

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 74 - application for reinstatement

Grant Joseph Elmsly AND Education Queensland
(TD/2009/90)

DEPUTY PRESIDENT BLOOMFIELD

5 February 2010

DECISION

[1] In giving my Decision from the Bench on 21 December 2009, I said:

"Mr Elmsly, I see no need to keep you waiting to know the outcome of your application. I'm going to refuse your application for an extension of time within which to lodge your application for reinstatement and I base that decision on a number of factors.

During your cross-examination today you identified three temporary engagements where you alleged you had been unfairly dismissed. The last of those temporary engagements was at Caboolture in the latter part of 2004. The period which has expired since 2004 and your lack of activity, since that time, to challenge the circumstances of the cessation of those engagements in this Commission would not - in the normal course of events - justify the granting of an extension of time.

However, quite apart from that, the records attached to the affidavit of Mr Cook show you were employed under a number of other casual or temporary appointments after the temporary contract at Caboolture came to an end in 2004.

As I mentioned to you during the course of the formal directions hearing a few weeks ago, if you continue to be employed under a succession of casual and temporary contracts it is a bit hard for you to argue that your employment was unfairly terminated in 2004. If you are continuing to work for the same employer under continuing engagements it is, with respect, a nonsense to say you've been dismissed.

The other issue I am concerned about is that if an extension of time is granted to you to allow you to argue that the circumstances of the cessation of three temporary contracts you dispute was unfair, you would have no prospect of gaining any outcome in respect of any of those matters because, as we discussed during the course of your submissions, you were paid for the full duration of the temporary contract at Tullawong, as well as for the full duration of your contract at Caboolture, taking into account the ability of the employer to pay you for the balance of the contract period instead of requiring you to work.

In addition, there would be no other remedy you could be awarded in relation to any of the three alleged terminations you dispute because, in accordance with the decisions of the President in *Department of Justice and Attorney-General v Carey*¹, the Commission has no ability to direct the Chief Executive of the Department of Education and Training to employ someone beyond the timeframes set out in a temporary engagement.

You also submitted the circumstances of at least one termination supports an argument that your employment was terminated for an invalid reason. With respect to you, there is no material contained within the 93 paragraphs of your statement which would support any such allegation about your being terminated for an invalid reason, within the meaning of the legislation.

At the end of the day Mr Elmsly, even if you were able to argue that you had been unfairly terminated from any of the three temporary appointments you highlight, you would still run into the problem that the remedy you seek would not be available to you. You couldn't be put back into a position that had just expired-----

APPLICANT: I could be.

DEPUTY PRESIDENT: -----and you couldn't be appointed to a position where the Chief Executive says that the temporary position you occupied for a time is no longer required.

APPLICANT: Could be, sir, if they wanted to.

¹ *Department of Justice and Attorney-General v Carey* (2002) 170 QGIG 306 and 375; and *Carey v Department of Justice and Attorney-General* (2002) 171 QGIG 391.

DEPUTY PRESIDENT: It is a reinstatement application, Mr Elmsly, not an application arguing that you should be given employment beyond that which you were offered, and paid for, which is where you seem to be heading. It is not where the *Industrial Relations Act 1999* (the Act) allows you to go unfortunately.

I will put out a more complete decision setting out the reasons why I've rejected your application, Mr Elmsly, but I felt it was fair to let you know now that your application is going to be rejected. I'll adjourn the Commission."

[2] In accordance with the comment in the final paragraph of the above statement I now issue further, and more complete, reasons for announcing to Mr Elmsly on 21 December 2009 that I proposed to dismiss his application for an extension of time within which to lodge his application for reinstatement.

[3] In his application for reinstatement, lodged on 6 May 2009, Mr Elmsly provided, *inter alia*, the following grounds in support of his application for an extension of time:

"I was a whistleblower as I reported misdemeanours, these were not followed up on and instead I was repeatedly targeted and punished for having obeyed my Ethical duty and Code of Conduct which my profession requires me to adhere to. Each time this happened I was isolated or removed from the school."

[4] In terms of remedy, Mr Elmsly sought, amongst other outcomes, the following:

"Published documents absolving me of fault and a full time permanent position."

[5] Mr Elmsly's application for reinstatement raises a number of concerns about his alleged and/or perceived treatment by various persons (including Principals, other teachers and students) as well as by the Department of Education between July 2000 and October 2008. However, the material included in his Application did not contain specifics as to the actual termination Mr Elmsly alleged was unfair.

