

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

CITATION : 2020 WAIRC 00938

CORAM : COMMISSIONER T B WALKINGTON

HEARD : ON THE PAPERS

DELIVERED : WEDNESDAY, 2 DECEMBER 2020

FILE NO. : U 67 OF 2020

BETWEEN : RODNEY CHARLES NATION
Applicant

AND

ALBANY COMMUNITY RADIO INC.
Respondent

CatchWords : Unfair dismissal - Jurisdiction - National system employer - Trading corporation - Trading activities - Whether trading activities substantial - Not for profit

Legislation : *Fair Work Act 2009* (Cth)
Associations Incorporation Act 1987 (WA)

Result : Application dismissed

Representation:

Applicant : Mr R C Nation

Respondent : Mr C Cooper (of counsel)

Cases referred to in reasons:

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

Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Others [2010] FCAFC 11, (2010) 182 FCR 483

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

Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers) (1987) 67 WAIG 325

United Firefighters Union of Australia v Country Fire Authority [2015] FCAFC 1; (2015) 228 FLR 497

Reasons for Decision

- 1 Mr Rodney Charles Nation claims that his employer, Albany Community Radio Inc, unfairly dismissed him when it purported to make his position redundant.
- 2 Albany Community Radio Inc deny that Mr Nation was unfairly dismissed and contend that the job was no longer required and it had been decided the job Mr Nation was engaged to do would no longer be done by anyone.
- 3 In addition, Albany Community Radio Inc maintains that it is a national system employer for the purposes of the *Fair Work Act 2009* (Cth) (**FW Act**) and therefore the Western Australian Industrial Relations Commission (**Commission**) lacks jurisdiction to hear and determine Mr Nation's claim. As this matter has been raised, it is necessary for the Commission to determine the issue of jurisdiction prior to enquiring into and dealing with the substance of Mr Nation's claim.

Questions to Be Decided

- 4 The issue I must decide is whether, on an overall assessment, Albany Community Radio Inc is a corporation, and its operations and activities have the character of trading. If I conclude that it is a trading corporation the Commission lacks jurisdiction to hear and determine the claim.

Background and Evidence

- 5 The 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.
- 6 Albany Community Radio Inc submitted a signed witness statement of the Chairperson and attached an extract of the ASIC Association Summary, an extract of the Australian Charities and Not-for-profits Commission record, a copy of the Rules of Association for Albany Community Radio Inc dated December 2013, and a profit and loss statement for the period of 1 July 2019 to 30 June 2020. The witness statement described the operations and activities of the organisation and noted the nature of the arrangements for the raising of revenue to support its activities.
- 7 Mr Nation submitted an email in response contending that the respondent was a state system employer as he had understood that he had not been employed by a national system employer and that other employees had made applications concerning the Albany Community Radio Inc that had been heard by the Commission. Mr Nation did not contest the contents of the Albany Community Radio Inc Chairperson's witness statement concerning the operations and activities of the organisation and the arrangements for raising revenue to support its activities.
- 8 In response to the Commission's invitation to provide further details concerning his knowledge of any other applications concerning Albany Community Radio Inc which were relevant to the issue of jurisdiction, Mr Nation provided the name of the employees and the application references for three matters involving two former employees.
- 9 Subsequently, Albany Community Radio Inc advised by email that they had not previously been involved in any proceedings before the Commission.
- 10 On 23 November 2020, Mr Nation in response to the submissions made by Albany Community Radio Inc, reiterated by email the application numbers and employee names of the three matters he believes 'were undertaken through the Fair Work Commission / WAIRC'.

- 11 The application references cited are not applications to this Commission. The application references use the reference system adopted by the Fair Work Commission (FWC) which differs from that of the Commission. A search of the decisions database of the FWC and the Commission did not identify a decision being issued in any of the matters cited. Therefore, I conclude that neither the FWC nor the Commission have previously considered and determined the issue of whether the Albany Community Radio Inc is a national system employer or a state system employer.

