Industrial Court of New South Wales

CITATION: Valda June Kerrison v New South Wales Technical and Further Education Commission [2007] NSWIRComm 140

PARTIES:

APPLICANT Valda June Kerrison

RESPONDENT
New South Wales Technical and Further Education Commission

FILE NUMBER: IRC 7143 of2003

CORAM: Walton J Vice-President; Staunton J; Staff~

CATCHWORDS: Courts and Judges - Application to reopen appeal after judgment ¬Relevant principles - Failure to identify exceptional circumstances - Absence of irremediable injustice - Proper exercise of discretion ¬Application to reopen refused - Costs reserved.

LEGISLATION CITED:
Anti-Discrimination Act 1977
Industrial Relations Act 1996
Technical and Further Education Commission Act 1990

CASES CITED:

D'Orta-Ekenaike v Victoria Legal Aid and Anor (2005) 223 CLR 1 Kerrison v New South Wales Technical and Further Education Commission [2003] NSWIRComm 76
Kerrison v New South Wales Technical and Further Education Commission [2003] NSWIRComm 429
Kim Hollingsworth v Commissioner of Police [2007] NSWIRComm 7
Metwally v University of Wollongong (1985) 60 ALR 68
New South Wales Technical and Further Education Commission v Valda June Kerrison [2004] NSWIRComm 369
Ove Arup Pty Ltd v WorkCover Authority (NSW) (Inspector Mansell) (2005) 141 IR 78
State Rail Authority of New South Wales v Codelfa Construction Pty Ltd (1982) 150 CLR 29

Vienkata Narasimha Appa Row v Court of Wards; Ex parte Rajah Gopala Appa Row (1886) 11 App Cas 660

DATES OF HEARING:

17 May 2007

DATE OF JUDGMENT , 8 June 2007

LEGAL REPRESENTATIVES:

APPLICANT
Ms VJ Kerrison (In person)

RESPONDENT
Ms ES Brus of counsel Solicitor:
Ms J Burton Crown Solicitor

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INDUSTRIAL COURT OF NEW SOUTH WALES - FULL BENCH

CORAM: WALTON J, Vice-President
STAUNTON J
STAFF J

8 June 2007

Matter No IRC 7143 of 2003

VALDA JUNE KERRISON v NEW SOUTH WALES TECHNICAL AND FURTHER EDUCATION COMMISSION

Application by Valda June Kerrison to reopen appeal proceedings

JUDGMENT OF THE COURT [2007] NSWIRComm 140

1 On 17 May 2007, the Court dismissed an application by Valda June Kerrison ("the applicant") to reopen appeal proceedings and for the Full Bench to vacate orders made in those proceedings. These are the reasons for that decision.

2 On 9 December 2004, the Full Bench delivered judgment in respect of an appeal brought by the New South Wales Technical and Further Education Commission ("TAFE") against a decision of her Honour Justice Schmidt: New South Wales Technical and Further Education Commission v Valda June Kerrison [2004] NSWIRComm 369. The Court made the following orders:

(1) Leave to appeal is granted.

(2) The appeal is upheld.

(3) The judgment and orders of Schmidt J in Matter No. IRC 3124 of 2000 are set aside.

3 The Full Bench then said at [91]:

The matter is set down for further hearing in relation to costs and as to any orders that should be made in relation to earlier orders staying the decision of Schmidt J.

'4 In the proceedings before Schmidt J, Ms Kerrison had sought declaratory relief pursuant to s 154 of the Industrial Relations Act 1996 ("the Act"). The core issue for determination was whether the applicant had been medically retired from her employment with TAFE in accordance with the provisions of the Technical and Further Education Commission Act 1990 ~"the TAFE Act").

