

APPEAL AGAINST A DECISION OF THE ROAD FREIGHT TRANSPORT INDUSTRY
 TRIBUNAL IN MATTER NO. RFT 1/2019 GIVEN ON 2 OCTOBER 2019
 WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

FULL BENCH

CITATION : 2020 WAIRC 00185

CORAM : CHIEF COMMISSIONER P E SCOTT
 COMMISSIONER D J MATTHEWS
 COMMISSIONER T B WALKINGTON

HEARD : TUESDAY, 25 FEBRUARY 2020

DELIVERED : FRIDAY, 27 MARCH 2020

FILE NO. : FBA 11 OF 2019

BETWEEN : D & K HOLDEN PTY LTD
 Appellant

AND

HOLCIM (AUSTRALIA) PTY LTD
 Respondent

ON APPEAL FROM:

Jurisdiction : **ROAD FREIGHT TRANSPORT INDUSTRY TRIBUNAL**

Coram : **SENIOR COMMISSION S KENNER**

Citation : **2019 WAIRC 00724**

File No : **RFT 1 OF 2019**

CatchWords : Industrial law (WA) – Appeal against decision of the Road Freight Transport Industrial Tribunal – Tribunal dismissed claim that respondent unlawfully terminated the Agreement – Tribunal found conduct constituted serious and wilful misconduct or reckless indifference – Whether finding are supported by evidence or do not take account of certain matters – No error in findings of Tribunal – Findings open to Tribunal to make on basis of evidence – Conduct was serious and wilful misconduct – Appeal dismissed.

Legislation : *Owner Drivers (Contracts and Disputes) Act 2007*, s 43(1)(j), s 47
Industrial Relations Act 1979, s 49

Result : Appeal dismissed

Representation:

Appellant : Mr D Holden

Respondent : Mr M Baroni (of counsel) and Ms C Vincent (of counsel)

Case(s) referred to in reasons:

Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission [2000] HCA 47; (2000) 203 CLR 194

Gronow v Gronow [1979] HCA 63; (1979) 144 CLR 513

House v The King [1936] HCA 40; (1936) 55 CLR 499

Jago v District Court (NSW) [1989] HCA 46; (1989) 168 CLR 23

Michael v Director General, Department of Education and Training [2009] WAIRC 01180; (2009) 89 WAIG 2266

Monteleone v The Owners of the Old Soap Factory [2007] WASCA 79

Norbis v Norbis [1986] HCA 17; (1986) 161 CLR 513

*Reasons for Decision***THE FULL BENCH:****Introduction**

- 1 The appellant, D & K Holden Pty Ltd, appeals against the decision of the Road Freight Transport Industry Tribunal dismissing its claim that Holcim (Australia) Pty Ltd contravened the Cartage Agreement between them by terminating the Agreement without notice or compensation ((2019) WAIRC 00726). The respondent did so in reliance on the conduct of Mr Damien Peter Holden, the director, shareholder and a truck driver of the appellant. The Tribunal found that the conduct constituted a fundamental breach of the Agreement in that it was serious and wilful misconduct or, alternatively, that it was reckless indifference to the possibility of the danger of the situation.
- 2 Mr Holden had an altercation with another contractor that was said to have ‘led to (him) driving (his) vehicle and physically hitting another contractor, following which an exchange of physical and verbal threats occurred’. This was the conduct for which the respondent ended the Agreement (exhibit R2).

The decision at first instance

- 3 Much of the decision at first instance dealt with the contractual arrangements between the parties and the appellant’s arrangements for the fit out of a concrete truck to undertake work under the Agreement. None of this is the subject of the appeal. The appeal relates to the Tribunal’s findings of fact and inferences drawn from those facts, as set out in [45] – [56] of the Reasons for Decision relating to the conduct and the termination of the Agreement.
- 4 On 8 December 2018, on a construction site in Applecross, the appellant’s truck, driven by Mr Holden, delivered concrete.
- 5 There was video footage of the incident taken from two sources. The Tribunal heard witness evidence and viewed the video footage. In the Reasons, the Tribunal described how Mr Holden drove his truck as he was leaving the site. He was required to navigate various obstacles which the Tribunal described as those ‘commonly associated with work sites’ [10]. On the left-hand side of the truck’s path out of the site were two trucks parked one behind the other, in a parallel parking arrangement, with some distance between them. The truck in front was operated by another contractor, Singh Logistics Australia Pty Ltd, and was driven by Mr Khiple. Mr Khiple had got out of his truck and left the driver’s door open. He was standing alongside his truck talking to the driver of the second truck, known as Alex.
- 6 The Tribunal considered the evidence, including the video footage. The Tribunal found that:
 1. Mr Khiple’s truck’s driver’s door was open, but not fully open [45];
 2. As Mr Holden’s truck approached Alex and Mr Khiple, Alex raised his arm, signalling for Mr Holden’s truck to stop [46];

