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INDUSTRIAL COURT
OF NEW SOUTH WALES

WALTON J VP
STAUNTON J
STAFF J

THURSDAY 17 MAY 2007

IRC07/7143 - NEW SOUTH WALES TECHNICAL AND FURTHER EDUCATION COMMISSION v VALDA JUNE KERRISON

Application by New South Wales Technical and Further Education Commission for leave to appeal and appeal against the judgment and orders of Justice Schmidt given on 21.3.03 and 10.12.03 in matter no 3124 of 2000

Ms E Brus for the Appellant
Respondent in person

WALTON AP: This matter has been listed today for a short hearing in the light of the written submissions filed in the proceedings to deal with various matters raised by Mrs Kerrison after the decision given by us on 9 December 2004, and before the consideration of the question of costs, which has then been reserved by us for consideration. The long delay in the intervening period might be explained on a number of bases, which are presently irrelevant, because the matter has been listed today to deal with those matters that Mrs Kerrison has identified as requiring consideration before we are able to consider the question of costs, and on her application, the question of costs should not be reached because of the matters she has raised.

Those matters have taken various forms, and I do not propose to do anything other than identify them in the broadest way so that the parties may be abundantly clear as to the broader subject matter. The centrepiece in the issues raised the question of a re-opening of the proceedings, which has two tranches, as it were.

Firstly, there is an issue as to the jurisdiction, that is our jurisdiction, to consider that application made by Mrs Kerrison, and secondly, as to the question of that matter, that is, as to the question next after the question of jurisdiction - assuming there is jurisdiction - whether there is a proper basis in any event to permit the proceedings to be re-opened at this stage, and various issues have been raised in that respect, including a question of whether there would be an irremediable injustice.

The second matter which seems to have crept into the submissions I list for the sake of completeness only, and that is some notion that on some basis the decision made

by us set aside - and I say no more than that other than it seems to have taken some feature in the various submissions - and lastly - and I won't attempt to define it, but identify it by reference to the document - there is what is described as a notice of special appearance filed by the respondent on 7 March 2007, with an accompanying affidavit raising various matters associated with that description.

I note that that application, if it be an application, postdates the application for reopening the proceedings which was filed on 12 February 2007. In respect of all of those matters, we have received various written submissions, which have been filed by the parties, and unless there is a desire to do so, I do not propose to list all of them, but merely note that we have received them and that we have read them.

We do note, however, that there is a somewhat unusual affidavit that has been filed late yesterday, which is described as affidavit for emails to Mr Stephen Davidson, CEO of HealthQuest. We are not sure why that material has been filed, or what relevance it has to the matters at hand, as I have described them, and it appears sensible somewhere near the outset of the proceedings, to deal with that matter. I am putting it in a different class to the affidavit which accompanied what is described as the notice of special appearance, which seems to be very much in the nature of a submission accompanying that notice, and therefore, raises no particular issue, other than the fact of that matter as raised presents itself in one way or another.

Mrs Kerrison, I think we should indicate to you that, firstly, we propose to, in the course of this morning's proceedings hear you as to anything further you wish to say in relation to the written submissions that you have filed, and in answer to the submissions of the appellant in that respect, and, secondly, to hear you in particular as to why we should receive the affidavit that I have just described as being filed yesterday.

I should indicate in doing so, in respect of that latter respect, that is the affidavit filed yesterday, that it will be unnecessary to rehear all those things that you have already put in writing, which obviously we have read. Just before I come to you in relation to the question of affidavit, I should find out what the appellant's position is in relation to it, and depending upon that, I will then call upon you to respond as necessary to do so.

RESPONDENT: Can I make it clear, if it wasn't clear in the affidavit, that I am not pressing the notice of special appearance, et cetera.

WALTON VP: I was going to ask you that a little bit down the road.

RESPONDENT: I'm not pressing that.

WALTON VP: So we do not need to attend to that matter?

RESPONDENT: No.

WALTON VP: That is what is intended by the first paragraph of that affidavit?

RESPONDENT: Yes.

WALTON AP: Thank you. With that clarification, Ms Brus, and without needing to rehearse any submissions, as it were, in support of what your position is, if you could just indicate what the appellant's position is in relation to that affidavit.

BRUS: We oppose it. We object to it being accepted by the Court.

WALTON VP: Mrs Kerrison, that being said----

RESPONDENT: May I speak why the affidavit went in?

WALTON VP: Yes, I need to hear you as to why we should receive it in the proceedings at this stage.

RESPONDENT: Because I am claiming this case first in the public interest, but I find it particularly interesting that now HealthQuest, who have been at the centre of all of this - I don't know how to put it without claiming something that HealthQuest may not wish to claim. However, the thing that I really wanted to put in was the case that formed part of the email.