[6] However, during the course of his cross-examination on 21 December 2009 Mr Elmsly made it clear that he was alleging he had been unfairly terminated from three temporary engagements, as follows:

- Marsden State School, where he was employed on a temporary contract for a period of 17 days between 7 August 2000 and 22 September 2000, inclusive;
- Tullawong State School, where he was employed on a temporary contract for a period of 103 days between 27 January 2004 and 11 June 2004, inclusive;
- Caboolture East State School, where he was employed on a temporary contract for 75 days between 12 July 2004 and 5 November 2004, inclusive.

[7] Mr Steven Cook, Human Resource Manager, Sunshine Coast Region, Education Queensland testified that Mr Elmsly has not been removed from the Teacher Relief and Temporary Employment Register and continues to be considered by schools for employment as a relief teacher in either casual or temporary positions. Further, he remains registered as an applicant for permanent teaching positions.

[8] In this respect, Mr Elmsly is one of 402 persons who enjoy a rating of "High Sound" on the Register of Teacher Vacancies in the Sunshine Coast Region. This Register also contains details of 771 "High Performing" teachers and 94 others ranked as "Outstanding" who are available for relief teaching roles and/or full-time employment. As such, Mr Elmsly faces significant competition for available vacancies.

[9] Further, Mr Cook provided evidence to the effect that Mr Elmsly was, and continues to be, offered temporary and casual (relief) teaching positions and said that he had accepted many such offers after his alleged unfair termination from Caboolture East State School in November 2004. The material attached to Mr Cook's affidavit showed that after Mr Elmsly's departure from Caboolture East State School he worked the following engagements:

- 2004 - 10 casual engagements between 8 November and 3 December 2004;
- 2005 - 82 casual engagements between 3 February and 2 December 2005;
- 2006 - 26 casual engagements between 17 March and 6 December 2006;
- 2007 - 69 casual engagements between 15 May and 11 December 2007;
- 2008 - 31 casual engagements between 1 March and 10 November 2008, together with three temporary engagements (of six days, six days and ten days, respectively);
- 2009 - 20 casual engagements between 29 July and 25 November 2009 (including three engagements in November).

- [10] Mr Cook also informed the Commission that Mr Elmsly had rejected an offer for a temporary contract for a period of three to four weeks at the end of Term 2, 2009 as well as a further offer of temporary employment for a period of four weeks commencing on 19 October 2009.
- [11] The material supplied by Mr Cook clearly establishes that Education Queensland continues to offer various teaching engagements to Mr Elmsly on a relief basis and that he has accepted many (but not all) such offers. As such, it is obvious that Mr Elmsly has not been "dismissed" from his employment, in the sense that his employment has not come to an end.
- [12] From the material contained in his initial application for reinstatement, read together with the material contained in his written submissions, it is apparent that Mr Elmsly has a number of grievances about his alleged and/or perceived treatment during the period of time he has worked for Education Queensland. This material cites interactions he has had with students, other teachers, school Principals and the Queensland Teachers' Union of Employees (QTU). Mr Elmsly indicates he has lodged a number of complaints and grievances, none of which have been addressed or resolved to his satisfaction. Further, he indicates he has lodged complaints with the Crime and Misconduct Commission, the Queensland College of Teachers, the Auditor General's Office, WorkCover Queensland, the Public Service Commission and the Human Rights and Equal Opportunities Commission.
- [13] Mr Elmsly argues that because he has been prepared to make claims, *inter alia*, about his treatment, the behaviour of students and the incompetence of teaching colleagues, he has been "blacklisted" by local Principals. In this respect, he said the limited work opportunities he has received in recent years have come about as a result of personal relationships with other teachers and Department Heads in certain schools.
- [14] Notwithstanding his various concerns about his alleged and/or perceived treatment, Mr Elmsly's main grievance is that, despite being on the books of Education Queensland for about eight years, he has not been able to obtain permanent employment. Indeed, as noted above, the principal remedy he seeks to achieve through his unfair dismissal application is an order that he be given a permanent position.
- [15] However, the Commission could not award Mr Elmsly such remedy *even if* he established he had been unfairly dismissed from employment with Education Queensland. The only remedy the Commission could award would be to restore him to any previous position he might have occupied and/or make an order for payment of compensation.
- [16] In this case neither of those potential remedies is available to Mr Elmsly in respect of his engagements at Marsden and Tullawong State Schools, respectively. Based on the evidence provided in these proceedings he has either worked the full period of his temporary contracts at these locations, or been paid to the end of the agreed contract period. For reasons which are recorded in the various decisions concerning *Department of Justice and Attorney-General v Carey*² the Commission does not possess the power to reinstate Mr Elmsly to a position which has expired, nor does it possess the power to order the Chief Executive to create some temporary position to accommodate Mr Elmsly. Equally, because he has already been paid for the full period of the temporary engagements concerned, Mr Elmsly could not be paid any compensation in respect of the cessation of those contracts.
- [17] In the case of Caboolture East State School, Mr Elmsly's temporary contract ceased on or around 5 November 2004 - some five weeks prior to the end of the school year (10 December 2004). The circumstances under which the employment came to an end are somewhat confusing. In one part of his evidence (transcript 2-15 at line 17), Mr Elmsly said that he was given two weeks notice by the Principal on 1 November 2004. However, in his later evidence he said that he had simply walked out, despite attempts by the Principal to stop him, on 5 November 2004, based upon alleged advice given to him by an employee of the QTU (transcript 2-10 at lines 23-39). It is not clear whether Mr Elmsly was paid to 5 November 2004, being his last day of work, or to 12 November 2004, being the last day of his two week notice period.
- [18] Following his departure from Caboolture East State School Mr Elmsly worked 10 casual engagements (totalling 10 days) over the balance of the school term. Accordingly, if Mr Elmsly was able to establish that he was unfairly terminated he might be able to claim compensation of either 10 days or 15 days (depending on whether he was paid the full notice period), being the (apparent) balance of his temporary contract to the end of the school year. However, for reasons noted above, he could not be reinstated into the former position or any other position.
- [19] The question which the Commission is required to consider therefore, is whether an extension of time should be granted to Mr Elmsly to allow him to argue that the circumstances surrounding his departure from the