3. The 'truck was moving at quite a speed for an onsite access way' [46];
4. As Mr Holden's truck stops, Mr Khiple looks over his left shoulder towards the open door of his truck [47];
5. Mr Khiple raised both hands towards the cab of Mr Holden's truck, with middle fingers raised;
6. Mr Holden saw the gesture. The truck is moving forward, the wheels turn to the left, in Mr Khiple's direction, Mr Khiple does not move from his position. Mr Holden saw him there. Mr Holden's truck continues forward and makes contact with Mr Khiple;
7. It appeared from the footage that there must have been some words or gestures made by Mr Holden towards Mr Khiple that caused Mr Khiple to look over his left shoulder towards the open door of his truck [51];
8. Mr Khiple responded to Mr Holden's words or gestures by moving two steps to his left, into the path of Mr Holden's truck. He then raised his hands, with both middle fingers raised, towards Mr Holden. Although Mr Holden denied any form of provocation towards Mr Khiple, the Tribunal found this difficult to accept, in fact rejecting the assertion that Mr Holden politely requested Mr Khiple to shut the door of his truck [51];
9. Mr Holden admitted that he saw Mr Khiple raise his hands towards Mr Holden's truck cab;
10. Mr Khiple did not move from that position. He must have remained within Mr Holden's clear view;
11. Mr Holden's truck continued forward, with the truck's wheels turning to the left, placing Mr Khiple further towards Mr Holden's driver's side and that it was difficult to accept Mr Holden's contention that he was unable to see Mr Khiple because he was in a blind spot when Mr Holden's truck made contact with Mr Khiple. The Tribunal rejected the assertion that any blind spot prevented Mr Holden from seeing Mr Khiple [52];
12. Mr Holden's truck continued to move towards Mr Khiple when Mr Holden either was, or should have been, aware that Mr Khiple was most likely directly in front of the left-hand side of Mr Holden's truck [52];
13. Mr Holden was able to manoeuvre his truck straight through and drove towards the exit on the site [53];
14. It was 'dangerous and quite reckless for Mr Holden's truck to continue to move forward in the knowledge that Mr Khiple was standing right in front of it moments before contact was made with him' [54];
15. There was obvious potential for a serious injury to Mr Khiple [54];

16. Mr Holden's conduct, in his truck continuing towards a person standing in very close proximity to it in a confined space in circumstances where the individual was moments before clearly in the vision of the truck driver' constitutes serious and wilful misconduct [55];
 17. It was inconceivable that Mr Holden was not aware of the danger, alternatively, he was recklessly indifferent to the possibility [55];
 18. Mr Khiple was dismissed by his employer for his inexcusable and provocative conduct including an altercation following Mr Holden's truck making contact with him [55];
 19. In addition to Mr Holden's conduct constituting serious and wilful misconduct, for the purposes of cl 9.1(i), it constituted a serious safety breach for the purposes of cl 9.1(f) of the Agreement [55]; and
 20. As a consequence of these findings, the termination of the Agreement by the respondent was not unlawful [56].
- 7 In essence, the Tribunal found that Mr Holden's conduct constituted serious and wilful misconduct. Alternatively, he was recklessly indifferent to the danger. Irrespective of whether it constituted serious and wilful misconduct, the Tribunal found that it constituted a serious safety breach for the purposes of the Agreement and that the respondent's ground for the termination of the Agreement was justified at the time the decision was made and it was not unlawful [56].

Grounds of appeal

- 8 Mr Holden says that the Tribunal's findings at [45] – [56], set out above, are not supported by the evidence or do not take account of certain matters. The first matter he says is his own 19 years of unblemished record without incident as an owner-driver with the respondent.
- 9 Mr Holden also submits that the video footage shows Alex waving to Mr Khiple to say hello, and then waving to Mr Holden in the same way, and giving Mr Holden a thumbs-up hello.
- 10 Mr Holden says that for some unknown reason his own vehicle's video recording had been unavailable. If it had been available, it would have shown visual and audio records of the whole incident. It would have shown his speed was within reasonable limits and that he did not direct any provocation towards Mr Khiple. He says that the video units are sealed and accessible only to Holcim. He says it is somewhat mysterious that the video worked in two of the three cameras that were removed but not in the one that would have helped his cause. It was unavailable through no fault of his own.
- 11 Mr Holden says that the Tribunal was wrong to have relied on the evidence of Mr Antonioli that there was a reasonable gap for his truck to have moved through and he questions Mr Antonioli's qualifications to make that assessment.