In the second email in the blue printing at the back, there is a discrimination case and one of the things that I have been saying all through this is that it is discriminatory to simply say: here is a disability label, therefore you are no longer able to carry out the duties of your office - and this particular case, although we know in our heads the rationale behind discrimination, it should be more than that.

Nevertheless, I believe that the Court and many people can't get away from hearing the label and then there is the assumption that the person is less than other people without that particular label. This particular case - and I will ask you something before I go a little bit further. When I need to put in court cases, I have generally included them in the body of submissions, and things like that. Is there another method that I should have been using?

WALTON VP: Mrs Kerrison, for present purposes, as long as you identify what you have, that is the cases you rely upon, and what you say their relevance is, in other words, what their significance is - which again I think you have

done - in terms of the formal process of receiving them, for our part it is as good as any to have them received. Whether they are of any significance at the end of the day, of course, is another matter.

RESPONDENT: I accept that. I was trying to make sure that there wasn't some rule that I wasn't aware of that precluded information going in in certain circumstances, because that could be fatal to whatever I am trying to put.

WALTON VP: The difficulty you really face is not a technical or formal issue of that kind, but whether any material should or would be received by us at this stage of the proceedings. That is the real issue, I think.

RESPONDENT: I would ask that that affidavit go in because it has two cases there. In the first email there is a case identifying in very simple language how easily it can be shown that procedural fairness has actually occurred.

STAUNTON J: Fairness or unfairness, Mrs Kerrison?

RESPONDENT: Unfairness. Thank you. That is on page 4, "The right to procedural fairness and the general principles" - I presume everyone has read it, but it has been quoted more in some of the cases that I have seen on the Web. It is an example of procedural fairness, which is very simple for most people to use and understand, and it is particularly easy for me to use. A party must be given an opportunity to make his defence if he has any, and then skipping down, "Even God himself did not pass sentence .... same question was put to Eve also".

Throughout this case I have been saying that I was not given procedural fairness in the decisions that were made. No one has ever said to me - did you do something - and if it is proven well, we are going to terminate your employment or we are going to make other decisions, cutting off your pay, or we are going to make decisions and keep you out of work. On the basis of procedural fairness I have been asking, right back from when original application went in, for them to be declared null and void.

If the decisions and documents et cetera are in fact null and void because of lack of procedural fairness, there is not any evidence left for this Commission, which makes it a bit of a problem if there has been a judgment handed down on the decisions. That is why I have asked for this case to go in as part of this affidavit.

WALTON VP: But the decisions that you are referring to here, so that we can be clear about this, are the decisions by your former employer in relation to your employment, is that what you are referring to?

RESPONDENT: Not only that, but the steps that they took

to prop up what I say is a non decision, the manufacturing of allegations out of the blue, hundreds of miles away, and putting them in the files. We all rely on our reputation. Without our reputation we don't have much left. In one of the cases which I have already put into the Commission, procedural fairness applies to people's reputations. In other words, if someone is going to be - let's look at the present case.

If someone was going to be applying a psychiatric label to any professional person in this room, we would really want procedural fairness so that we could fight for someone, if someone was going to manufacture allegations that any professional person in this room was running around with guns, threatening homicide or suicide, and put them on our professional employment files, as they are, in my submission - we would want procedural fairness before they made a decision to do that. Instead of that, all of these decisions and actions - there's a whole list attached to one of - I'll just find it.

WALTON VP: Mrs Kerrison, while you are looking for that document, can I clarify this with you? I note you indicated that part of the reason that you want to put this before us is because you wish to refer to some authorities, but the real reason that this affidavit evidence is put forward is to establish a basis to say - that is, on your application - that the decision to remove you from service, for whatever reason, was wrong, and should have been overturned by us in our decision in this case, because of procedural unfairness.

When I say it was wrong, I am including in that your argument that it was ultra vires or void in some way, or that it was just procedurally unfair and, as it were, unfair because of that reason. All of this is to enable you to present an argument that at the end of the day the decision of the employer vis a vis you should be reversed as to the issue of procedural unfairness.

RESPONDENT: Am I understanding you in that the issue that you believe that I am making is that the decision of TAFE which removed me from office is null and void because of procedural fairness? That is part of it, but there is also the part where I have been also saying that discrimination is right through this, and the Commission is compelled to take into account discrimination. I am hoping that I will be given the chance to show you that simply removing a person from office on the grounds of a presumed disability is discrimination, and the Industrial Relations Commission or Court should not be backing anything like that. All of the decisions that were made to keep me out of the workforce - that is prohibited under the Antidiscrimination Act.

If we have a look at the Antidiscrimination Act, the Industrial Relations Commission is compelled to take into account the Antidiscrimination Act. They give an example

of a woman receiving less than a man and the Antidiscrimination Act is very strong on presumed or even real disability. In the document filed on 13 April 2007, on page 10, it talks about discrimination in work.

