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## INDUSTRIAL COURT OF QUEENSLAND

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

**Robert William Nilsson AND Q-COMP (C/2008/22)**

PRESIDENT HALL

1 September 2008

### DECISION

On 11 July 2007, Robert William Nilsson lodged an Application for Compensation under the *Workers' Compensation and Rehabilitation Act 2003* (the Act). By a letter dated 27 August 2007, the insurer (WorkCover Queensland) informed Mr Nilsson that his application had not been accepted on the ground that he had not sustained an "injury" within the meaning of s. 32 of the Act. As he was entitled to do, Mr Nilsson sought a Statutory Review on 24 October 2007. By a letter dated 12 December 2007, Q-COMP informed Mr Nilsson that Q-COMP had decided to confirm the decision of WorkCover. On 17 January 2008, Mr Nilsson filed a Notice of Appeal to the Queensland Industrial Relations Commission pursuant to s. 550 of the Act. By a decision of 12 May 2008, now reported at 188 QGIG 60, the Commission dismissed Mr Nilsson's appeal. On 27 May 2008, Mr Nilsson filed an appeal to this Court.

The appeal to the Queensland Industrial Relations Commission pursuant to s. 550, is an appeal by way of hearing *de novo*. The appeal is not by way of a judicial review of Q-COMP's decision. It follows, that on a subsequent appeal to this Court, little is ordinarily said about the Statutory Review and/or the decision of the insurer. This is an unusual case in which it is helpful to trace the early history of the matter in some detail.

Mr Nilsson, who was 51 years of age at the time of the hearing before the Commission, had entered the workforce at 15 years of age and had been employed in occupations involving performance of manual labour until the second half of 2007. Over the period August 2001 until 25 September 2007, he was employed at Townsville by a company trading as Industrial Galvanisers. On 29 May 2006, Mr Nilsson experienced a sharp pain in his right shoulder and neck region whilst alighting from a forklift. He was placed on restricted duties and hours by his employer. On 11 July 2006, Mr Nilsson lodged an Application for Compensation for a work-related aggravation of a pre-existing condition. On 17 July 2006, WorkCover accepted Mr Nilsson's claim. Workcover specifically noted that the compensation for the incident of 29 May 2006 was for "aggravation" of a pre-existing injury only. On 26 October 2006, after an assessment process initiated by himself, Mr Nilsson returned to full duties and full hours. On Sunday 8 July 2007, Mr Nilsson was awoken by pins and needles down his right side. He notified his employer and was directed to a general practitioner (Dr

Lorraine Ellis) who provided certain medical services to the employer in connection with the conduct of its business. On 11 July 2007, on the basis of an assessment by Dr Ellis (who gave evidence at first instance), Mr Nilsson was returned to light duties. It was on that day that Mr Nilsson completed the Application for Compensation previously referred to. The Commissioner who dealt with the matter at first instance (accurately) summarised the Application for Compensation as follows:

"The background to the appeal commenced with an application for compensation being lodged on 11 July 2007 where the nature of the injury was identified as:

'Pins and Needles - Right Hand and Arm  
Right Foot - Shoulder - Neck - Back'.

The application contained further information indicating that the injury happened when Mr Nilsson was 'Alighting Forklift' in the Dispatch Area of Industrial Galvanisers, his employer at the time.

Further on the in [sic] the application, the appellant was required to answer a question as to whether he had previously suffered any similar injuries or conditions, to which he made the following statement:

'Reoccurrence of Injury of 2006'.

It seems to me to be tolerably clear that the Claims Assessor who dealt with the Application for Compensation proceeded on the view that Mr Nilsson was asserting that, as in 2006, an incident/episode in the course of his employment had caused an underlying condition to become symptomatic. The Claims Assessor was unable to attach the emergence of the symptoms on the Sunday to a work-related trigger. The Assessor had access to file notes suggesting (perhaps incorrectly) that Mr Nilsson's symptoms had remained dormant since his return to work in October 2006, and an opinion obtained from a neurosurgeon (Dr Michael Redmond) which asserted that Mr Nilsson was "not suffering a work-related condition". The Assessor's conclusion is quite understandable.

Mr Nilsson's subsequent Application for Review made plain that Mr Nilsson was not asserting that a fresh incident/episode had caused new pain comparable or similar to that experienced in 2006. Rather, the essence of the claim developed was that because he had continued to work, the aggravation of 2006 had re-occurred. Materially, Mr Nilsson observed:

"WorkCover by its decision of 11<sup>th</sup> August 2006 no file SOHC39470 accepted I had work related aggravation of a pre-existing condition. That was based on a CT scan of 11<sup>th</sup> July 2006. The MRI of 25<sup>th</sup> July 2007 shows that the identical degeneration of C3/4, C4/5, C6/7 is advanced from my continuing to work. How can my present advanced condition from a previously accepted work related injury not be work related?".