- 12 Mr Holden says that the Tribunal's conclusion that there was no blind spot to prevent Mr Holden from seeing Mr Khiple is in error.
- 13 The appeal also challenges the Tribunal's acceptance that Mr Holden provoked Mr Khiple. Mr Holden says that this could not be so as he said no words or made no actions that would have provoked an unreasonable response, particularly given his 19 years' unblemished record and with him not knowing Mr Khiple. He said the Tribunal chose not to believe that he simply asked Mr Khiple to close his door.
- 14 Mr Holden also says that the Tribunal's finding that it was difficult to see how Mr Khiple would not have been noticed, was in error.
- 15 Although the grounds of appeal and the written submission assert that there was bias on the part of the Tribunal, this was not a matter pursued during the course of the hearing of the appeal.
- 16 During the hearing of the appeal, Mr Holden elaborated on some of the issues in the appeal. However, he accepts that moving the truck forward without being sure where Mr Khiple was located was negligent and that the Tribunal was wrong to find that there was reckless indifference. He says he had hoped that Mr Khiple was getting out of the way when he proceeded.
- 17 Mr Holden says that he was hoping for a lesser penalty and that the punishment did not fit the crime and generally disagrees with the findings.

The approach to an appeal to the Full Bench

- 18 The essence of the dispute between the parties was whether the respondent was entitled to terminate the Agreement immediately and to do so without compensating the appellant. It was entitled to do so in the case of a fundamental breach by the appellant or its driver. That included serious and wilful misconduct (cl 9.1(i)). The matter before the Tribunal at first instance required a discretionary decision made pursuant to s 47 of the *Owner Drivers (Contracts and Disputes) Act 2007 (WA)* (the OD Act).
- 19 A decision of the Tribunal may be appealed to the Full Bench pursuant to s 43(1)(j) of the OD Act.
- 20 The approach to be taken by the Full Bench in considering an appeal against the discretionary decision is set out in *Michael v Director General, Department of Education and Training* [2009] WAIRC 01180; (2009) 89 WAIG 2266 at [140] – [143], per Ritter AP, by reference in particular to *House v The King* [1936] HCA 40; (1936) 55 CLR 499 and *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194:

The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows

extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred [140].

As there stated, an appeal against a discretionary decision cannot be allowed simply because the appellate court would not have made the same decision. The reason why this is so was explained in the joint reasons of Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Limited v Australian Industrial Relations Commission* [2000] HCA 47; (2000) 203 CLR 194 at [19]- [21]. At [19] their Honours explained by reference to the reasons of Gaudron J in *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23 at 76, that a discretionary decision results from a “decision-making process in which ‘no one [consideration] and no combination of [considerations] is necessarily determinative of the result’”. Instead “the decision-maker is allowed some latitude as to the choice of the decision to be made”. At [21] their Honours said that because “a decision-maker charged with the making of a discretionary decision has some latitude as to the decision to be made, the correctness of the decision can only be challenged by showing error in the decision-making process”. Their Honours then quoted part of the passage of *House v King* which we have quoted above [141].

Similarly, Kirby J in *Coal and Allied* at [72] said that in considering appeals against discretionary decisions, the appellate body is to proceed with “caution and restraint”. His Honour said this is “because of the primary assignment of decision-making to a specific repository of the power and the fact that minds can so readily differ over most discretionary or similar questions. It is rare that there will only be one admissible point of view”. (See also *Norbis v Norbis* [1986] HCA 17; (1986) 161 CLR 513 per Mason and Deane JJ at 518 and Wilson and Dawson JJ at 535) [142].