WALTON VP: If I add discrimination to the matters I have raised with you, that is, in addition to procedural fairness or unfairness as her Honour pointed out, all of this is a platform for an attack on the employer's decision, that is, your former employer's decision to remove you. In other words, you say that: I want to be able to present an argument that says that that decision was either ultra vires or wrong or unfair, because of (1) unfairness, procedural unfairness, or (2) because of discrimination, and----

RESPONDENT: And also because the judgment fell into, I believe, a trap of assuming that the words that HealthQuest happened to write on a document fulfilled all the requirements that were in the TAFE Act - that the Court presumed that an opinion hundreds of kilometres away was actually a finding, whereas the TAFE Act said that there had to be a finding that a person was unable to carry out the duties of an office.

HealthQuest simply say: we have found a disability, therefore, we are of the opinion that this person can't carry out the duties of office. That may sound very convincing when it is said by a doctor, because doctors are supposed to know these things. However, we are all humans and we can all make mistakes. Doctors also can make mistakes. That is why there are such things as - if a person does not think that a particular medical opinion is correct, they can elect to go somewhere else to get a second opinion.

WALTON VP: But Mrs Kerrison, can I stop you there, and I would ask you to listen carefully to what I'm about to say to you. If I add the third thing to the list I have been developing to you, that you just mentioned, that is that last issue about proper medical assessment and the like, are those not all arguments that you would wish to bring, if we permitted you to reopen proceedings, so as to re-agitate issues of this kind, after our decision has been given?

RESPONDENT: Not being familiar with the Court, I'm not sure how much I have to say, because if I don't say something at a particular time, it can be assumed that there is no reason----

WALTON VP: But the question I am raising with you is this. You wish us to reopen the proceedings.

RESPONDENT: I do.

WALTON VP: By which you mean any proceedings which we have given judgment on, save as to the question of costs,

except for the question of costs. You wish us to reopen proceedings so as to consider the merits of your case, and the merits of the case are what I'm asking you that you wish to agitate, are those things which you have been summarising this morning for us, namely, the question of procedural fairness, that's the first one. Secondly, the question of discrimination, and thirdly, the last issue that you raised as to the medical approach. But they are all issues left in waiting if you were permitted to reopen the proceedings, are they not?

RESPONDENT: Yes. Yes they are. I'm not sure what the Court relies on when it decides whether or not to reopen. Is it the strength of the information that I have put in? Is it on law of whether it can be reopened or not, and that has gone in? I'm not sure what the Court relies on to make that decision.

WALTON VP: At this stage I am just clarifying with you that that is what you are developing.

RESPONDENT: Yes.

WALTON VP: One of the reasons that you seek to reopen the proceedings is that you say that there are matters which we should have regard to that go to the question of justice, or irremediable injustice or something of that kind, which would warrant us revisiting the case or going back to the merits of the case.

RESPONDENT: Yes, your Honour.

WALTON VP: As I have said, we have read these documents, but are there any other issues of that kind that you say should be taken into account in us assessing whether to reopen the matter? That is, in addition to procedural unfairness and, as you describe it, discrimination and the medical assessment issue that you have raised?

RESPONDENT: They are the main areas. One of the problems of this case for everyone is the longevity of it all. It has been like a piece of string. One thing would happen and another and another and another over more than a decade.

In order to keep that piece of string going, it seems that all sorts of extra actions have happened, but the areas that you have outlined are the main ones, as far as I can recall. They are the ones that I really hope to be able to put to the Bench and hopefully make sure that everything is right.

WALTON VP: These are the main reasons you wish to introduce this new material?

RESPONDENT: Yes. The discriminatory nature of all those years and the lack of procedural fairness over all that time, including - and there is a list of more than 30

decisions and actions that were taken and that forms part of the information that you already had, and the fact that HealthQuest did not fulfil the exact wording of the TAFE Act, and also fundamentally, because that TAFE Act and similar Acts date back to heaven only knows how long, and obviously before the Antidiscrimination Act, and it does not take into account the recent, the entitlement to employees, which is written in the enterprise agreements such as that there must be an adjustment at work if an employee is actually sick, there must be considerations of adjustment to work and other things.

So I am asking the Commission to look seriously at that antiquated section and considering that everything is written up very well in the more recent enterprise agreements, where it has written in procedural fairness, and the steps to be taken if a person's employment is unsatisfactory in the workplace, that's another area that I'm asking the Commission to consider for the good of everyone.

WALTON VP: Ms Brus, strictly speaking, this affidavit, even if it was admissible on the ordinary base of admissibility, is an affidavit going to the question of what might be escribed as "what if". In other words, on one view of it, it is premature because it goes to matters that, as it were, would be agitated in evidence if there was permitted a reopening, and in that respect, if there was jurisdiction to reopen, and in turn, if there was jurisdiction, a discretionary basis to reopen. I'm wondering whether the material might be received on a different basis, maybe not in the form of an affidavit, as to matters that Mrs Kerrison would wish to agitate, if she was permitted to, as it were, reopen the proceedings.