As I understand the "Reasons for Review Decision", the Review Officer grasped that the case being advanced was that over time Mr Nilsson's continuing to work had caused an aggravation of a pre-existing degenerative condition as had previously occurred in 2006. The Decision of WorkCover was confirmed largely because of the opinion of Dr Redmond who indicated that Mr Nilsson's "current symptoms are not, in any way, connected to the injury he sustained in May 2006 ... The current symptoms are not an aggravation of a pre-existing condition", and because of an opinion of an orthopaedic surgeon (Dr Richard Gibberd) that the ongoing symptoms carried back to work by Mr Nilsson in October 2006 were not attributable to the incident of 29 May 2006, but were attributable to "constitutional causes".

On the appeal to the Commission, it emerged that the claim developed by Mr Nilsson was other than the claim which had been dealt with by the Review Officer. The case developed by Mr Nilsson was that his back was not dormant when he returned to work, that his back had continued to cause him to experience pain and that pain had continued until 8 July 2007 when it sharply escalated. Mr Nilsson admitted that he had concealed his suffering and (in particular) admitted that he had concealed his continuing suffering from each of Dr Ellis and Dr Redmond.

Mr Nilsson explained that he took the initiative of instigating the process which led to his return to work and that he concealed the extent of his problems with his back, because he feared the loss of his employment. Without seeking to be so unfair to Mr Nilsson's employer as to suggest that there was any reasonable basis for Mr Nilsson's apprehensions, the explanation is inherently credible. The issue was whether it should be believed in the circumstances of the particular case. I rather apprehend that the Commissioner did not accept the explanation. To begin with, the final paragraph in the Commissioner's reasons under the heading "Conclusions" was:

"The appellant presented well before the Commission in terms of his whole evidence, however in respect of the evidence about his condition remaining stable for the nine month period following his return to full duties in October 2006 there did appear to be some discrepancies which warrant careful consideration in the determination of the appeal."

Earlier the Commissioner had noted:

"In the period of time between October 2006, and 11 July 2007, the appellant undertook normal duties, although in evidence he indicated he did, in the course of that employment, experience symptoms that included pins and needles, and shoulder pain as a result of the heavy duty work he performed.

Evidence of any medical treatment for such symptoms over that nine month period was not provided in the proceedings.

The appellant acknowledged, in evidence, that he had informed Mr Redmond on 17 August 2007 'that his condition remained stable for a period of nine months'.

Certainly unhelpful to the appellant's cause was his failure to indicate that he had suffered pain or discomfort in that nine month period when being examined by Mr Redmond."

I largely agree with those remarks. Indeed, taking advantage of the latitude allowed by such decisions as *Fox v Percy* 214 CLR 118 at paras 27-31 per Gleeson CJ, Gummow and Kirby JJ, I would go further and say that Mr Nilsson's claim that he concealed information about the true state of his back from each of Dr Ellis and Dr Redmond after he had rung his employer on Sunday 8 July 2007, to inform the employer about the state of his back and, in the case of Dr Redmond, after the claim for compensation had been lodged, was entirely implausible. Further, under the heading "Finding" the Commission observed:

"Secondly, it is found that the appellant did suffer a personal injury, however applying the standard of proof required to be exercised by the Commission in the absence of evidence identifying a triggering event and consideration of the medical evidence where the evidence of Mr Redmond and Mr Gibberd is preferred, then the Commission is, in the circumstances, unable to conclude that the personal injury subject to the claim for compensation, arose out of, or in the course of, the appellant's employment and that the appellant's employment was a significant contributing factor."

That passage is comprehensible only on the basis that the Commissioner accepted Mr Nilsson's claim that he returned to work in October 2006, carrying a painful back which remained painful thereafter in consequence of the nature of the work to which he was exposed. Dr Redmond's opinion was written on the basis that Mr Nilsson's returned to work with a dormant back which remained dormant until 8 July 2007. In the course of cross-examination, Dr Redmond's opinion was attacked on the basis that his understanding of the nature of the heavy labouring work performed by Mr Nilsson was inadequate. However, at no point was Dr Redmond's opinion sought on the hypothesis that Mr Nilsson had returned to work with a painful back which it continued to be a source of great (or any) discomfort. Dr Gibberd's opinion of 2006 went to Mr Nilsson's condition on his return to work and was based on the assumption that Mr Nilsson's back was quiescent. Cross-examination was directed to his inability to speak directly of Mr Nilsson's condition post July 2007 and to his strongly expressed views about degeneration and about stresses in the thoracic and cervical spine. At no point was his opinion sought on the hypothesis that Mr Nilsson had returned to work with a symptomatic spine which continued to be a source of great (or any) discomfort. Had the Commissioner accepted Mr Nilsson's version of events, it would have been largely pointless to go to the evidence of Drs Redmond and Gibberd.