5 Schmidt J delivered the following judgments: Kerrison v New South Wales Technical and Further Education Commission [2003] NSWIRComm 76 (a judgment given on 21 March 2003); Kerrison v New South Wales Technical and Further Education Commission [2003] NSWIRComm 429 (a judgment given on 10 December 2003). Her Honour found that it could not be inferred that any person with authority to do so ever made a decision to cause Ms Kerrison to be medically retired from her employment with TAFE. It followed, as her Honour found at [214] that there had never been any valid, or effective, termination of Ms Kerrison's employment. The Full Bench rejected her Honour's conclusions and dealt with the construction of s 20 of the TAFE Act and whether TAFE caused Ms Kerrison's retirement within the meaning of that Act at [44] - [67] of its judgment.

6 After the Full Bench judgment was delivered, the appeal was listed on a number of occasions for directions so that the issue of costs and any orders in relation to the orders staying the decision of Schmidt J could be made. Ms Kerrison experienced a significant health issue soon after the judgment was delivered, which has resulted in the delay in finalising the appeal. In order to deal with the outstanding issues, the appeal was listed for directions on 12 February -2007. On that day, Ms Kerrison filed her application to reopen, together with an affidavit in support, relying upon medical reports that had been provided to the Court as to why the application was not made earlier. Directions were made for the filing and serving of written submissions. After these directions were made, the applicant filed the following additional material in support of her application to reopen:

(i) on 7 March 2007, a notice of special appearance and affidavit in support. This application was not pressed;

(ii) on 21 March 2007, an affidavit referring to emergency, ex debito justitiae. This matter was also not pressed;

(iii) written submissions dated 13 April 2007;

(iv) on 16 May 2007, an affidavit for emails to Mr Steven Davison, CEO HealthQuest, which was received by the Court as information in the form of submissions in support of the application to reopen.

7 The fundamental issue in these proceedings is whether the Full Bench has power to reopen the appeal proceedings. Ms Kerrison, who appears in person in respect of the application to reopen, contends as best as we can understand her argument, that this Court is a Court of last resort and in order to avoid an "irremediable injustice", it is appropriate for this Full Bench to reopen the proceedings.

8 At the outset, it is appropriate to observe that the jurisdiction to reopen is an exceptional jurisdiction. It is to be exercised only where warranted.

Otherwise, as we observe by reference to High Court authority, public policy in favour of the finality in litigation will be jeopardised. The question for consideration is, subject to whether there is- any jurisdictional basis to reopen the proceedings, could its invocation be justified? It is clearly important that Courts, in the interests of justice, do not fail to recognise when exceptional circumstances are made out. No less important, is that unjustified applications are discouraged.

Whether there is Power to Reopen the Appeal Proceedings - The Relevant Principles

9 The jurisdiction of this Court to reopen an appeal was recently extensively considered by the Full Bench, (Wright J, President, Walton J, Vice-President and Boland J) in *Ove Arup Pty Ltd u WorkCover Authority (NSW) (Inspector Mansell) (2005*) 141 IR 78.

10 The Court firstly turned to consider the distinction between the pronouncement of the Court's decision and the formal entry of a judgment or order stating:

[13] The distinction, in superior courts of record, between the pronouncement and the formal entry of a judgment or order is often an important one. A court has an inherent or implied power at common law to review, correct or alter its judgment or orders before the judgment or order has been entered: Smith u NSW Bar Association (No 2) (1992) 176 CLR 256 at 265 per Brennan, Dawson,

Toohey and Gaudron JJ. See also Autodesk Inc v Dyason (No 2) (1993) 176 CLR 300 per Brennan J at 308, per Dawson J at 317, per Gaudron J at 322; Codelfa at 38 per Mason and Wilson JJ. But it is evident that it will be "extremely rare" that a court would re-open a judgment which it has pronounced and that:

> The public interest in maintaining the finality of litigation necessarily means that the power to re-open to enable a rehearing must be exercised with great caution: *Wentworth u Woollahra Municipal Council (1982*) 149 CLR 672 at 684.