In short, the matters that she summarised this morning orally, those things which she has put in writing and, thirdly, in the things which probably are in inappropriate form in the form of an affidavit, but that bring together some other cases, obviously these don't go to the question of jurisdiction, but if we are in the area of discretion, might - and I underline "might" - might be relevant to the question of whether there is irremediable injustice by looking at the matters that the application for reopening might wish to address, if the reopening was granted. I was wondering if there was a basis to receive it in that way?

BRUS: Certainly we would oppose it being received on the basis of having any relevance to the issue of jurisdiction, and, as it is currently cast, it is not an affidavit as such. If the Court is happy to receive it as a document by the respondent in support of one aspect of her case, then we would be not opposing that, and it would be a matter for the Court as to how you characterise it, but certainly we would say that the document as it currently is cast, has no relevance whatsoever to the matter of whether this Court has jurisdiction to reopen.

WALTON VP: Although it might be received, without the benefit of consulting with the other members of the Bench, whether it might be received as something like an aid to the submission, and not evidence per se, and that submission would be only a submission, not going to the question of jurisdiction, but a submission going to the exercise of discretion, if there be jurisdiction. I know that sounds convoluted.

BRUS: We are not uncomfortable with what you are proposing. It would seem that Mrs Kerrison has made unnecessary work for herself. She has already made reference to the Lord Fortescue case in her submissions.

WALTON VP: There is a good deal of overlap, which is one of the reasons I am raising this with you.

BRUS: We are comfortable with what you are proposing as to how the document might be taken by the Court.

WALTON VP: Mrs Kerrison, you have heard the discussion I have had with Ms Brus.

RESPONDENT: Yes.

WALTON VP: We will receive what is described as an affidavit filed on 16 May 2007 by you, not as evidence in the proceedings at this stage, but rather, as information in the form of submissions or an aid to a submission that you would wish to make in support of your case. In other words, we will have regard to it as part of the submissions that you are putting in support of the application to reopen, but not as evidence in the proceedings as such.

RESPONDENT: I'm happy with that. Thank you your Honours./

WALTON VP: That brings us to the stage, I think, where I think in the earlier discussion that we were having, I had taken you some way down the road of your submission as to why a reopening should be given, as well as submissions supporting the receipt of the affidavit. Are there any other submissions that you would wish to put orally, that is, in addition to that which you have said this morning, and the written material we have now received, about the question of reopening, either as to jurisdiction or discretion? I have been at pains to say to Ms Brus that we will deal with both matters this morning in a compendious way of dealing with the issues. In other words, if there was jurisdiction, why should we reopen the case.

RESPONDENT: Other than what I have already said?

WALTON VP: Yes, if there is anything supplementary or additional. I'm not asking you to summarise or repeat it,

but if there is anything further or additional to what you have already said.

RESPONDENT: Once again, this may not be the appropriate time, but because discrimination is so applicable right from the first, right through and even included in the Commission's judgment, that document that was filed last night, or yesterday afternoon, includes a case where the requirement to avoid implications of discrimination and how an organisation or a person can establish that they are not really discriminating against someone, and that what they are doing is completely reasonable - I would like to take the Court to that, because I have noticed that in the judgment that has been given, it has simply been accepted - there is a disability, therefore, that person is treated as a less person than others, and that comes into the discrimination.

It is unlawful for people to discriminate against a person on the grounds of disability and for an employer to do so in the terms and conditions of employment which the employer affords an employee. The terms and conditions of my employment were changed by denying the employee access, or limiting access, and other changes, et cetera, or by dismissing the employee. However, the particular case I refer to - I would like the Commission to have a quick look at.

The question that this case posed was based on a man who applied to be a police officer, and he was colour blind, so there was a disability, and the Court had to decide "Did the complainant have a disability within the legislation", or a presumed disability, and "did the employer or prospective employer refuse the complainant's application because of that disability". And, of course, they did, which set up straight out the disability, but there is a defence in that, "A defence is available if however there is a real reason .... ", and the defence that they set up was that they had to identify the disability and then they had to know the characterisation of that disability and it then had to be applied, particularly to the duties of that very person in the particular job, and in the case of the policeman, they had to be able to show what that disability would affect in the job, and they came up with the disability that they found, and the characterisations were that "He would, on occasions, misname colours, be subject to a high risk of accident by reason of a failure to see red lights sufficiently quickly ... recognition of single colour".

That shows that even if a person does have a disability, the assumption that they are therefore immediately incapable, has to have a defence, if it is to be respected. The Commission in the judgment has not taken into account any statement of duties which I had, and nor has HealthQuest and nor has TAFE, which means that from the time that they began to change my terms of employment, all the way through, these steps should have been taken,

and I would be agitating that the Commission should be also taking these steps in the wording of its judgment, otherwise that judgment is going to stand with everyone's names on it, including mine, of a disability or assumption of disability.