Principles

- 12 Section 14(1)(a) of the 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 an employer is a trading corporation it is a national system employer, then this Commission does not have jurisdiction to consider, hear or determine an unfair dismissal application.
- 13 In accordance with the Western Australian Industrial Appeal Court's decision in *Springdale Comfort Pty Ltd trading as Dalfield Homes v Building Trades Association of Unions of Western Australia (Association of Workers)* (1987) 67 WAIG 325, the Commission is unable to proceed unless satisfied that the Commission has the necessary jurisdiction to do so.
- 14 In *Aboriginal Legal Service of Western Australia (Inc) v Lawrence (No 2)* [2008] WASCA 254; (2008) 89 WAIG 243 (*Lawrence*), the Western Australian Industrial Appeal Court 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 categorisations 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].
- 15 The decision of the Court in *Lawrence* has been cited with approval in superior appellate court decisions (see for example *United Firefighters Union of Australia v Country Fire Authority* [2015] FCAFC 1; (2015) 228 FLR 497 and in *Bankstown Handicapped Children's Centre Association Inc and Another v Hillman and Others* [2010] FCAFC 11, (2010) 182 FCR 483 (*Bankstown*)).
- 16 In *Bankstown* in recognising that the activities of the Association in that case were directed at the public good the Full Court of the Federal Court nevertheless concluded the operations and activities were trading activities and had a commercial character. The Federal Court noted the description of the relationship between the parties in the relevant contract and its overall activities [54].

Is Albany Community Radio Inc a Corporation?

- 17 I find that Albany Community Radio Inc is an incorporated body and upon its registration as an incorporated Association under the *Association Incorporation Act 1987* (WA) on 16 February 2005, it became a body corporate in accordance with that Act.

Is Albany Community Radio Inc a Trading Corporation?

- 18 The second question to be determined is whether the overall activities of the Albany Community Radio Inc have the character of trading activities.
- 19 The 'Rules of Association' set out the principal objects of Albany Community Radio Inc are to operate, maintain and conduct the business of operating an FM radio broadcasting, transmitting and receiving station at a designated site to be known as 'Albany Community Radio', provide for equitable and community access to the broadcasting station, cultivate an awareness and appreciation of all types of Australian music with particular emphasis on encouraging local performers and provide a forum for debating topical and community issues. As in *Bankstown*, the purpose of the organisation, however, is not necessarily determinative and an assessment of its activities and whether these have the character of trading is required.
- 20 To support its activities Albany Community Radio Inc receives revenue through different sources:
- a. Income from subleasing antennae of a Transmitter mast at Mount Clarence, Western Australia to several entities (transmitter income). The Transmitter mast is leased by Albany Community Radio Inc from the Department of Lands and Heritage.

- b. Various sponsors make payments to Albany Community Radio Inc in exchange for advertising ‘spots’ during on-air radio broadcast (sponsor income).
 - c. Membership is open to all interested persons and organisations and a fee is levied (membership income).
 - d. Donations may also be received (donations).
 - e. The Australian Taxation Office made a payment of \$10,000 in April 2020 as part of the stimulus package to support businesses during the COVID-19 crisis (stimulus income).
 - f. In 2017 a grant of \$20,000 for the payment of bookkeeper wages and IT equipment was received from the Community Broadcasting Association of Australia (grant income).
- 21 The Albany Community Radio Inc expends funds on staffing, licences, accommodation, communications, insurance and banking, subscriptions and travel.
- 22 In accordance with the principles in *Lawrence* it is necessary to establish whether the trading activities are sufficient to justify its categorisation as a ‘trading corporation’ and it is a question of fact and degree.
- 23 In 2019-2020 the revenue raised by Albany Community Radio Inc was \$131,890.92 from the following sources:
- a. \$74,274.04 from transmitter income representing 56% of total revenue.
 - b. \$45,373.79 from sponsor income representing 34% of total revenue.
 - c. \$10,000.00 from stimulus income representing 8% of total revenue.
 - d. \$2,243.09 from membership fees, donations and miscellaneous income representing 2% of total revenue.
- 24 I consider that the subleasing and sponsorship activities have the character of trading activities. These activities involve contracting with various organisations predominantly businesses for payment in exchange for provision of a service. That is, they have the character of commercial trade in services or elements of exchange: Re *Ku-ring-gai Co-operative Building Society (No 12) Ltd* (1978) 36 FLR 134 (139, 159 - 160) cited in *Lawrence*.
- 25 The two trading activities are the overwhelming sources of revenue and when combined represent 90% of the total revenue. In *Bankstown* [52] the Full Court observed that ‘there is no bright line that determines what proportion of trading activities is substantial’. The purpose of the Albany Community Radio station may not be commercial in nature, however, clearly the trading activities engaged in to support the operations of the organisation are not insubstantial, not trivial, insignificant, marginal, minor nor incidental.

Conclusion

- 26 For these reasons I conclude that Albany Community Radio Inc is a trading corporation. This finding reflects an overall assessment of the nature of the operations and activities on the material provided to me.
- 27 In concluding that Albany Community Radio Inc is a trading corporation I must conclude that this Commission lacks the necessary jurisdiction to hear and determine this matter and dismiss the application.