

**UNFAIR DISMISSAL APPLICATION
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

CITATION : 2020 WAIRC 00123

CORAM : COMMISSIONER T B WALKINGTON

HEARD : ON THE PAPERS

DELIVERED : THURSDAY, 27 FEBRUARY 2020

FILE NO. : U 136 OF 2019

BETWEEN : TROY HERMES-SMITH
Applicant

AND

RUC CEMENTATION MINING CONTRACTORS PTY LTD
Respondent

CatchWords : Industrial Law (WA) - Termination of employment - Harsh, oppressive or unfair dismissal claim - Whether Commission has jurisdiction - Trading activities of respondent

Legislation : *Fair Work Act 2009*

Result : Application dismissed for want of jurisdiction

Representation:

Applicant : In person

Respondent : Mr David Heldsinger (of counsel)

Case referred to in reasons:

Aboriginal Legal Service of Western Australia (Inc) v Lawrence [No 2] [2008] WASCA 254; (2008) 89 WAIG 243

Case(s) also cited:

Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd (1982) 150 CLR 169

Bevanere Pty Ltd v Lubidineuse (1985) 7 FCR 325

Commonwealth of Australia v The State of Tasmania (1983) 158 CLR 1 (*Tasmanian Dam case*)

E v Australian Red Cross Society (1991) 27 FCR 310

Fencott v Muller (1983) 152 CLR 570

Fowler v Syd-West Personnel Ltd [1998] AIRComm 904 (Unreported, McIntyre VP, 30 June 1998)

Hardeman v Children's Medical Research Institute [2007] NSWIRComm 189; (2007) 166 IR 196

Hughes v Western Australian Cricket Association Inc (1986) 19 FCR 10

Mid Density Development Pty Ltd v Rockdale Municipal Council (1992) 39 FCR 579

Pellow v Umoona Community Council Inc [2006] AIRComm 426 (Unreported, O'Callaghan SDP, 19 July 2006)

Quickenden v O'Connor [2001] FCA 303; (2001) 109 FCR 243

R v The Judges of the Federal Court of Australia; Ex parte Western Australia National Football League (Inc) (1979) 143 CLR 190 (*Adamson*)

R v Trade Practices Tribunal; Ex parte St George County Council (1974) 130 CLR 533

Re Ku-ring-gai Co-operative Building Society (No 12) Ltd (1978) 36 FLR 134

State Superannuation Board v Trade Practices Commission (1982) 150 CLR 282

Reasons for Decision

- 1 Mr Troy Hermes-Smith was employed by RUC Cementation Mining Contractors Pty Ltd (**RUC Cementation**) from 29 July 2019 until his employment terminated on 11 September 2019. Mr Hermes-Smith claims he was unfairly dismissed and applied to the Western Australian Industrial Relations Commission (**Commission**) for compensation. RUC Cementation objects to the Commission dealing with this matter because it says it is a national system employer and the Commission does not have the necessary jurisdiction.

Question to be decided

- 2 The question to be decided is whether Mr Hermes-Smith's employer is a trading corporation and a national system employer.

