exchanges between Mr Foote and Ms Denim on the traumatic afternoon of 3 October 2004. It appeared that Mr Foote had taken offence because Ms Denim had said "we'll see", when Mr Foote said he was looking forward to his Information Service training. Ms Denim had meant no more than that the performance measured training was not something to look forward to. There is an issue as to whether large tracts of Mr Foote's evidence are perceptions rather than reality.

There are also issues about Mr Foote's underlying psychological condition. The alcoholism may well have been the product of an underlying condition. Certainly, he had a past history of depression. His evidence is that he attended at the Royal Darwin Hospital in March 1986 complaining of depression. His evidence was that his condition had improved by 6 February 1987 and that by 8 January 1988, he felt well, though he was still taking Prozac as a medication. He received further treatment for psychiatric problems in Darwin in mid 1994 and was prescribed Melleril. The authorities upon degenerative backs and psychological injuries cannot be kept in separate folders. One has to be alive to the possibility that Mr Foote's condition may have deepened as a result of natural progression and that the only connection with his employment was temporal.

Allowing for all those difficulties and bearing in mind the difficulties arising out of the attempt to re-hear on the record itself, it seems to me that having regard to the qualifications and experience of Dr Byth and Mr Morgan, I should accept that each of them grappled with the risk of inaccurate history and formed a reliable opinion that Mr Foote suffered from an advanced psychological condition. I note that each of Dr Byth and Dr Morgan diagnose a different condition. Dr Byth diagnoses a Dysthymic Disorder against a background history of substance abuse disorder in remission, Dr Morgan concluded that Mr Foote experienced a severe depressive episode and is afflicted with strong persecutory ideation with possibly paranoid or even delusionary elements. If Mr Morgan's observation of persecutory thinking is treated, not as evidence of delusions or psychosis, but as evidence of a strongly (perhaps wrongly) held belief that he had been harassed, the difference between the two opinions was perhaps a matter of emphasis. Of more importance is the circumstance that each of Dr Byth and Dr Morgan find the linkage between the psychological condition and Mr Foote's employment at BIALA. All of the stressors identified by Mr Foote, and the stressors change somewhat over time (e.g. the history recounted to Mr Morgan tended to focus on the "gang of four" whereas the history given to Dr Byth highlighted the role of Mr Perry), are stressors arising from Mr Foote's employment at BIALA. Whilst there may be much of perception in some of the stressors, a fragile psychological makeup is no more a bar to entitlement to benefits under the Act than an eggshell skull. Where the psychological disorder develops out of a worker's perception of reasonable management action been taken against the worker, it is withdrawn from the definition of injury (see s. 32(5)(b) of the Act). Where the psychological disorder arises out of or in the course of reasonable management action taken in a reasonable way by an employer in connection with the worker's employment, the psychological injury is withdrawn from the definition of "injury", whatever the worker's perceptions may have been (see s. 32(5)(a)). However, those very significant statutory qualifications aside, an insurer takes a worker with all his faults. Although Mr Foote came to BIALA upon, or shortly after a relationship break-up, no attention was focused on that break-up in the course of cross-examination. Every stressor identified is BIALA related. In those circumstances, subject to a qualification to which I shall shortly turn, the conclusion seems to me to be inescapable that Mr Foote's employment at BIALA was a significant contributing factor to his psychological injury for the purposes of s. 32(1) of the Act.

The qualification is that on Dr Byth's analysis, Mr Foote's employment at BIALA was not so much the cause of his psychological injury as an exacerbation of a pre-existing Dysthymic Disorder. Notwithstanding that Mr Foote's condition was not symptomatic before he went to BIALA, the speed with which he commenced to become angry, the speed to which he began to put on weight and the early on-set of troubled relationships at work, Dr Byth's opinion seems to me, if I might take the liberty of saying so, to be entirely correct. In my view, this case is on a proper example of an "injury" within s. 32(3)(b) rather than a case of an injury within s. 32(1). I rather regret that conclusion because on the evidence of Dr Byth, Mr Foote's state was so agitated that it may be quite impossible to assess the extent of the aggravation for the purposes of s. 32(4) of the Act.

I dismiss the Appeal. I reserve all questions as to costs.

Dated 26 November 2008.

D.R. HALL, President.