² *Department of Justice and Attorney-General v Carey* (2002) 170 QGIG 306 and 375; and *Carey v Department of Justice and Attorney-General* (2002) 171 QGIG 391.

Caboolture East State School in November 2004 constitutes either an unfair termination or termination for an invalid reason.

- [20] Apart from claiming that he did not know that he had a remedy available to him, in that he alleged both Education Queensland and QTU actively discouraged casual and temporary teachers disputing the circumstances of the cessation of various contracts, Mr Elmsly has not advanced any cogent argument why I should grant him the extension sought.
- [21] In the scheme of things, the only potential remedy available to Mr Elmsly in respect of his alleged unfair termination from Caboolture East State School is relatively minor - involving maximum compensation of 10 or 15 days - *if* he is able to establish he was unfairly terminated. In this respect, based upon Mr Elmsly's evidence in these proceedings, there is considerable potential for a finding to be made that, rather than being dismissed, the employment relationship came to an end at the initiative of Mr Elmsly himself when he walked out of the school on Friday 5 November 2004.
- [22] Further, there is nothing in the material advanced which would support an argument by Mr Elmsly that he was terminated from Caboolture East State School for an invalid reason. The letter to him confirming his termination cites a number of reasons - all of which will need to be canvassed in detail if the matter goes to trial. However, if it is ultimately decided that his termination was (as Mr Elmsly alleges) because he made a complaint to the Head of Department about the withdrawal of his teacher aide support, that does not constitute termination for an invalid reason within the meaning of s. 73(2) of the Act.
- [23] In all of the circumstances, particularly the fact that the *only* remedy available to Mr Elmsly, *if* he is able to successfully establish he was unfairly dismissed, would appear to be a maximum of 15 days' compensation, I decline to exercise my discretion to grant Mr Elmsly leave to lodge his application alleging unfair dismissal some four and a-half years after the last of the three terminations he disputes. In my view, the maximum available remedy, when compared to the costs involved in conducting a trial and the difficulties likely to be encountered by witnesses being asked to recall events more than five years previously, does not support the exercise of the available discretion.
- [24] For the foregoing reasons I dismiss Application No. TD/2009/90.

A.L. BLOOMFIELD, Deputy President.

Appearances:

Mr G. Elmsly appearing on his own behalf.

Hearing Details:

2009 21 December

Mr D. Honour appearing for the Department of Education and Training.

Released: 5 February 2010