Principles

- 3 Section 14(1)(a) of the *Fair Work Act 2009* (**FW Act**) defines a national system employer as a constitutional corporation so far as it employs or usually employs an individual and s 13 of the FW Act defines a national system employee as an individual employed by a national system employer. Section 12 of the FW Act defines constitutional corporations as corporations which are trading, or financial corporations formed within the limits of the Commonwealth. Section 26 of the FW Act states that it applies to the exclusion of all state or territory industrial laws that would otherwise apply to a national system employee or employer including the FW Act. If the respondent is a trading corporation the jurisdiction of the Commission to deal with the applicant's claim is therefore excluded.
- 4 The issues to be determined in this matter when deciding whether the respondent is a trading corporation is whether it is incorporated, the character of the activities carried on by it at the relevant time and whether or not it was engaged in significant and substantial trading activities of a commercial nature such that it can be described as a trading corporation.
- 5 *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254; (2008) 89 WAIG 243, sets out the principles to be applied by the Commission when considering whether an entity is a trading corporation [68].
- (1) A corporation may be a trading corporation even though trading is not its predominant activity: *Adamson* (239); *State Superannuation Board* (303 - 304); *Tasmanian Dam case* (156, 240, 293); *Quickenden* [49] - [51], [101]; *Hardeman* [18].
 - (2) However, trading must be a substantial and not merely a peripheral activity: *Adamson* (208, 234, 239); *State Superannuation Board* (303 - 304); *Hughes v Western Australian Cricket Association Inc* (1986) 19 FCR 10, 20; *Fencott* (622); *Tasmanian Dam case* (156, 240, 293); *Mid Density* (584); *Hardeman* [22].
 - (3) In this context, 'trading' is not given a narrow construction. It extends beyond buying and selling to business activities carried on with a view to earning revenue and includes trade in services: *Ku-ring-gai* (139, 159 - 160); *Adamson* (235); *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 184 - 185, 203; *Bevanere Pty Ltd v Lubidineuse* (1985) 7 FCR 325, 330; *Quickenden* [101].
 - (4) The making of a profit is not an essential prerequisite to trade, but it is a usual concomitant: *St George County Council* (539, 563, 569); *Ku-ring-gai* (140, 167); *Adamson* (219); *E* (343, 345); *Pellow* [28].
 - (5) The ends which a corporation seeks to serve by trading are irrelevant to its description: *St George County Council* (543, 569); *Ku-ring-gai* (160); *State Superannuation Board*

(304 - 306); *E* (343). Consequently, the fact that the trading activities are conducted in the public interest or for a public purpose will not necessarily exclude the categorisation of those activities as ‘trade’: *St George County Council* (543) (Barwick CJ); *Tasmanian Dam case* (156) (Mason J).

- (6) Whether the trading activities of an incorporated body are sufficient to justify its categorisation as a ‘trading corporation’ is a question of fact and degree: *Adamson* (234) (Mason J); *State Superannuation Board* (304); *Fencott* (589); *Quickenden* [52], [101]; *Mid Density* (584).
- (7) The current activities of the corporation, while an important criterion for determining its characterisation, are not the only criterion. Regard must also be had to the intended purpose of the corporation, although a corporation that carries on trading activities can be found to be a trading corporation even if it was not originally established to trade: *State Superannuation Board* (294 - 295, 304 - 305); *Fencott* (588 - 589, 602, 611, 622 - 624); *Hughes* (20); *Quickenden* [101]; *E* (344); *Hardeman* [18].
- (8) The commercial nature of an activity is an element in deciding whether the activity is in trade or trading: *Adamson* (209, 211); *Ku-ring-gai* (139, 142, 160, 167); *Bevanere* (330); *Hughes* (19 - 20); *E* (343); *Fowler*; *Hardeman* [26].

Is RUC Cementation Mining Contractors Pty Ltd a trading corporation?

- 6 On 21 October 2019 RUC Cementation submitted an Annual Financial Report for the year end 30 June 2019, copies of pay slips for Mr Hermes-Smith, a contract of employment between RUC Cementation and Mr Hermes-Smith dated 29 July 2019, a copy of the RUC Mining Contractors Enterprise Agreement 2016, an extract of the company details held by ASIC and Mr Hermes-Smith’s termination notice.
- 7 Mr Hermes-Smith was invited to provide submissions and allowed time to obtain the advice and assistance from his union, an industrial agent or lawyer. Mr Hermes-Smith did not make any submissions.
- 8 On the undisputed information and documentation provided by the respondent I am satisfied that RUC Cementation is an incorporated entity and its main purpose is to trade with the aim of generating a profit.
- 9 Mr Hermes-Smith’s claim erroneously named the respondent as ‘Ruc Cementation’. The correct legal name of his former employer is ‘RUC Cementation Mining Contractors Pty Ltd’. The Commission notified the parties of the proposal, in accordance with s 27(1)(m) of the *Industrial Relations Act 1979* to amend the name of the respondent.

Conclusion

- 10 RUC Cementation is a trading corporation and Mr Hermes-Smith was employed by a national system employer and this Commission does not have jurisdiction to deal with Mr Hermes-Smith’s application for unfair dismissal.
- 11 An order will issue that the name ‘Ruc Cementation’ be deleted and that there be substituted therefore the name ‘RUC Cementation Mining Contractors Pty Ltd’.
- 12 An order will issue dismissing this application for want of jurisdiction.