*Appearances:*

Mr P. Rashleigh, directly instructed for the Appellant.

Mr R. Green, instructed by Welsh & Welsh, Solicitors for the Respondent.

Released: 26 November 2008

## INDUSTRIAL COURT OF QUEENSLAND

*Industrial Relations Act 1999* - s. 459(1)(b) - application for orders about performance and observance of rules

**Desmond Anthony Hansson AND Cameron Pope And Queensland Police Union of Employees (C/2008/37)**

PRESIDENT HALL

25 November 2008

## DECISION

The Queensland Police Union of Employees (the QPUE) is an Employee Organisation under the *Industrial Relations Act 1999* (the Act). The Applicant, viz., Mr Desmond Anthony Hansson, is a Member of the Executive of the QPUE. Mr Cameron Pope is the QPUE's President. By an Application filed 15 September 2008, Mr Hansson seeks orders pursuant to s. 459(1)(b) of the Act against each of Mr Pope and the QPUE. It is convenient to reproduce those parts of the Application which describe the relief sought. [The paragraph numbering below is reproduced in the same way in which was communicated in the Application filed 15 September 2008].

"1. A declaration that the General President (Cameron Pope) of the Queensland Police Union of Employees; and

The Queensland Police Union of Employees obey the rules of the Queensland Police Union of Employees.

The following decision:

(a) 1. A declaration that the results of the elections conducted on the 16<sup>th</sup> of July 2008 be ruled null and void and that the status quo as at that date remain until a full and duly elected Executive is convened, including the vacancy for the Metropolitan North Region; and

2. That a full election be conducted as soon as possible for the vacancy in the Metropolitan North Region in compliance with the rules. That is Rule 26.2 which states '*If an elected position becomes vacant between elections and the remaining term of office is less than twelve (12) months then; for and Executive position the remaining Executive Members shall assume responsibility for that vacancy; for the General Secretary and the Assistant General Secretary ... ..*'.

3. And Rule 26.3 which states '*If the unexpired period of the term of office in which the vacancy occurs is twelve (12) months or greater, the Executive shall arrange for a by-election for that vacancy as soon as is reasonably possible. That election shall be held under the terms of the Rules of the QPUE*'.

; and

(i) The claimed irregularity is that from the 31<sup>st</sup> day of June 2008 the immediate past Executive member for Metropolitan North (Michael BARNES) became the General Secretary of the QPUE. Therefore according to the rules as the unexpired period of office for that position was twelve (12) months or greater the General President (Cameron POPE) should have caused an election to be conducted under the QPUE rules.

(ii) Consequently the elections for office bearers conducted at an Executive meeting of the QPUE on the 16<sup>th</sup> day of July 2008 denied 1,260 members of the Metropolitan North Region a say in those election; and

3. Further I apply for directions as to the conduct of this application in relation to the following matters -

- (a) service of documents; (I am able to serve documents)
- (b) nature of hearing;
- (c) place and time of hearing; "

It is useful to commence with the Election or purported Election conducted at an Executive Meeting of the QPUE on 16 July 2008. In terms, the Application seeks a declaration that the Election is null and void. It is apparent from the affidavit sworn in support of the Application that the relief sought is not loosely described. The Application is in truth an application for a declaration that an election is null and void. By its express terms, s. 459(2)(a) of the Act denies this Court authority to make such a declaration. It is apparent from the outline of submissions filed by Mr Hansson that he now accepts that the declaration sought may not be granted.

As to the claim for an order that a full Election be conducted as soon as possible for the Metropolitan North Region Executive position, it is clear that the Rule which attaches is Rule 26.3 and not Rule 26.2. The vacancy did not occur until 18 July 2008 when the then representative of the Metropolitan North Region on the Executive resigned from the Queensland Police Service and from the QPUE. In those circumstances, the "unexpired period of the term of Office" is less than 12 months. Once again, by his written outline of submissions, Mr Hansson accepts that the relevant Rule was Rule 26.3 and that there was no obligation pursuant to Rule 26.2 which the Court might lawfully order anyone to perform.