[14] Where a judgment or order has been formally entered or "perfected", the authorities relating to single judges and intermediate courts of appeal are very clear: subject to any contrary statutory provision there is no jurisdiction to re-open. In *Grierson v The King* (1938) 60 CLR 431 the High Court held that the jurisdiction of the Court of Criminal Appeal of New South Wales was confined within the limits of the Criminal Appeal Act 1912 and that when the Court has heard an appeal on its merits and given its decision the appeal cannot be reopened. Dixon J, with whom McTiernan J agreed, stated at 436-7:

> Under the Judicature system an action may be brought to set aside a judgment obtained by fraud, but it is an independent proceeding equitable in its origin and nature (*Ronald v. Harper* [(1913) V.L.R. 311, at p. 318] per *Cussen J.; Halsbury's Laws of England*, 2nd ed., vol. 19, p. 266, and the cases there collected, particularly *Jonesco v. Beard* [(1930) AC 298]. But under that system no court has authority to review its own decision pronounced upon a hearing *inter partes* after the decision has passed into a judgment formally drawn up (*In re St. Nazaire Co* [(1879) 12 Ch D 88]). If the prisoner has abandoned his appeal, the Court of Criminal Appeal in England will exercise a discretion to allow him to withdraw his notice of abandonment, notwithstanding that it operates as a dismissal of the appeal (*Halsbury's Laws of England*, 2nd ed., vol. 9, p. 273, and the cases cited in note 0). But in such a case there has been no determination by the court, and there is no English case in which, after such a determination, an appeal has been reopened or a fresh appeal has been entertained.

[15] In *Bailey v Marinoff* (1971) 125 CLR 529 it was held by the High Court (Gibbs J dissenting) that there is no inherent power in a court to -deal with an appeal which has already been dismissed by formal order, in conformity with an order pronounced, where the order was entered before an application to vary it was made. *Barwick* CJ stated at 530-531:

> Once an order disposing of a proceeding has been perfected by being drawn up as the record of a court, that proceeding apart from any specific and relevant statutory provision is at an end in that court and is in its

> substance, in my opinion, beyond recall by that court. *It would, in my opinion, not promote the due administration of the law or the promotion of justice for a court to have a power to reinstate a proceeding of which it has* finally disposed. In my opinion, none of the decided cases lend support to the view that the Supreme Court in this case had any inherent power or jurisdiction to make the order it did make, its earlier order-dismissing the appeal having been perfected by the processes of the Court. I would add that, however hard the case might seem for the would-be appellant the loss of its right of appeal derived from its own conduct or from that of persons for whom it must take responsibility. *The finality of the order dismissing the appeal does not seem to me to partake of injustice in the circumstances or to call for any departure from well settled principles, themselves essential in my opinion to the due administration of our system of law* (emphasis added) .

[16] Menzies J went somewhat further and stated at 532:

> Nor do I think a court from which no appeal lies, or continues to lie, has greater inherent power to recall a judgment than has a court from which an appeal, for the time being, does lie. The extent of the inherent jurisdiction of a court to revive proceedings cannot depend upon whether its decisions are appealable or not, or whether or not the appropriate steps to appeal have been taken.

[17] In *Gamser v The Nominal Defendant* (1976) 736 CLR 145 the High Court held that the Supreme Court of New South Wales had no power under the *Supreme Court Act* 1970, or the Rules of the Court, or by virtue of its inherent jurisdiction, to set aside a judgment by reason of circumstances occurring after a case had been finally disposed of.

[18] In Reardon the Court of Criminal Appeal considered it was bound by *Grierson*. At [40]-[41] *Hodgson* JA (with whom Simpson *and Ba*rr JJ agreed) stated:

> The authorities make it clear that, if an application to re-open an appeal is made before the judgment dealing with the appeal has been perfected, the Court has jurisdiction to re-open its consideration of the appeal, and that denial of procedural fairness will be a ground on which the Court may take that course. However, the situation is not so clear where. the application to re-open is made after the order of the Court has been perfected. Grierson is direct authority to the effect that the Court of Criminal Appeal has no jurisdiction to re-open an appeal once it has heard and determined the appeal and the order has been perfected. *Jones* suggests that this principle might not apply if a purported determination of an appeal in fact does not amount to a determination of the appeal because there has been a total failure to determine some of the grounds of the