The Commission is compelled to take into account discrimination and also should note the enterprise agreement guarantees to the employee, that these sorts of things must not happen, and I would be agitating that.

WALTON VP: Mrs Kerrison, can I ask you one question then as to the matters that you identified. You identified this morning, I think in summary, the procedural unfairness point.

RESPONDENT: Yes.

WALTON VP: And the discrimination issue.

RESPONDENT: Yes.

WALTON VP: The question of the medical assessment and you have developed them in various ways. Are there any of those matters that were not raised by you or those representing you in the proceedings either before Justice Schmidt or before the Full Bench?

RESPONDENT: I'm sorry. There were too many negatives there, and I got lost.

WALTON VP: I will try and straighten it out.

RESPONDENT: Thank you.

WALTON VP: Of the matters that you have identified as being matters appropriate for us to consider to reopen the case, are there any of those matters which you have not raised before in the proceedings either before Justice Schmidt?

RESPONDENT: No.

WALTON VP: Or the proceedings before the Full Bench?

RESPONDENT: No. The original application included procedural fairness and included discrimination. The wrongs of the medical assessment - the original application included all those things with the request that those documents and decisions be made null and void, and that discrimination was a big issue. They were all in it.

WALTON VP: Thank you. Ms Brus, as identified earlier, we will hear you as to both matters, that is, jurisdiction and discretion, under the heading of reopening. While I think the issue of setting aside has been raised in the respondent's submissions, I think it really is either, as

a matter of form or logic or even argument now put in this way, that the decision as it were would be set aside if a reopening were granted. If you could address those matters but, as it were, with an eye to the fact that we have read both of the submissions that you have made and perhaps given that this jurisdiction submission seemed reasonably succinct, with particular attention to the discretion component.

BRUS: I can assure you I am not going to regurgitate the written submission. The matters raised by Mrs Kerrison this morning we would submit have been amply addressed in this Court's decision on the original matter, particularly the issue of procedural fairness. The Court will no doubt recall, as included in their decision, that points of contention were raised on behalf of Mrs Kerrison to agitate the very issue of procedural fairness, the one matter which she has spent some time talking to you about this morning.

The Court allowed her arguments to be heard and to be put and to be considered and the Court determined that notwithstanding those arguments, the matter before it was such that they should not be accepted. Mrs Kerrison has not put forward one piece of new information to this Court to indicate why your original decision was anything other than a proper decision, and indeed, we would submit that she cannot, because those arguments have been run. They have been heard, and they have been decided.

I believe the difficulty with the position adopted by Mrs Kerrison is that she fails to grasp that the matter before her Honour Justice Schmidt at first instance, and before this Court, dealt with a decision by TAFE to terminate her employment, or to medically retire her from the teaching service. This was a point addressed in the appeal decision towards the end. In paragraph 88 the judgment says, "The decision that is the subject of .... section 20 of the Act".

That is the matter before Justice Schmidt and that is the matter that was before you and that is the matter which has been resolved and finalised. Mrs Kerrison indeed wishes to not only reopen the original matter, but in some respects she wishes to reopen the original matter with a twist, and that twist is what would appear to be a whole raft of things, including, but not limited to, the decisions unstated of various persons unknown, over a period of time, unspecified, leading up to and subsequent to the end of her employment pursuant to section 20 of the Act.

It is because of the approach Mrs Kerrison has adopted that we would say it is most improper for this Court to extend its jurisdiction in Mrs Kerrison's favour. She not only wishes to have her matter - that is the matter considered at first instance and on appeal - reopened, but indeed she wants to have a whole range of issues

revisited, or at least visited by the Court. That is not what is possibly contemplated in the meaning of the very vague irremediable injustice. I do not profess to have any understanding of that term in any great depth, but what Mrs Kerrison is raising would seem to be, because all these things need to be investigated, because all these things have happened to me, it would be irremediable injustice if they were not. That is what we understand Mrs Kerrison's submissions to be.

The Court, even if it was inclined to, cannot investigate anything that was beyond the original application, or the matter before you on appeal. That would require a recasting of the original application and the decision that was the subject of the challenge or a decision of Dr. Wilmott. All those other matters were the subject of the evidence before Justice Schmidt and there was indeed some commentary about the extensive nature of the proceedings before her Honour at first instance.

Those matters have in fact distracted Mrs Kerrison and, to some degree the Court, from what was the real issue and the real issue was identified by this Court in paragraph 88 of its judgment. That matter has been resolved and, as we would say, has been put to bed. The orders have been made, save as to costs, and there has not been one argument put forward to this Court, we would submit, that would (a) allow you to consider that you have any jurisdiction because Mrs Kerrison has not identified any jurisdictional basis and (b) she has not given any reason why - even if you are able to find such jurisdiction - why you should exercise your discretion.