These principles of appellate restraint have particular significance when it is argued, as here, that a court at first instance placed insufficient weight on a particular consideration or particular evidence. This was considered by Stephen J in *Gronow v Gronow* [1979] HCA 63; (1979) 144 CLR 513 at 519. There, his Honour explained that although “error in the proper weight to be given to particular matters may justify reversal on appeal, ... disagreement only on matters of weight by no means necessarily justifies a reversal of the trial judge”. This is because, in considering an appeal against a discretionary decision it is “well established that it is never enough that an appellate court, left to itself, would have arrived at a different conclusion”, and that when “no error of law or mistake of fact is present, to arrive at a different conclusion which does not of itself justify reversal can be due to little else but a difference of view as to weight”. (See also Aickin J at 534 and 537 and *Monteleone v The Owners of the Old Soap Factory* [2007] WASCA 79 at [36]) [143].

- 21 The Full Bench is required to consider all that was before the Tribunal. It is to do so in deciding whether the Tribunal made any error raised in the grounds of appeal. It is not enough that the Full Bench might have come to a different conclusion if it had decided the matter for itself. Where a finding or conclusion was open to the Tribunal on what was before it, the Full Bench ought not to interfere with the finding or conclusion.

Consideration of the evidence

- 22 It is clear that the appellant has suffered a significant loss as a consequence of the respondent bringing the Agreement to an end. The difficulty for the appellant is that he has been unable to identify any of the findings or conclusions of the Tribunal that were not available to the Tribunal based on the material that was before it.
- 23 We have considered the evidence before the Tribunal and viewed the video evidence. The video shows that Mr Holden's truck approached Alex and Mr Khiple as they stood talking next to Mr Khiple's truck. Alex held up his hand. It could have been a wave, a thumbs up or a signal to stop. The truck rolled almost to a stop. Mr Khiple stepped back and looked over his shoulder. It is reasonable to infer that he did so to look at his truck's door. He turned back. He took two steps to his left, leaning slightly on his left leg, leaving him almost directly in front of the left-hand or passenger side corner of Mr Holden's truck's cab. Mr Khiple raised two hands with the middle fingers facing upwards, directed towards the position that the driver would occupy. Upon doing that, Mr Khiple did not move as the truck's wheels then turned towards Mr Khiple and the truck accelerated quite sharply. This turning of the wheels towards Mr Khiple aligned the centre of Mr Khiple's chest with the front left-hand corner of the cab. As the truck moved forward quickly, the corner of the cab collided with Mr Khiple's hands and chest, knocking Mr Khiple backwards. The wheels then turned to the right and the truck proceeded, with what appears to be ample room on either side, towards the exit.
- 24 Both the oral evidence and the video evidence support or at least allow the findings made by the Tribunal. During the hearing of the appeal, there was discussion to the effect that, in fact, the Tribunal's findings and description of Mr Holden's conduct were recorded in words which were restrained compared with what they might have been. In our respectful view, the Tribunal could well have described Mr Holden's conduct towards Mr Khiple as being that after Mr Khiple made an offensive gesture to him and having seen Mr Khiple standing there in front of him, Mr Holden deliberately turned the wheels of the truck toward Mr Khiple and accelerated, charging at him with the truck. Mr Holden says that he was hoping that Mr Khiple would get out of the way. A viewing of the video suggests that in fact Mr Holden both knew and intended that the vehicle would move towards Mr Khiple. Whether he intended to actually strike Mr Khiple or not, he did so. Even if the truck had not actually made contact with Mr Khiple, Mr Holden's actions were highly dangerous and deliberate.
- 25 Whether there were any errors in the findings about whether there was sufficient room for Mr Holden to manoeuvre the truck past Mr Khiple's truck with its door partially open; the speed at which he was travelling prior to pulling up towards Mr Khiple and Alex, and whether

Mr Holden provoked Mr Khiple into the crude gesture, the most important and telling aspect of this case is whether Mr Holden drove his truck in such a way that made contact with Mr Khiple and whether he did so wilfully. Mr Holden saw Mr Khiple when Mr Khiple stepped forward. He saw him gesture at him. Between the time he made the gesture which Mr Holden saw and the moment when the truck collided with Mr Khiple, Mr Khiple did not move. Therefore, Mr Khiple could not have been within a blind spot for Mr Holden. Mr Holden knew or ought to have known when he turned the truck towards Mr Khiple and accelerated that Mr Khiple was still in his path, and in fact was more directly so. He deliberately drove in the direction where Mr Khiple was standing. He says he assumed Mr Khiple had moved out the way. If such a claim is genuine, then the assumption was both foolish and dangerous.