On the Appeal to this Court much of the argument was directed to whether, having regard to the responses of Drs Redmond and Gibberd to the questions put to them in cross-examination, the Commissioner was justified in relying upon their evidence. Having read the transcript, it seems to me that Dr Redmond did ultimately accept that his understanding of the work performed by Mr Nilsson was flawed and that without greater information about what other work injuries, sport injuries or traffic injuries Mr Nilsson might have endured and without better information about Mr Nilsson's genetic predisposition (if any), he was unable to exclude the work performed by Mr Nilsson at Industrial Galvanisers as a contributing factor. The evidence of Dr Gibberd is another matter. Dr Gibberd, of course, gave evidence about Mr Nilsson's back at the stage which Mr Nilsson returned to full duties. Dr Gibberd did not purport to give evidence about the condition of Mr Nilsson's back post July 2007. However, it was Dr Gibberd's opinion that at the time of his return to work Mr Nilsson's back problems were "constitutional" one may, it seems to me, conclude that Mr Nilsson would continue to be afflicted by "constitutional" problems in July 2007. Further, Dr Gibberd volunteered some generalised comments about the on-set of painful backs. In particular, Dr Gibberd gave evidence that unless "significant", a physical injury to a back would not hasten further natural degeneration and that backs may become symptomatic while people are asleep. (Dr Redmond, I should note, had also taken up the issue of the frequency of which backs became painful while persons were asleep). I do not accept that Dr Gibberd was a truculent witness determined to defend his written opinion. Dr Gibberd did no more than defend himself against the line of questioning which he considered to be unfair to him.

Dr Gibberd's evidence that only "significant" injuries would hasten degeneration becomes important because of the evidence of Dr Ellis upon which Mr Nilsson largely relies. It is perhaps useful to set forth Dr Ellis' written opinion [formal parts omitted]:

"I have been the attending practitioner caring for Robert since the 11th of July 2007. Robert presented to me with the onset of neurological signs in his right side over the previous few weeks.

He had a previous history of a work injury to his neck and subsequent cervical degeneration. Robert has proceeded on to have a decompression of his cervical spine with good results.

I have been asked my professional opinion and I do this only as a General Practitioner not as a Neurosurgeon or Orthopaedic surgeon.

I cannot say that Mr Nilsson's injuries arose from any specific incident at work but undoubtedly the previous work injuries would have had a significant effect on his cervical spine and the consequent early degeneration of his spine.

It is most unusual for a man of his age to have such significant problems without there being any antecedent cause. The only precedent factors to my knowledge have been the work related injuries.

As for the nature of his employment being a contributing factor – I am not aware of all the duties carried out Mr Nilsson and therefore cannot at this stage comment on this. [Emphasis added].

That opinion gives no support at all to the argument that over time Mr Nilsson's work at Industrial Galvanisers had caused an injury to his back or had aggravated an underlining condition. To the extent that Dr Ellis attributes the early degeneration of Mr Nilsson's spine to previous injuries, her opinion is inconsistent with the evidence of Dr Gibberd. Neither Dr Gibberd nor Dr Ellis, were pursued about that particular matter. The Commissioner was perfectly entitled to prefer the evidence of Dr Gibberd, a gentleman of 30 years experience, to the evidence of a general practitioner registered some four and a-half previously. From the point of view of Q-COMP, the most adverse view which the Commissioner could have formed was that the conflict between the evidence of Dr Ellis and the evidence of Dr Gibberd could not be resolved. Even on that view of the evidence, Mr Nilsson's position became untenable.

One must recognise that the question whether Mr Nilsson suffered an injury within s. 32(1) or an aggravation which was an injury within s. 32(3) is a question of fact which is not necessarily to be resolved by acceptance or rejection of medical testimony. There is room for "intuitive" reasoning; compare *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538 at 563 per Rich ACJ, *Fernandez v Tubemakers of Australia Ltd* (1975) 2 NSWLR 190 and *Murray v Shillingsworth* (2008) 68 NSWLR 451. However, one may not in the process substitute speculation for satisfaction on the balance of probabilities. On the hypothesis that Mr Nilsson had returned to work in October 2006, free of symptoms but carrying a back with a "constitutional" predisposition to degeneration, that his back did not become painful until Sunday, 8 July 2007 and that Mr Nilsson was on that morning awoken by pins and needles down his right hand side, the situation is clearly covered by the decision of de Jersey, President in *Pleming v Workers' Compensation Board of Queensland* (1996) 152 QGIG 1181. Of particular relevance is the passage at 1182:

"What is to exclude the appellant having rolled irregularly in bed the night before, thereby having triggered the serious pain he experienced on 11 January 1995 before going to work?".