> appeal. *Pantorno* and *Postiglioni* suggests the possibility that there might be jurisdiction to re-open an appeal where procedural fairness has been denied. In the Court of Criminal Appeal, *Lapa* suggests that there is no jurisdiction to re-open an appeal once the order is perfected, even where there is a denial of procedural fairness; but it could be said that that view is expressed obiter. The contrary view is expressed in [R v] *Saxon* [(1998) 101 A Crim R 71] and [R v] *Gust*, [[2000] NSWCCA 287] but again it could be said that the view is expressed obiter.
>
> In my opinion, what was said in *Jones, Pantorno* [v *The Queen* (1989) 166 CLR 466] and *Postiglioni* [*v The Queen* (1997) 187 CLR 295] is insufficient to displace the binding authority of *Grierson* to the effect, once an appeal has been heard and determined and the order perfected, there is no jurisdiction to re-open the appeal. This is subject to the slip rule, and the possibility of separate proceedings to set aside orders obtained by fraud. However, it is to be noted that this principle applies when an appeal has been heard and determined; and leaves open the possibility that if there are grounds of appeal which are not determined at all, it could be said that the appeal has not been determined. That is a possibility adverted to by *Sperling* J in Saxon; but in my opinion, it is not any denial of procedural fairness which would have the result that it could be said that an appeal has not been heard and determined. In my opinion, it is only if there is some ground of appeal which was argued but not determined by the Court that one might be able to say that a purported determination does not, in relation to that ground of appeal, amount to a determination of the appeal. Failure to deal with an argument that has been advanced, or deciding an appeal on a basis not properly argued, although possibly amounting to a denial of procedural fairness and thereby to an error of law, could not of itself in my opinion be a failure to determine the appeal such as could avoid the operation of the principle in *Grierson*. To that extent, I prefer the view expressed in *Lapa* to the contrary view expressed in S*axon* and *Gust*.

We note that none of the exceptions referred to by *Hodgson* JA apply in the present proceedings.

> [19] In *Codelfa, Mason* and *Wilson* JJ in their joint judgment touched upon the issue of whether a court of last resort, such as the High Court, had the power 1;(;> vacate orders that had not been perfected. At 38 their Honours stated (emphasis added):
>
> > Counsel for the Authority referred the Court to many cases to establish the jurisdiction of the Court to entertain the present application. We have no doubt that such a jurisdiction exists: *Rajunder Narain Rae v Bijai Govind Sing* (1839) II Moo lnd App 181 (18 ER 269). See also *Vienkata Narasimha Appa Row v. Court of Wards* (1886) 11 App Cas 660; In re

Harrison's Share Under a Settlement (1955) Ch 260. Nevertheless, it is a power to be exercised with great caution. There may be little difficulty in a case where the orders have not been perfected and some mistake or misprision is disclosed. But in other cases it will be a case of weighing what would otherwise be irremediable injustice against the public interest in maintaining the finality of litigation. The circumstances that will justify a rehearing must be quite exceptional. In Rae's Case, Lord Brougham said, in words which the Authority claims are apposite to the present case Rajunder Narain Rae v Bijai Govind Sing (1839) II Moo Ind App, at p 220 (18 ER) at p 284:

> It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where by some accident, without any blame, the party has not been heard, and an Order has been inadvertently made as if the party had been heard.

We note that *Codelfa* was not a case where judgment had been entered:

[20] In *DJL v The Central Authority* (2000) 201 CLR 226 the High Court (Kirby J contra) dealt with proceedings in the Full Court of the Family Court of Australia. The High Court held that the Full Court of the Family Court did not have power to re-open final orders after their entry. Importantly, it was stated by the majority (*Gleeson CJ, Gaudron, McHugh, Gummow and Hayne* JJ (at [43]-[44]):