By his outline of submissions Mr Hansson seeks an order to enjoin any attempt to appoint a "temporary" Metropolitan North Region Executive Member. Putting aside for the future any issue about whether s. 459(1)(b) of the Act authorises the Court to pre-empt breach of the rules of an organisation by restraining apprehended breach, the relief sought by Mr Hansson in his outline of submissions travels well beyond the relief sought in the Application and is not supported by the affidavit to the Application. If Mr Hansson wishes to press his claim for an order restraining breach he must file a new application. (Should Mr Hansson determine to pursue that course, he may wish to consider seeking orders against all Members of the Executive other than himself, rather than an order against the President only).

As to the claim for a global declaration that each of the President and the QPUE obey the rules of the Queensland Police Union of Employees, the relief sought is beyond power. Section 459(1)(b) of the Act is concerned with the grant of orders requiring persons under a duty to perform and observe a particular rule or rules to discharge that pre-existing and particular obligation.

In the circumstances of the case it is unnecessary to consider whether an organisation under the Act is a "person" for the purposes of s. 459(1)(b), whether the rules of an organisation can impose obligations upon the organisation itself as distinct from its members and office bearers and whether the rules of the QPUE do impose such obligations.

I dismiss the Application.

I reserve all questions as to costs.

Dated 25 November 2008.

D.R. HALL, President.

*Appearances:*

The Applicant in person.

Mr S. Reidy of Carne Reidy Herd Lawyers, for the First Respondent.

Mr J.A. Walker of McInnes Wilson Lawyers, for the Second Respondent, to abide the order of the Court.

Released: 25 November 2008

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#### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 - s. 320 - basis of decisions of the commission and magistrates*

*Workers' Compensation and Rehabilitation Act 2003 - s. 549 - who may appeal*

#### **Swickers Kingaroy Bacon Factory Pty Ltd AND Somsuay Kruayu and Q-COMP (WC/2008/100)**

DEPUTY PRESIDENT SWAN

28 November 2008

#### DECISION

Ms Somsuay Kruayu (the first respondent) is the appellant in an application [WC/2008/87 (the appeal)] made against the Review Unit of Q-COMP (the second respondent).

The employer is Swickers Kingaroy Bacon Factory Pty Ltd (the applicant) which now makes this application pursuant to s. 550 of the *Workers' Compensation and Rehabilitation Act 2003* and s. 320 of the *Industrial Relations Act 1999* for leave to appear and be heard in the appeal between the first respondent and the second respondent.

The applicant sought the following orders:

- "1. In accordance with s320(2) of the *Industrial Relations Act 1999* (Qld), Swickers Kingaroy Bacon Factory Pty Ltd be granted leave to be heard in these proceedings.

2. All parties and Swickers Kingaroy Bacon Factory Pty Ltd are to exchange documents in accordance with section 554.
3. Swickers Kingaroy Bacon Factory Pty Ltd has the right to cross-examine witnesses.
4. Swickers Kingaroy Bacon Factory Pty Ltd has liberty at trial to adduce evidence.
5. Swickers Kingaroy Bacon Factory Pty Ltd has the right to make submissions and to address on evidence.
6. Costs reserved."

Having heard from the parties, there is neither opposition nor support for the application by both the first and second respondents.

The applicant has put to the Commission that the employer witnesses it proposes to call to give evidence will be able to assist the Commission in its determination of the substantive matter. The "injury" alleged by the first respondent required a consideration of machinery at the applicant's premises and the applicant will consider calling expert evidence as well as other workplace witnesses to give evidence around these issues.

Further to this point, the first respondent has indicated that it may ask the Commission at the pre-trial conference, to inspect the applicant's premises as it relates to this, and perhaps other, matters.

As well, the applicant points out that there is no date yet set for a hearing of this matter, and as such there has been no request on its part to seek an adjournment in preparation for the trial.

The applicant does not believe that the calling of its witnesses would unduly prolong the hearing.

Having considered these submissions, it is appropriate that leave be granted to the applicant in the terms set out above.

Order accordingly.

D.A. SWAN, Deputy President.

*Hearing Details:*

2008 26 November

Released: 28 November 2008

*Appearances:*

Mr A. Horneman-Wren, Counsel, directly instructed by Ms C. Laird of Livingstones Australia, for the applicant.

Mr T. Schulz of The Bacon Factories' Union of Employees, Queensland, for the first respondent.

Ms S. Young of Q-COMP, for the second respondent.

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