If anything, given the admission that the onset of pain occurred when Mr Nilsson awoke and the evidence from Dr Redmond and Dr Gibberd about the onset of back pain whilst people are asleep, the case against the acceptance of Mr Nilsson's claim is stronger than the case against the acceptance of the pain in *Pleming*, (*ibid*). Indeed, given the existence of a potential cause other than the work performed by Mr Nilsson, *viz.*, the "constitutional" predisposition, and the circumstance that the pain on 8 July 2007, was remarkably worse than it had been for a period of a little over 12 months, there is much to be said for the view that even if Mr Nilsson's assertions that he returned to work in October 2006 carrying symptoms and because of the work did not overcome those symptoms, be accepted, I doubt that one could legitimately be satisfied on the balance of probabilities that what occurred on 8 July 2007, was work related.

I dismiss the Appeal.

I reserve all questions as to costs.

Dated 1 September 2008.

D.R. HALL, President.

Released: 1 September 2008

*Appearances:*

Mr K.C Fleming, QC and Mr S.J.R. Cilento, instructed by Dempseys Lawyers, for the Appellant.

Mr C. Clark, directly instructed for the Respondent.

## INDUSTRIAL COURT OF QUEENSLAND

*Workers' Compensation and Rehabilitation Act 2003 - s. 561 - appeal against decision of industrial magistrate***Malcolm Edward Tolhurst AND Q-COMP (C/2008/23)**

PRESIDENT HALL

2 September 2008

## DECISION

By a decision dated 19 March 2008, the Industrial Magistrate at Southport dismissed an appeal by Malcolm Edward Tolhurst against a decision by Q-COMP confirming an earlier decision by WorkCover Queensland rejecting Mr Tolhurst's claim for compensation under the *Workers' Compensation and Rehabilitation Act 2003*. On 28 May 2008, Mr Tolhurst lodged an appeal to this Court. Such an appeal is by way of rehearing on the evidence and proceedings in the Industrial Magistrate's Court. In this case, the transcript for the first day commences at or about the point at which Exhibit 9 is tendered. The transcript for the second day ceases at or about the time that Dr Dodd is telephoned to give evidence. A search of the tapes has proven entirely unrewarding. Nothing further may be extracted. The deficiencies are not inconsequential. Criticism of the evidence of Dr Dodd is critical to the Appellant's case. In those circumstances Q-COMP surrenders the fruits of its victory and consents to an order under s. 248(1)(e) of the *Industrial Relations Act 1999*, quashing the decision of the Industrial Magistrate and remitting the matter to be heard and determined according to law. That seems to me to be the appropriate course: see the discussion in *Pinkstone v Goldrick and Anor* [1979] 1 NSWLR 279 and *Sherring v Goldrick and Ors* [1979] 1 NSWLR 285.

I note that the Appellant who is self represented, asserts that fairness requires that his Appeal be allowed. The Appeal cannot be allowed because it cannot be heard.

I declare the decision of the Industrial Magistrate at Southport on 19 March 2008, in the matter of Malcolm Edward Tolhurst and Q-COMP to have no effect in law and order that the matter be remitted to the Industrial Magistrates Court at Southport in order that it may be heard in full and determined according to law. It follows that there will be no hearing in this Court on 12 September 2008.

Dated 2 September 2008.

D.R. HALL, President

*Appearances:*

Released: 2 September 2008

The Appellant in person.

Mr S. McLeod, directly instructed for the Respondent.

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## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 - s. 473 - approval for other name amendment***Queensland Fire Service Senior Officers' Association, Union of Employees (RIO/2008/146)**

VICE PRESIDENT LINNANE

4 September 2008

Application for approval to change name - No objection - No similar name - *Industrial Relations Act 1999 - s. 473*.

## REPORT ON DECISION (as edited)

Delivering her decision from the Bench on 2 September 2008, Vice President Linnane stated:

"This is an application by Queensland Fire Service Senior Officers' Association, Union of Employees to amend its name to the Queensland Fire and Rescue - Senior Officers Union of Employees.

I am satisfied that the change in name has been effected in accordance with the rules of the organisation and is made in accordance with the relevant provisions of the *Industrial Relations Act 1999* and the *Industrial Relations Regulation 2000*.

There is no objection to the change in name.

I find that the proposed name is not the same as the name of any existing industrial organisation of employees, nor is the proposed name so similar to the name of an existing organisation of employees as to be likely to cause confusion.

In the circumstances I approve the name amendment. The amendment is to be operative as and from 2 September 2008.

Order accordingly."

By the Commission,  
[L.S.] G.D. Savill,  
Industrial Registrar.

*Appearances:*  
Ms C. Miller of Clayton Utz Lawyers for the Queensland Fire  
Service Senior Officers' Association, Union of Employees.