> [I]n the present litigation, clarity of thought and the isolation of the true issues have not been encouraged by submissions expressed in general terms respecting the position in "intermediate courts of appeal". In the case of each such court, State or federal, attention must be given to the text of the governing statutes and any express or implied powers to be seen therein. Nor is it of assistance to consider the position with respect to this Court in the exercise of its entrenched jurisdiction as a court of final appeal under s 73 of the Constitution, or with respect to the Privy Councilor the House of Lords after *R v Bow Street Metropolitan Stipendiary Magistrate; Ex parte Pinochet Ugarte* (No 2) [2001] AC 119 a decision referred to by the Solicitor-General of the Commonwealth.
>
> We would add that the statement in De L *v Director-General, NSW Department of Community Services* [No 2J (1997) 190 CLR 207 at 215 that the power of the High Court to re-open its judgments and orders is not in doubt should not be misconstrued. In that case and in all of the authorities respecting orders of this Court which were referred to in that passage [*Wentworth v Woollahra Municipal Council* (1982) 149 CLR 6~; *Codelfa; Autodesk; Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994)

181 CLR 134] the applications were to re-open final orders and were made before entry of the orders in question. There is, as yet, no decision of this Court which turns upon the position after entry of its final orders.

[21] Callinan J stated at [189]:

> The decisions of the majority in *Bailey* and *Gamser* confirm that intermediate appellate, and certainly other statutory courts (absent clear provision to the contrary) lack inherent power to re-open perfected orders disposing of proceedings. Those authorities have not been doubted in this Court. The stated exceptions to this general rule are few and rarely found in practice. On the current authorities they are confined (statute apart) to the correction of formal errors and the like, fraud, or failure to give a party a hearing [see footnote 258 to the judgment]. This case is not an occasion for any extension of this narrow, and properly so, category of exceptions.

[22] In respect of what has been referred to in a number of the authorities as "intermediate appellate courts", it is, as we have already stated, transparently clear that subject to statutory provisions to the contrary and the stated limited exceptions such as fraud, such courts have no power to re-open perfected judgments or orders disposing of proceedings. Further, in so far as courts of last resort are concerned, the latest authority in that respect is DJL, which makes it clear that there is no decision of the High Court dealing with that Court's power to re-open final orders after they have been perfected.

[23] However, the High Court's admonition in DJL makes it plain that in considering whether there is power in a court to re-open an appeal after orders have been perfected, the focus is to be on "the text of the governing statutes and any express or implied powers to be seen therein" and not reliance on general expressions relating to intermediate courts of appeal or on the status of the High Court.

11 Their Honours then turned to consider firstly whether the orders of the Full Bench had been perfected, and if so, whether the Court had the power to reopen the appeal proceedings and vacate the orders made. Next, the Court considered the practice in relation to judgments and orders made by the Court at [26], concluding that pronouncement and entry occurred simultaneously, as entry is made in the written judgment and by its delivery in open Court. Their Honours then considered the question of whether this Court was an intermediate appellate Court or a Court of last resort, concluding as follows:

> [36] It may be arguable, therefore, this Court is a court of last resort and thus, despite the strength of the statements in Grierson and *Bailey v Marinoff* to the effect that once an order disposing of a proceeding has been perfected that proceeding (apart from any specific and relevant statutory provision) is at an end

in that court and is beyond recall by that court, in order to avoid an "irrremediable injustice", circumstances may render it appropriate for a Full Bench of this Court to re-open proceedings: *Codelfa* at 38.

[37] In the light of the provisions of s 179 (*Handley* JA in *Mitchforce* at [204] remarked that it was the widest privative clause he had seen), we intend to deal with the issues raised in these proceedings on the basis that this Court is a court of last resort (although we recognise that there remains an issue about that matter in light of the Hickman principle). In those , circumstances, we shall proceed to determine, in the exercise of our discretion, whether the circumstances of this matter -are sufficiently exceptional so as to warrant re-opening of the appeal proceedings. In doing - so, we are cognizant of the fact that the High Court in DJL has left open the question as to whether even a court of last resort had the discretion to re-open a perfected judgment.