WALTON VP: Can I ask you to address those same considerations in relation to the question, either raised or now raised, concerning discretion?

WALTON VP: Mrs Kerrison has identified the issue raised, I think in her application at first instance.

BRUS: I do not have a copy of Mrs Kerrison's original application with me, and I am struggling to recall whether it was identified or whether it was simply alluded to. The argument as I understand it was never put forward as a specific and separate argument that the issue of discrimination was one that should be taken into consideration. As I recall, the issue of discrimination was not raised other than in passing in the issue before this Court. So it has not been raised at any level with any degree of force that I have any recollection of.

I would put a caveat on myself, on my recollection, because I would like to go back and trawl through transcript with greater intensity. But I might add, the issue of discrimination in respect of what occurred is the subject of separate proceedings, which Mrs Kerrison is still proceeding with, and which may well be finalised this year.

WALTON VP: It may be helpful if you would put on a short note just identifying - not by way of argument - but by way of notation what references you say exist in the proceedings as to that matter.

BRUS: Yes. Could I make this comment, whilst Mrs Kerrison is quite right in relation to the Industrial Relations Act requiring this Court or Commission to take into account the Antidiscrimination Act, the position which I think is being put forward by Mrs Kerrison is in some respects this Court should usurp the role of the Administrative Decisions Tribunal in respect of a claim of discrimination.

This matter was never agitated as a claim of discrimination on the basis of disability or perceived disability. I direct the Court back to paragraph 88 of the decision, the matter that was before this Commission and ultimately this Court was the validity of the decision of Dr Wilmott and it was never ever pursued, or agitated, as a case involving discrimination. Certainly it has been mentioned and traversed, but not with it being the primary focus of a primary driving force behind the claim.

WALTON VP: I think I saw somewhere in the papers proceedings elsewhere in the Antidiscrimination Tribunal was held over for some time.

BRUS: Yes, the proceedings commenced in the ADT and in this Commission roughly around the same time.

STAUNTON J: Which proceedings here are you talking about?

BRUS: The initial proceedings. The ADT proceedings were commenced when it was known as the EOT or they were commenced prior to the proceedings in this Commission.

There is a provision in the Antidiscrimination Act, if proceedings are on foot here, then the matters in the ADT or EOT are put on hold pending finalisation, because obviously if there are the same facts and circumstances, you do not want the parties to be in two jurisdictions fighting over the same matter. At our request, those proceedings were put on hold pending the finalisation of these matters.

The current status of the ADT proceedings is hearing dates have been set for October and five days have been set. As to how or what material the tribunal wishes to accept, or to have regard to, is yet to be determined, and there will be obviously directions hearings before that Tribunal to establish what parts of the proceedings in this Commission can or will be used.

WALTON VP: I do not think it will be necessary then to provide the note that I referred to, following that last submission.

BRUS: I really do not have anything further to add, other than to say this again, there is no jurisdiction to do what Mrs Kerrison is asking you to do. The matter has been well canvassed; the appeal before you provided Mrs Kerrison with significant opportunities to air before you the various applications and various concerns. You have considered them and determined the matter should now be finalised. The orders set out in judgment 1 to 3 should be perfected and the matter of costs should be resolved as a matter of some urgency.

WALTON VP: As to the question of jurisdiction, is there any impact upon the submissions that you make in consequence of the issue of costs not having been resolved at this stage?

BRUS: If I understand the question, is the order perfected because the matter of costs is not resolved---

WALTON VP: You can answer whichever way. The question I think was plain enough.

BRUS: I do not believe so. The question is still the same. The judgment has been determined. The orders have been made. The onus is still on Mrs Kerrison to provide to you not only the reasons as to why you should revisit your judgment and we would submit none of the reasons she has put forward are sufficient; and secondly, what provision of the Act would permit you to reopen what is a final decision, given on the perfected decision. There is nothing, we would say, that is before you, to enable you to do that.

The issue of finality is one that turns to a degree on whether the orders are perfected, and it is perfectly understandable, orders are perfected when all orders are perfected, including the cost order. But the cost order

in this case has been unresolved, not because of anybody's fault, but because of circumstances beyond the control of the respondent and this particular court. If Mrs Kerrison is allowed to take advantage of those circumstances to now seek to have these matters reopened, and re-agitated, that would be inherently unfair to the respondent and it would be contrary to the notion 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 decision and the fact intervening circumstances have left the perfection of that judgment unresolved for some time, should not be a situation which acts to the prejudice of the respondent, which it would in these circumstances.

WALTON VP: Mrs Kerrison, is there anything you wish to put in reply?

RESPONDENT: Yes. Obviously, I do not agree with what has been said. One of the things which has come up - until the case is perfected, it can be revisited. The discrimination matter has been throughout the Court case, to the extent there were many allusions to the phrase "medical retirement" and in the judgment handed down by Schmidt J, she did not use that phrase "medical retirement".