*Hearing Details:*  
2008 2 September

Released: 4 September 2008

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#### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 - s. 278 - power to recover unpaid wages and  
superannuation contribution etc.*

#### **Bill Savage AND Greg and Angela Kallio t/as Poolwerx Petrie (B/2008/55)**

COMMISSIONER THOMPSON

8 September 2008

Application under s. 278 *Industrial Relations Act 1999* - Unpaid wages - Payment *in lieu* of notice - Interpretation of notice period - Evidence of applicant preferred - Respondent ordered to make payment - Deduct income tax.

#### DECISION

#### **Background**

An application was filed on 8 July 2008 by Mr Bill Savage (the applicant) seeking an order for the underpayment of wages in the following terms:

• Wages - 2 days	\$307.70
• Payment <i>in lieu</i> of notice - 4 weeks	\$3,076.82
• Annual Leave - 79.47 hours	\$1,528.27
Total:	<u>\$4,912.89</u>

The application identified the employer as Greg and Angela Kallio t/as Poolwerx Petrie (the respondent) and alleged the amounts claimed were for periods all ending at 4 March 2008. Both parties were self represented.

#### **Applicant**

The evidence of the applicant was that he commenced employment with the respondent on 29 August 2006 with the employment ceasing on 4 March 2008.

The applicant's work duties included pool maintenance, chemical balancing of pools, cleaning pools, cells and filters, installation of pumps, filters and other associated works.

Hours of work were not set out in written form, however 40 hours per week were required to be worked with him usually commencing at 7.30 a.m. and finishing around 4.00 p.m. Some days (most) the applicant did not get a lunch break.

The applicant had family responsibilities relating to picking up his daughter which made working beyond 4.00 p.m. difficult for him.

It was a disagreement with Greg Kallio over hours of work that led to the cessation of the working relationship.

The status of the termination formed a significant part of the claim in that the applicant's evidence was that upon giving his "formal verbal notice", Greg Kallio had requested that he reconsider his giving of notice and when he (the applicant) refused and went on to state "Should I just finish today or what?", Greg Kallio had replied "Yes, just finish today."

The applicant's understanding was that a four week notice period existed and he would be expected to work out that time in accordance with his contract of employment. The contract had not been registered and appeared to operate as a common law agreement.

The applicant gave evidence relating to the events of 4 March 2008 where he arrived late to work as a result of his son arriving from the United Kingdom.

Although he had informed Greg Kallio's son the previous evening that he would be late, he was still chastised for being late.

After discussion about the applicant's hours of work, including working through his lunch hours, he left the employer's premises, returning a short time later where he engaged with Greg Kallio who, according to the applicant's evidence, was angry and agitated.

It was in the course of the exchange with Greg Kallio that the applicant formed the view that he was being told to finish up.

The applicant was of the view that whilst there was no other party present at the meeting with Greg Kallio, his son (Ryan Kallio) would have been able to hear the conversation inside the house but when they moved outside then it was simply the two of them.

In cross-examination, Greg Kallio raised with the applicant the failure to work out his notice (page 16, line 1 of transcript):

"Greg Kallio: No. I have a question on the end of that. I had plenty of work. I was reasonably happy with your performance. I would then have to pay an extra four weeks wages and finally train someone else. Why would I do that?"

Savage: Because you were annoyed with me. Because you could see that I wasn't going to be bringing in you that income at the end of that time that you'd got used to having brought in.

Greg Kallio: If I was annoyed at you, Bill, why would I get you to work that day?

Savage: Because I was expecting to work out my notice. And if I had just walked out - -

Greg Kallio: You're going around in circles, Bill?

Savage: No, if I had just walked out, then I would not have been fulfilling my part of the obligation. You said to me, yes, just you do today. So, I just did that day as requested.

Greg Kallio: So, you resigned, you wanted to work your four weeks notice?

Savage: That's what I would have done, yes.

Greg Kallio: And, I've asked you to reconsider while I was busily eating my bowl of cereal?

Savage: And I said, no, I won't reconsider.

Greg Kallio: But, you wanted to know whether I wanted you to work that day?

Savage: Yes.

Greg Kallio: And, I said just finish today and that's it?

Savage: In your own words, exactly that.

Greg Kallio: You stated in your story that you were shocked, surprised and disappointed in my attitude towards you and my ability to let you go so easily?

Savage: I was, yes."

The applicant confirmed that he was both surprised and disappointed that Greg Kallio had let him go so easily.

The applicant completed the tasks allocated to him on 4 March 2008 and, at the end of the day, returned the work van, computer and keys to the respondent's premises.

At the end of that week, the applicant returned uniforms that had been provided and left a note for the attention of Greg Kallio.

In the note, the following paragraph appeared:

"I'll take my holiday and sick in lieu of the 4 days notice - I worked one of them."

Note: The applicant, in submissions, claimed that the reference to four days should have been four weeks to be consistent with the contract of employment executed by the parties on the commencement of employment.