12 Since the decision in *Ove Arup*, the Full Bench in *Kim Hollingsworth v Commissioner of Police* [2007] NSWIRComm 7 has had the opportunity to consider the terms of s 179 of the Act which are now different to what they were when considered by the Full Bench in *Ove Arup*. Section 179 is in the following terms:

179 Finality of decisions

(1) A decision of the Commission (however constituted) is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal.

(2) Proceedings of the Commission, (however constituted) may not be prevented from being brought, prevented from being continued, terminated or called into question by any court or tribunal.

(3) This section extends to proceedings brought in a court or tribunal in respect of a decision or proceedings of the Commission on an issue of fact or law.

(4) This section extends to proceedings brought in a court or tribunal in respect of a purported decision of the Commission on an issue of the jurisdiction of the Commission, but does not extend to any such purported decision of:

(a) the Full Bench of the Commission in Court Session, or

(b) the Commission in Court Session if the Full Bench refuses to give leave to appeal the decision.

(5) This section extends to proceedings brought in a court or tribunal for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction or declaration or otherwise.

(6) This section is subject to the exercise of a right of appeal to a Full Bench of the Commission conferred by this or any other Act or law.

(7) In this section:

decision includes any award or order.

13 Having considered s 179 in its current form, their Honours stated in Hollingsworth:

> [58] The terms of s 179, as they presently exist, make it clear that the Full Bench of the Court may not be regarded as a court of last resort with respect to a "purported decision... on an issue of jurisdiction". Such decisions are reviewable. That is to say, a purported decision by the Full Bench on an issue of jurisdiction does not produce a final judgment of this Court that forecloses the re-opening of the matter: see *Kirk Group Holdings Pty Ltd v Work Cover Authority (NSW)* (2006) 154 IR 310 at [28]-[50] per Spigelman CJ. This situation does not apply with respect to matters before the Commission as opposed to the Court, but as we have earlier noted, whilst this matter has an industrial aspect it is, due to the history of the matter, squarely before the Industrial Court and thereby attracts the provisions of s 179 (4).
>
> [59] It follows that this Court has no express or implied power under the Industrial Relations Act 1996 to re-open the orders made by the Commission in Court Session in Hollingsworth (No 2).

14 Ms ES Brus of counsel, who appeared for the respondent, quite properly conceded that the issue of the finality of the Court's decision turned on whether the orders of the Court were perfected. Ms Brus acknowledged that the costs order in the appeal remained unresolved, not because of any party's fault, but because of circumstances beyond the control of Ms Kerrison and this Court. Ms Brus submitted that if Ms Kerrison was allowed to take advantage of these circumstances to now seek to have the appeal reopened, that would be inherently unfair to the respondent and contrary to the principle that once a judgment is made in a- Court such as this, it is final and the respondent should be entitled to rely upon the finality of that judgment. The fact that intervening circumstances had left the perfection of that judgment unresolved for some time, counsel submitted, should not be allowed to give rise to a situation which would result in prejudice to the respondent.

15 We do not find it necessary to determine this issue as we have reached the firm view, for the reasons that we will now give, that in the proper exercise of our discretion the application to reopen the appeal should be refused.

16 In other words, even if we were satisfied that there is some residual implied discretion arising from being a Court of last resort, save for matters of jurisdiction, which we are not, we would conclude that there exists neither exceptional circumstances or an "irremediable injustice" warranting the reopening of the appeal proceedings. For the Court to exercise this discretion, it must be first satisfied that there is a need to avoid an "irremediable injustice" and that need is greater than the significant public interest of maintaining the finality of litigation. See [19] of Ove Arup citing *State Rail Authority of New South Wales v Codelfa Construction Pty Ltd* (1982) 150 CLR 29, set out earlier in this judgement.

