

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

**CITATION** : 2020 WAIRC 00162

**CORAM** : COMMISSIONER T B WALKINGTON

**HEARD** : ON THE PAPERS

**DELIVERED** : FRIDAY, 6 MARCH 2020

**FILE NO.** : U 152 OF 2019

**BETWEEN** : AIDEN BILCICH  
Applicant

AND

GLS ENTERPRISES PTY LTD AS TRUSTEE FOR THE GLEN  
SIMS FAMILY TRUST AND BATHURST PTY LTD AS  
TRUSTEE FOR THE ROSE FAMILY TRUST  
Respondent

**CatchWords** : Industrial Law (WA) - termination of employment - Harsh, oppressive or unfair dismissal claim - name of respondent - Whether Commission has jurisdiction - Trusts and trustees - Trading activities of respondent

**Legislation** : *Industrial Relations Act 1979* (WA)  
*Fair Work Act 2009*

**Result** : Application dismissed for want of jurisdiction.

**Representation:**

Applicant : Mr A Bilcich  
Respondent : Mr D Rose

**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

*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 Aiden Bilcich was employed by GLS Enterprises Pty Ltd as trustee for the Glen Sims Family Trust and Bathurst Pty Ltd as trustee for the Rose Family Trust (**Family Trusts**) from 29 January 2019 to 25 October 2019 when he was notified of the termination of his employment effective on that day. The Family Trusts 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.
- 2 The application names the respondent as ‘Stockman Paper Merchants’ which is a business trading name. The Family Trusts submits that Mr Bilcich’s employer was the trustee for the Glen Sims Family Trust and the trustee for the Rose Family Trust. The two trusts are in partnership as the registered business trading name of Stockman Paper Merchants. The trustee for the Glen Sims Family Trust is GLS Enterprises Pty Ltd ACN 085 476 599. The trustee for the Rose Family Trust is Bathurst Pty Ltd ACN 057 689 460.

### **Question to be decided**

- 3 The questions to be decided in this matter are the correct name of Mr Bilcich’s employer, whether the employer 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.

### **Background and Evidence**

- 4 On 27 November 2019 the Western Australian Industrial Relations Commission (**Commission**) wrote to the parties proposing to hear the matter of the objection to the jurisdiction of the Commission on the papers unless one party objected. Neither party objected and the parties were invited to make submissions and file material relevant to the issues.
- 5 On 5 February 2020 the Family Trusts submitted, on a confidential basis pursuant to s 33(3) of the *Industrial Relations Act 1979* (WA) (**IR Act**), a letter from a partner of BDO Australia confirming that the Family Trusts are a partnership that carries on business of Stockman Paper Merchants and that the entity consists solely of trading activities associated with the conduct of a commercial enterprise. A copy of the Stockman Paper Merchants annual financial report for the year end 30 June 2019 and copies of the trust deeds for the Glen Sims Family Trust and the Rose Family Trust were submitted.
- 6 In the *Form 2A – Employer Response to Unfair Dismissal Application*, the Family Trusts included an extract from the ABN Lookup website displaying the current details, as at 18 November 2019. For ABN 72 770 426 173 the trustee for the Glen Sims Family Trust and the trustee for the Rose Family Trust trading as Stockman Paper Merchants dated from 1 July 2000. In addition, the extracts from the ASIC database as at 18 November 2019 for GLS Enterprises Pty Ltd and Bathhurst Pty Ltd were included.
- 7 Mr Bilcich was allowed time to make submissions and obtain the advice and assistance from his union, an industrial agent or lawyer. Mr Bilcich did not make any submissions.

### **Principles**

- 8 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 Family Trusts is a trading corporation the jurisdiction of the Commission to deal with the applicant's claim is therefore excluded.

- 9 *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].
- 10 Business trading names do not have an identifiable legal personality and cannot be employers.
- 11 A trust is also not a legal entity and it is the trustee, the person/entity responsible for administering the trust, who enters into the employment contracts. If the trustee is a company, it may be a constitutional corporation and a national system employer.

**Who is the Employer and is the Employer a Trading Corporation?**

- 12 'Stockman Paper Merchants' which is a business trading name, has no identifiable legal personality and cannot have been Mr Bilcich's employer.
- 13 The Family Trusts submits that Mr Bilcich's employer was the trustee for the Glen Sims Family Trust and the trustee for the Rose Family Trust. The two trusts are in partnership as the registered trading business name of Stockman Paper Merchants. The trustee for the Glen Sims Family Trust is GLS Enterprises Pty Ltd ACN 085 476 599. The trustee for the Rose Family Trust is Bathurst Pty Ltd ACN 057 689 460.
- 14 On the undisputed information and documentation provided by the Family Trusts I am satisfied that Mr Bilcich's employer was the two trustees.
- 15 I have formed the view that it is appropriate, in accordance with s 27(1)(l) and s 27(1)(m) of the IR Act, to order that the name of 'Stockman Paper Merchants' be amended to 'GLS Enterprises Pty Ltd as trustee for the Glen Sims Family Trust and Bathurst Pty Ltd as trustee for the Rose Family Trust'.
- 16 On examination of the materials submitted by the Family Trusts, I am satisfied that the Family Trusts engages in trading activities associated with the conduct of a commercial enterprise of the nature set out in *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)*.

**Conclusion**

- 17 The Family Trusts, the employer, is incorporated, and carries on trading activities of a commercial nature such that it can be described as a trading corporation and is a trading corporation. Mr Bilcich was employed by a national system employer and this Commission does not have jurisdiction to deal with Mr Bilcich's application for unfair dismissal.
- 18 An order will issue that the name 'Stockman Paper Merchants' be deleted and that there be substituted therefore the name 'GLS Enterprises Pty Ltd as trustee for the Glen Sims Family Trust and Bathurst Pty Ltd as trustee for the Rose Family Trust'.
- 19 An order will issue dismissing this application for want of jurisdiction.