The applicant delivered a further note on 19 March 2008 to the respondent requesting that all monies owed to him be paid into his account as soon as possible.

On 20 March 2008, correspondence was forwarded by the respondent which stated that with the applicant failing to give the "required 4 weeks notice" before leaving the employment (as per the contract of employment), all monies owing to the applicant would be withheld.

On 2 June 2008 the applicant had his legal representatives forward correspondence to the respondent which advised that if monies owing had not been paid within seven days, that proceedings may be issued on behalf of the applicant.

### **Respondent**

Evidence on behalf of the respondent was provided through Greg and Ryan Kallio.

#### **Greg Kallio**

Greg Kallio informed the Commission that he was in partnership with his wife in a franchise arrangement with Poolwerx whereby they undertook a range of tasks associated with pool maintenance and repairs.

The contract of employment between the applicant and the partnership was a Poolwerx contract used by a number of franchises to set out conditions of employment.

He was unaware if the employment contract had been registered in some jurisdiction.

The evidence of Greg Kallio went to the events of 4 March 2008 when the applicant had arrived some 55 minutes late for work which had resulted in an exchange between the two in respect of the applicant's hours of work and working without approval through his lunch break.

According to the witness, the applicant became angry but eventually left with his jobs for the day.

Around five minutes later, whilst the witness was partaking of his breakfast, the applicant returned in an aggressive manner, "storming" in through the entry sliding door, slamming it into the wall.

The applicant is said to have yelled "I'm not happy about this" and marched back outside.

The witness followed the applicant outside and asked him to calm down.

A further exchange occurred where the applicant informed Greg Kallio that he was resigning and asked should he work the day, which was answered in the affirmative.

It was suggested by the witness that the applicant should take some time and think about his decision and discuss the matter later.

The next day was put as a time in which further talks could take place.

Later that day, the witness returned home at 5.00 p.m. to find the applicant's work van parked outside with the keys, mobile phone, laptop computer, folder and fuel card left at the back of the house.

It was obvious that the applicant had not changed his mind about resigning, a decision that caused significant hardship to the business.

According to Greg Kallio, the applicant's departure had forced him to do the work of two persons as it was in the busy season.

On 7 March 2008, the applicant left his uniforms and a note outside the front door of the respondent's home.

The note clearly stated that he had resigned, but presumed that the notice period was of one week and not the four weeks contained in the employment agreement.

A further note was left in the respondent's letterbox on 19 March 2008 demanding that the applicant be paid two days wages, holiday pay, sick pay and bonuses. There was no claim for four weeks *in lieu* of notice.

The note (Exhibit 6) stated:

"Uniforms, socks etc - Washed. Rest of uniform, hat, fleece, spray jacket are in van.

I'll take my holiday pay and sick in lieu of the 4 days notice - I worked one of them.

Bill."

In cross-examination, the witness was taken to an exchange in relation to the notice period not being worked out (page 26, line 23 of transcript):

"Savage: No. It's just ridiculous. I'd just like to ask you if - you know, I was so angry and this, that and the other, why was it that I finished that day's work? What, in your opinion, would make me finish that day's work?-

Greg Kallio: Because at that point I was trying to calm you down, Bill. I was trying to calm you down. I was hoping that you'd think about it 'cause I didn't want to lose you and I was hoping you'd calm down that day. I thought, 'Good, this is your chance to reconsider and hopefully not finish up that day.'

Savage: No, you told me just to finish that day?

Greg Kallio: No."

The respondent contacted Wageline and was advised that they were entitled to withhold monies equal to the ordinary time rate for the required period of notice.

### **Ryan Kallio**

Ryan Kallio (son of Greg Kallio) gave evidence relating to the events of 4 March 2008 when the applicant arrived for work.

The witness was, at the time, in the back bedroom some 14 metres away from the dining area but with a good line of sight and within hearing distance.

His evidence was that he could hear his father and the applicant discussing finishing times and working through lunch breaks.

The applicant left and returned some five minutes later "storming" through the sliding entry door.

When asked to explain "stormed" he replied (at page 29, line 10 of transcript) "He sort of stomped in and slammed the door into the wall".

The applicant and his father left the house and continued the discussion outside.

The witness gave evidence that he left the bedroom and went to the front of the house where he was able to overhear their discussion.

He stated that the applicant was agitated and that his father (who was not agitated) was trying to calm him down.

The applicant said that he had wanted to resign and had asked his father if he wanted him to work that day to which his father had stated "Well, yes you should".

His father had gone on to say "just take your time over the course of the day to think about it and we can discuss it later [tomorrow]".

Under cross-examination from the applicant, the witness acknowledged that he had not made contemporaneous notes at the time of the incident and had relied on his memory to recollect his evidence.

### **Submissions**

#### **Applicant**

The applicant provided a brief submission that took issue with the account of events presented by the respondent.