17 *Codelfa Constructions* was referred to with approval by the High Court (Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ) *in Metwally v University of Wollongong* (1985) 60 ALR 68 at 70. More recently, the High Court (Gleeson CJ, Gummow, Hayne and Heydon JJ) in D'Qrta-Ekenaike v Victoria Legal-Aid and Anor (2005) 223 CLR 1 at [34] stated:

> A central and pervading tenet of the judicial system is that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. That tenet finds reflection in the restriction upon the reopening of final orders after entry and in the rules concerning the bringing of an action to set aside a final judgment on the ground that it was procured by fraud. The tenet also finds reflection in the doctrines of res judicata and issue estoppel. Those doctrines prevent a party to a proceeding raising, in a new proceeding against a party to the original proceeding, a cause of action or issue that was finally decided in the original proceedings. It is a tenet that underpins the extension of principles of preclusion to some circumstances where the issues raised in the later proceeding could have been raised in an earlier proceeding. (Footnotes omitted).

18 The application does not identify the existence of any exceptional circumstances in our view, such that would lead us to exercise our discretion to reopen the appeal in order to prevent an "irremediable injustice". Nor do we consider that any basis has been established by M$ Kerrison, whereby, on some wider criteria in the interests of justice, we should further hear her, after the giving of our judgment on 9 December 2004 on the issues sought to be ventilated in the reopening of the application. Ms Kerrison, in her written submissions, contended that:

> (a) the Full Bench had made errors which should be corrected and the failure to do so could bring the Commission into disrepute;
>
> (b) the failure to reopen and review the judgment of 9 December 2004 may create irreparable harm to the application of discrimination law under the Anti-

Discrimination Act which may not be able to be rectified later in the inferior Administrative Decisions Tribunal;

(c) the Full Bench was procedurally in error when it disallowed the applicant's contentions that TAFE relied on decisions and actions performed without procedural fairness;

(d) the application to reopen is in the public interest and the public had commenced acting by making an application ex debito justitiae to the Commission;

(e) TAFE Lawyers appear to have mistaken or misled the Commission into thinking a psychiatric label was sufficient to grant evidence of fault in Ms Kerrison.

19 During oral submissions, Ms Kerrison summarised the grounds justifying the reopening of the appeal to be, first, she had been denied procedural fairness, secondly, her removal from TAFE on the grounds of a presumed disability constituted discrimination and thirdly, she had been denied a proper medical assessment.

20 These grounds were supported by extensive particulars which, in effect, seek to challenge the Full Bench's construction of the TAFE Act, the Court's reasoning and its failure to consider the discrimination issue. The applicant, in effect, seeks that the Court's decision be treated as a nullity. Needless to say, it is not contended by the applicant that the alleged errors or mistakes made by the Court can, or should be amended by way of use of the "slip rule". In reality, the applicant is seeking to either appeal the Full Bench's decision or to ventilate before us matters which were not raised as grounds of appeal or contentions during the hearings giving rise to our judgment of 9 December 2004.

21 There can be no suggestion that the Full Bench proceedings were in any fashion irregular, or that either party was not accorded procedural fairness. During the appeal proceedings the applicant (respondent to the appeal) was represented by experienced counsel and the Full Bench with some reservations. allowed a contention to be argued by her (the denial of procedural fairness issue), which the Court observed had the potential to avoid the provisions of s 188 of the Act for a prospective appellant/cross-appellant.

22 Although the Court allowed the applicant's contentions to be argued and rejected them, the application now before the Court clearly seeks to re-agitate those matters. Similarly, despite the Court's determination as to the proper construction of s 20 of the TAFE Act, the applicant contends that this matter should be revisited, not because of any exceptional circumstances, but because "the Commission was mistaken or misled". We reject this submission. It would be entirely inappropriate, in our view, to permit Ms Kerrison to re-agitate these issues before us. Such an approach would be contrary to those principles which we discuss below. Nor, we would add, has anything in the grounds presented by Ms Kerrison in the current application provided the slightest basis for

reopening or .revisiting the conclusions we reached as to those matters (whether as grounds or contentions) in our decision of 9 December 2004.

23 In respect of the discrimination issue, it was not a matter pressed before Schmidt J, or on appeal. The grounds and reasons in support of the amended application for a declaration stated that:

> "... each of the decisions taken by officers of the TAFE Commission, HealthQuest and the Medical Appeals Panel in relation to the applicant's employment has involved: (a) denial of procedural fairness/natural justice; (b) improper purpose; (c) bad faith."