It was not until this Court decided to throw out what had happened and what we had all seen happen in the previous court before Schmidt J, that the Court overturned things and decided Dr Wilmott had made all sorts of decisions when that was not what was seen and heard by all of us in the Court, and made findings that people have done various things.

When Dr Wilmott came into the next court case, Dr Wilmott never said he made any decision or even seen the possible fraudulent retirement certificate. But this Court decided all these things had happened. It had not been agitated about procedural fairness, with Schmidt J. We all saw Dr Wilmott did not know - and this is what I believe happened - did not know anything about the retirement certificate. He had just seen some letter.

It overturned all of that and started using the discriminatory offensive phrase "medical retirement". It used to be that people could apply the phrase "age retired" and it used to be in the olden days people could be forced to retire if they got pregnant or married. But one judgment the Court handed down suddenly used the phrase "medical retirement" and that stands as offensive to the Antidiscrimination Act and where we are nowadays, I believe this should be opened and we should make sure the judgment is a fair judgment which sets a precedent for State cases and Federal cases, and all sorts of cases.

If everyone can now say "This person is 60 years old, therefore they are age retired", or, "This person has a disability, therefore they are medically retired", that

these offensive tags in court judgments I believe should be looked at by the Commission, because it is 2007 now, it is not before the Antidiscrimination Act, it is not back in the days when people could be forcibly retired for any number of reasons under the Act.

Because of the persuasiveness, no doubt, of claims about what Dr Wilmott did and what other people did, which was not shown in the lower Court, for me to now have to wear that things weren't pursued in that court, is a little bit tough, because I can't go back there, and investigate things. It is a point members of the public have actually written to all of these people asking, "Did you give procedural fairness?"

All these people, including Ms Brus, and lawyers and other people, not one of them have come back and said "yes, there was procedural fairness, and it happened on such and such a day". So all of these decisions and things which have happened against me in order for TAFE to keep me out of the workplace, when there has never been any finding that I have ever done anything wrong in the workplace, it is a little rough for me to wear, because the length of time this appeal panel can look at things is so short, compared to the time when Schmidt J worked so hard on being fair to everyone, including myself.

She saw the witnesses come in, she saw Dr Wilmott could not help at all, regarding any decision or when any bits of paper came into TAFE. The department had barristers and lawyers and everything they wanted. They also knew we had agitated in our amended application there was lack of procedural fairness right through, they should have had the legal knowledge to say, "Dr Wilmott, did you accord procedural fairness in such and such a decision?"

They did not. What we all saw and heard was Dr Wilmott did not know anything about the decision. Dr Ramsay said, "I thought it was a case for HealthQuest". They knew nothing about the retirement certificate when it was floating around or anything that happened as a result of that. Schmidt J saw that and I believe the appeals Court should be aware they were not in a position to see what happened, to see the blank looks on these witnesses, who are going to go into the Administrative Appeals Tribunal and when someone says, "What day did you make the decision or finding on such and such", and they say, "I don't know anything about it", it is a problem.

I realise it is a problem and I apologise, it is difficult. However, that is why I have been agitating procedural fairness, because no procedural fairness whatever happened regarding the HealthQuest document. If it is null and void we don't have to worry who did what. It is null and void and its existence doesn't really matter.

Regarding other issues, where we have spent a lot of time

trying to decide what Dr Ramsay thought or HealthQuest thought, if it is simply null and void, it can be as simple as asking people, "Did you accord procedural fairness?" and if so, to supply that information. It could be by way of affidavit or telephone hook-up or something, to simply look at the main areas and if they are null and void, we can all come out squeaky clean, because any wrong assumptions this Commission has made about who did what, it will make this Appeals Court look as if it has egg on its face when the same witnesses come in.

So, it won't matter if it is null and void. So whatever Dr Wilmott did or may not have done, if there is no procedural fairness, nothing happens. Whatever HealthQuest or any other decision the respondents may want to rely on, if there was no procedural fairness it is null and void, and we do not have to angst over who did what over what time, because it is too hard when a lot of it is simply good talking from the other side, to make smokes and mirrors.

Perhaps it could be done by way of affidavit or reopening a telephone hook-up or something like that, but I believe that would be the fastest and easiest way for us to come out with justice, because it is natural justice which is important.

WALTON VP: We propose to adjourn. We would ask the parties to wait.

SHORT ADJOURNMENT

WALTON VP: We have given some consideration to whether we should reserve our decision in this matter. However, given the long history of the proceedings since we rendered judgement in the matter on 9 December 2004, we consider it appropriate for us to deliver judgment in relation to the application or applications made by Mrs Kerrison, which have caused us to sit today, to provide some very short reasons in relation to that judgment, and then to take further steps, as required, in relation to the proceedings.