It was submitted that the Kallio's (Greg and Ryan) had colluded to give evidence that was, at best, fictitious.

The applicant denied being aggressive in his discussions with Greg Kallio and took exception to the allegation that he had "stormed" in to the Kallio house.

His employment had been effectively terminated when the respondent had not required him to work out the four weeks notice.

The Commission was encouraged to accept the evidence of the applicant in preference to that of the respondent and to award the monies sought in the application.

#### **Respondent**

The submission addressed, in the first instance, the discussions with the applicant on 4 March 2008 making reference to the applicant admitting that he was irate at the time.

The applicant tendered his resignation on that day and refused the chance to discuss the matter on the following day by not returning to work.

In respect of the period of notice, Greg Kallio, at page 39, line 15 of transcript, stated:

"I would have had to pay Mr Savage four weeks' notice if I'd got rid of him - if I had dismissed him, but he actually says, in his own handwriting, 'I'll take my holiday and sick in lieu, instead of the four days' notice. I worked one of them.'

Meaning that he thought he had to give five days' notice but he worked that Tuesday. He resigned in the morning but he still worked that day, so, he was telling us to take four days off his holiday and sick pay when you don't get, off his holiday pay. That's what he's saying there."

After the applicant's last day of work, the only contact between the parties had been by way of notes that passed between the parties.

The respondent, on 20 March 2008 (Exhibit 3) advised the applicant that, having failed to give four weeks' notice before leaving their employ (as required) he would not be receiving any entitlements owing.

The applicant had lied in the course of the hearing and the Commission should accept the honest position of the respondent.

The claim should be rejected.

### **Conclusion**

The Commission, in the determination of the application, notes that common ground exists in respect of the applicant's employment status, period of employment and that a resignation was offered (verbally) by the applicant on 4 March 2008.

The question, in essence, for the Commission is whether the respondent was entitled, in accordance with s. 397 of the *Industrial Relations Act 1999* (the Act) to deduct from the employees wages an amount stated by the instrument of employment, for the failure of the applicant to work out the relevant period of notice.

**"397 Deduction of wages in lieu of notice of termination**

- (1) This section applies if -
  - (a) an industrial instrument requires an employee to give notice of termination of employment for a specified period; and
  - (b) an employee ceases the employment without giving the employer the notice for the specified period.
- (2) The employer may deduct from the employee's wages an amount stated by the instrument to be forfeited or payable to the employer if notice of termination is not given for the period specified."

The instrument governing the employment, in these circumstances, was an Employment Agreement entered into between Greg and Angela Kallio trading as Poolwerx Petrie and Bill Savage on 29 August 2006.

A "Term of Employment" provision was included at clause 4 of the agreement:

"The Employee's employment shall commence on the date set out in Item 3 of the Schedule and shall, subject to this Agreement, continue for an indefinite period of time until terminated by either party providing notice as set out in Item 4 of the Schedule, to the other party. Alternatively, The Employer may pay to The Employee the amount of one week's salary as defined in Item 5 of the Schedule ('salary') in lieu of such notice.

Nothing in this Agreement shall require The Employer to pay more than 50% of such payment to The Employee for a period of 3 months from the date of termination of this Agreement. Any such payment retained shall only be payable, at the end of this period, to the extent it exceeds warranty claims that have been made against The Employee's work performed during this Agreement."

Item 4 of the schedule stated only "4 weeks" which leaves one with the simplest of interpretations that each party would be required to give the other party four weeks' notice upon wishing to end the employment arrangement.

However, in the second sentence of paragraph one of clause 4, it allows the employer to make a payment of one weeks' salary in lieu of meeting their notice requirements.

Such an option in favour of the employer, in my view, would render the employment contract inherently unfair in favour of the employer, certainly with regards to the notice period.

At the same time, it would not be appropriate to have, in these circumstances, the applicant receive the period of one week *in lieu* of notice when the Act, at s. 84, identifies the minimum period of notice for a person with the applicant's length of service as being that of two weeks:

**"84 Minimum period of notice required from employers**

- (1) The minimum period of notice is -
  - (a) if the employee's continuous service is -
    - (i) not more than 1 year - 1 week; and
    - (ii) more than 1 year, but not more than 3 years - 2 weeks; and
    - (iii) more than 3 years, but not more than 5 years - 3 weeks; and
    - (iv) more than 5 years - 4 weeks; and
  - (b) increased by 1 week if the employee -
    - (i) is 45 years old or over; and
    - (ii) has completed at least 2 years of continuous service with the employer.
- (2) A regulation may prescribe matters that must be disregarded when working out continuous service under subsection (1)."

In the matter of *Reilly v TDG Logistics* [2001] QIRC Comm 52; 166 QGIG 430 (5 April 2001), Commissioner Bechly, in determining an application under s. 276 of the Act, said, in respect of unfair contract matters:

"Unfair contract matters have been the subject of considerable litigation in that jurisdiction with much attention being paid to what is meant by the term 'unfair'.