24 Ms Kerrison commenced proceedings in the Equal Opportunity Tribunal, the predecessor to the Administrative Decisions Tribunal ("ADT') prior to commencing proceedings before this Court. The ADT proceedings were stood over in accordance with the requirements of the Anti-Discrimination Act 1977 pending finalization of these proceedings. These proceedings have been listed for hearing for five days in October of this year. Clearly, the discrimination issue was not before this Court. The opportunity to argue these matters, to the extent relevant, was at the time of the hearing of the appeal. We would add that there would have been great difficulty in those matters being introduced in the appeal proceedings given the limited basis upon which Ms Kerrison had pursued her application for declaratory relief.

25 Turning to the applicant's contention that the application to reopen is in the public interest, we consider that there is an important public interest embodied in the principle of finality of litigation, a purpose to which the authorities referring to s 179 of the Act are directed. We consider that there does not exist, in this case, an exceptional circumstance that overcomes the fundamental principle of finality of litigation.

26 In the circumstances of this case, it is appropriate, in our view, to repeat the Full Bench's reference in *Ove Arup* at [45] to *Vienkata Narasimha Appa Row v Court of Wards*; Ex parte Rajah Gopala Appa Row (1886) 11 App Cas 660 also referred to in Codelfa at [39]:

> [45] Whilst any claim for relief in the Court of Appeal is, of course, a matter for the applicants, it was submitted in that respect that the preferable course, rather than the applicants seeking prerogative relief to which they allege they are entitled, is for this Full Bench to re-open and vacate the orders earlier made. We do not agree. Whilst we have proceeded on the basis that this Court is a court of last resort for the purpose of considering whether there are exceptional circumstances warranting re-opening, we are mindful of the force of what was said in Grierson and Bailey v Marinoff and the absence of any persuasive authority regarding the power of a .court of last resort to re-open proceedings after orders have been perfected. But also, we consider there does not exist in this case an exceptional circumstance that overcomes the fundamental principle of finality

of litigation. In this regard we note the reference to *Appa Row v Court of Wards Ex parte Appa Row* (1886) LR 11 App Cas 660 in Codelfa (at 39):

> Even before report, whilst the decision of the Board is not yet res judicata great caution has been observed in permitting the rehearing of appeals. In the last case to which we were referred, that of *Hebbert v. Purchas* (1871) L.R. 3 P.C. 664, where a litigant alleged, before report and approval, that he had been disabled by want of means from appearing and maintaining his case, the Lord Chancellor said: - "Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finalty '(sic)' of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused." There is a salutary maxim which ought to be observed by all Courts of last resort - Interest reipublicae ut sit finis litium. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

27 In these circumstances, we have reached the firm view that in the proper exercise-of our discretion, the application to reopen should be refused.

28 Finally, Ms Brus submitted that an attachment to the application to reopen which asserts, without any proper foundation, that a number of persons have committed a criminal act or acts, is scandalous and totally lacking in any relevance to either the appeal, or this application. The respondent seeks that the Court exercise its discretion and remove this document from the Court files.

29 In light of the conclusion that we have reached that this Court, in the proper exercise of its discretion, should decline to reopen the decisions and orders made by the Court on 9 December 2004, we can see no basis for the material complained of by the respondent to remain on the files. We therefore direct the Registrar to remove the document dated 6 February 2007, comprising 15 pages attached to the application to reopen filed on 12 February 2007, from the Court files.

ORDERS

30 The Court confirms and makes the following orders:

1. The application filed by Valda June Kerrison on 12 February 2007 to reopen matter No IRC 7143 of 2003 is dismissed.

2. The Registrar is to remove the document dated 6 February 2007, comprising 15 pages attached to the application to reopen filed on 12 February 2007 from the Court files.

3. The Court will sit at 10.00 am on Wednesday 18 July 2007 to determine the question of costs in the appeal and in respect of this application. It will also determine any issues arising from the earlier stay orders made in the appeal.