- 26 We are not persuaded that the Tribunal was in error to find that Mr Holden's conduct was wilful. Although there is no video footage showing Mr Holden and what he said or did, we find that it was open to the Tribunal to draw inferences that it followed and was caused by Mr Khiple's crude gesture and that Mr Khiple's gesture was a response to Mr Holden's provocation. As we have noted, this does not alter the fact of the deliberate driving at and making contact with a person in the path of the vehicle when Mr Holden must have known he was in its path.
- 27 Our observations reached from our viewing of the video make clear to us that there was no error in the findings made by the Tribunal. They were findings that were open to the Tribunal to make on the basis of all of the evidence. The conduct was serious misconduct and it was wilful.

Consideration of the grounds of appeal

- 28 As to the grounds of appeal in particular, in respect of the first, Mr Holden says that he had an unblemished record as an owner-driver with the respondent. With respect, the issue is not about whether the respondent's decision to terminate the Agreement was harsh. It was about whether the respondent breached the Agreement by the summary termination and whether the conduct was serious and wilful misconduct such as to enable the respondent to lawfully terminate the Agreement.
- 29 The appellant's case at first instance was that his conduct was not wilful or deliberate. The only issue of fairness raised in the application at first instance related to the procedural fairness associated with the process the respondent undertook before the termination. It was not about the fairness of the penalty, if it could be called such, of the termination of the Agreement. Rather, it was about whether the respondent was entitled to terminate the Agreement, in the terms provided in the Agreement, on the basis of the conduct being serious and wilful misconduct.
- 30 The second aspect of the appeal ground is whether Alex waved or signalled for Mr Holden to stop. The video is not clear as to whether it was a wave, a thumbs up or an indication to stop. It was open to the Tribunal to make a finding on any of those possibilities and it did so. There

was no error in that regard. Even if there was an error, we do not see that it would have made a difference to the other findings.

- 31 The third aspect of the appeal is about what may or may not have been visible had Mr Holden's own vehicle's video recording been available. What is material for the purposes of the appeal is the evidence that was available and considered by the Tribunal. Although Mr Holden says that the unavailability of the video recording from his truck is mysterious, there is no suggestion that there was some sinister reason for it being unavailable. It does not undermine the fact that the findings made were available on the evidence before the Tribunal.
- 32 Mr Holden complains that Mr Antonioli was not qualified to give evidence about the amount of space available to manoeuvre the truck past Mr Khiple's truck with its door open. He says that Mr Antonioli had not been a driver for some time. Mr Antonioli's evidence about the space available for Mr Holden's truck to move past Alex and Mr Khiple, including with Mr Khiple's truck's door being open, was not seriously challenged or undermined in cross-examination.
- 33 Mr Antonioli said that there was no blind spot in the truck which would have prevented Mr Holden from seeing Mr Khiple. That, too, was not seriously challenged in cross-examination and was not undermined. The Tribunal was entitled to accept Mr Antonioli's evidence and there was no error in doing so.
- 34 As to the issue of the Tribunal's acceptance that Mr Holden provoked Mr Khiple, Mr Holden says that this could not be so as he spoke no words and made no actions that would have provoked Mr Khiple. He said the finding is unreasonable, particularly given his 19 years' unblemished record and with his not knowing Mr Khiple. He says the Tribunal chose not to believe that he simply asked Mr Khiple to close his truck's door.
- 35 Again, having viewed the video, and noted the evidence before the Tribunal, in our view it was entirely open for the Tribunal to form the conclusion that Mr Holden had conducted himself in such a way as to provoke Mr Khiple. There is no other explanation for Mr Khiple responding to what Mr Holden described as a polite request to close his door, by making the obscene gesture. However, Mr Khiple's gesture provoked Mr Holden into aligning the truck with Mr Khiple and driving at him. One can only imagine that Mr Holden was aggravated at the door being open, and then perhaps infuriated at being gestured to, and his response was to turn the truck towards Mr Khiple, accelerate and hit him. The findings made by the Tribunal were open to it and were not in error.

Conclusion

- 36 The authorities cited make clear that it is not for the Full Bench to overturn the decision at first instance on the basis that it may have come to a different conclusion where a range of conclusions were available, including those reached by the Tribunal at first instance. In this case, we find no error in the Tribunal's conclusions nor in the acceptance and rejection of certain evidence. While Mr Holden may disagree with the conclusions, that is not sufficient to overturn the Tribunal's decision. The appeal is not an opportunity to relitigate, but rather to

examine the case at first instance and the decision and identify whether there were errors as alleged in the appeal. We have no hesitation in dismissing the appeal.