Compare *Agius v Arrow Freightways Pty Ltd* [1965] AR(NSW) 77 to 89; *Davies v General Transport Development Pty Ltd* [1967] AR(NSW) 371; *A & M Thompson Pty Ltd v Total Australia Ltd* (1982) NSWLR 1 at 13; and *Palmer v TNT Australia Ltd* (1995) (NSW Industrial Relations Commission, decision of Hungerford, J.).

In summary, arising from the above matters it could be said that the test of unfairness of a contract or arrangement or understanding has been found to be determinable by the application of common sense and sense of justice and the common sense approach of a jurymen and that it is a moral and not a legal issue.

Also, in applying that test, it is not simply a case of applying standards which appear to provide a proper balance or division of advantage or disadvantage between parties who have made a contract or arrangement. What has also to be born in mind is the conduct of the parties, their capability to appreciate the bargain that was made and the comparative bargaining positions when entering into the contract or arrangement."

In respect of the employment contract in force for this employment arrangement, the evidence is clear that the conditions of employment were not subject to negotiation with the applicant having to accept the Poolwex template as a "*fait accompli*" and this would not meet the "test of unfairness of a contract or arrangement or understanding" referred to by Commissioner Bechly.

For fairness to prevail, it is necessary for the Commission to determine that each party must have access to the same level of notice which would fall back to the minimum specified in the Act.

Note: Whilst the decision of Commissioner Bechly was set aside on appeal, it was not for the reason that his approach to the meaning of unfairness was wrong.

The next important factor for the Commission to determine is whether the applicant, in giving notice and offering to work out the full notice period, was relieved of that obligation by Greg Kallio, making the statement "Yes, just finish today", which was the evidence of the applicant.

Greg Kallio provided a different version, and relied upon the evidence of Ryan Kallio to corroborate his position, that he did not agree to the applicant not working out the notice period.

The Commission is not convinced that the evidence of Ryan Kallio was of a nature that would allow the Commission to embrace such evidence with any confidence.

The location of Ryan Kallio, in itself, when he is said to have overheard the full discussion between the applicant and his father is, in the view of the Commission, "suspect" to the extent that he is more than likely not to have heard all that was said between the parties.

On examination of the actions of Greg Kallio, following the return of the work vehicle and other associated issue (on 4 March 2008), it was found that no effort was made to contact the applicant to ascertain why he was not working out his notice period.

It is true that any monies owing to the applicant were withheld at that point of time, however no advice was provided to the applicant of this action until the respondent, in correspondence of 20 March 2008 (in reply to correspondence from the applicant dated 19 March 2008) informed the applicant.

In evidence (at page 23, line 42 of transcript), Greg Kallio stated that Wageline had been contacted, but he did not indicate at what time in the cycle such an approach was undertaken, however it is not out of the question, on the evidence, that contact with Wageline was made after the respondent received the applicant's note of 19 March 2008.

Having, in effect, disregarded the evidence of Ryan Kallio, the Commission must consider whether to accept the evidence of the applicant or Greg Kallio on whether there was a requirement for the applicant to work out the period of notice or otherwise.

It would be fair to say that each of the two witnesses in question presented well before the proceedings, however the Commission is inclined to accept the evidence of the applicant to that of Greg Kallio in relation to the applicant being told to "just finish today".

All of the applicant's actions from the time of the animated discussions with Greg Kallio on the morning of 4 March 2008 are consistent with his version of events and, as a consequence, lead one to conclude that, in the circumstances, he was not required to work out his period of notice and therefore has an entitlement firstly to a payment *in lieu* of notice, in addition to the other outstanding monies subject of the claim.

### **Finding**

Having heard the evidence, submissions and taken into account the material placed before the proceedings, the Commission is satisfied that, on the balance of probabilities, that the monetary amounts identified in the body of the application are wages to which the applicant is entitled, except for the claim of four weeks payment *in lieu* of notice whereby it be amended to reflect the provisions of the Act at s. 84 (as mentioned earlier in the decision).

The respondent is ordered to pay Bill Savage the gross amount of \$3,220.62 made up of:

- Wages - 2 days (includes one day of notice period worked)      \$307.70
- Payment *in lieu* of notice - 9 days      \$1,384.65
- Annual leave - 79.47 hours      \$1,528.27

The respondent is to deduct the appropriate income tax and make the payment within 22 days of the release of this decision.

I so order.

J.M. THOMPSON, Commissioner.

*Hearing Details:*  
2008 18 August

Released: 8 September 2008

*Appearances:*  
Mr B. Savage, Applicant.  
Mr G. Kallio, of Greg and Angela Kallio t/as Poolwerx Petrie,  
Respondent.

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