As to the judgment at hand, we note in the proceedings this morning, that Mrs Kerrison did not press that aspect of her applications which fell under the application described as notice of special appearance filed on 7 March 2007, but otherwise proceeded with her various applications to either reopen the proceedings or have them set aside.

We have determined to reject those applications. In doing so, we have formed the view essentially that irrespective of the question of our jurisdiction to do so, in the exercise of our discretion, we consider that it would be inappropriate to grant the applications as pressed.

In short, we do not consider a proper basis has been established for us within jurisdiction to take an appropriate application to reopen the proceedings in this matter, or upon any of the bases identified by Mrs Kerrison to agitate further as to the merits of the matter if allowed to do so, and to set aside the decision which we have earlier given.

All of that summary is under the broad heading dealing with the applications to reopen the proceedings. That therefore concludes all of the matters in the proceedings before us, except for the question of costs. Again, for the same reason, that is, given the rather lengthy history of the matter, what we propose to do is to fix the hearing of the question of costs with the parties, and in doing so, indicate that we will render our full reasons in relation to the rejection of the applications heard today before we sit to hear the question of costs.

We presently have in mind, subject to availability, that we would hear the question of costs on Wednesday, 18 July or Friday 20 July, and make provision for the filing of submissions preceding that date, or one of those dates, with a view to hearing of the cost application, being a short hearing as to supplementary oral submissions that might be made on the day in question.

So the question to both Mrs Kerrison and to you, Ms Brus, is as to whether you are available on either of the days in question? We do not propose a particular time at this stage.

BRUS: The 18th is suitable, but not the 20th.

WALTON VP: Any problem with you appearing on Wednesday 18 July, Mrs Kerrison?

RESPONDENT: Towards the end of the week is better, if possible. If not, that will probably be okay.

WALTON VP: It is a Wednesday.

RESPONDENT: Yes, Wednesday would be fine.

WALTON VP: We had in mind 10 am, is that suitable to both parties?

BRUS: Yes.

RESPONDENT: Yes.

WALTON VP: We will fix the question of the hearing of costs for 10 am Wednesday 18 July 2007. As to the question of programming, that really should put you going first, I think, Ms Brus, in relation to that matter. We assume that you are continuing to press the application for costs?

BRUS: Yes. The appellant's application for costs was not just the standard cost argument but there is a matter unresolved with regard to a stay application which your Honour heard and arrangements that were put in place with regard to payments that were made to Mrs Kerrison from a particular point in time. That would be addressed by way of an affidavit and I think it will be self explanatory to the Bench, but I just would indicate there would be that element as well as what would be a fairly standard cost argument.

WALTON VP: That is payments made in the nature of salary or the equivalent thereof?

BRUS: Yes.

WALTON VP: Over a period of time?

BRUS: yes.

WALTON VP: Which would now be a fixed period?

BRUS: Yes. We would be seeking back pay of that particular amount of money and that is something we will address in our submissions and that would be by way of an affidavit which sets out the details of payments, and also the background by way of the transcript of the proceedings that were before yourself in December 2005, I believe.

WALTON VP: Are you seeking the repayment of those moneys?

BRUS: Yes, we will be.

WALTON VP: So this relates to the matter we raised in the last paragraph of our judgment?

BRUS: Yes, the issue of the stay orders agreed between the parties and the arrangements put in place with regard to payments from a particular point in time.

WALTON VP: Do you intend to address the issue of costs at first instance?

BRUS: Yes.

WALTON VP: And are you proposing to quantify the amounts?

BRUS: Yes, your Honour.

WALTON VP: It might be useful to do a submission in all respects.

BRUS: Yes.

WALTON VP: How much time do you need to prepare all of that?

BRUS: If we had fourteen days, that would be sufficient.

WALTON VP: Say, to 4 June, is that sufficient?

BRUS: Yes.

WALTON VP: Mrs Kerrison, I was proposing we give you a month to reply. Would 2 July be suitable for you, that is approximately a month from receipt of the appellant's submissions?

RESPONDENT: It probably would be.

WALTON VP: I am taking the matter as close as I am to the actual date for hearing, which is the 18th.

RESPONDENT: Yes, that will be fine.

WALTON VP: I do not propose, Ms Brus, there would be a necessity to reply unless you had some particular desire to do so.

BRUS: No, it can be attended to at the hearing.

WALTON VP: We will fix the matter to hear those issues which are described in paragraph 91 of our decision of 9 December 2004, namely, the issue as to costs and issues arising from the earlier stay orders. Those matters will be fixed for a short hearing orally at 10 am on Wednesday 18 July 2007, and we make orders there be filed written submissions in relation to those matters, in the case of the appellant, by 4 pm Monday 4 June 2007, and in the case of Mrs Kerrison, the respondent, by 4 pm on Monday 2 July 2007. We note our reserved decisions as to reasons will be given prior to the date fixed for hearing.

MATTER ADJOURNED TO WEDNESDAY 18 JULY 2007 FOR HEARING

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