SUPREME COURT OF QUEENSLAND

CITATION:	*The Electrical Trades Union of Employees Queensland v The President of the Queensland Industrial Court & Ors* [2006] QSC 076
PARTIES:	**THE ELECTRICAL TRADES UNION OF EMPLOYEES QUEENSLAND** (applicant) **v** **DAVID HALL, PRESIDENT OF THE QUEENSLAND INDUSTRIAL COURT** (first respondent) and **ERGON ENERGY CORPORATION LIMITED** (second respondent) and **ERGON ENERGY PTY LTD** (third respondent) and **ENERGEX LIMITED** (fourth respondent) and **ENERGEX RETAIL LTD** (fifth respondent) and **SERVICES ESSENTIALS PTY LTD** (sixth respondent) and **SPARQ SOLUTIONS PTY LTD** (seventh respondent) and **QUEENSLAND ELECTRICITY TRANSMISSION CORPORATION (POWERLINK QUEENSLAND)** (eighth respondent) and **MINISTER FOR INDUSTRIAL RELATIONS** (ninth respondent)
FILE NO:	BS 2355 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 April 2006
DELIVERED AT:	Brisbane

HEARING DATE: 6 April 2006

JUDGE: Chesterman J

ORDER: **The application is dismissed.**

CATCHWORDS: INDUSTRIAL LAW – QUEENSLAND – APPEALS – APPEAL TO SUPREME COURT –where the second to eighth respondents made certified agreements – where, for the term of the agreements, extra claims were prohibited – where the applicant subsequently successfully applied to the Queensland Industrial Relations Commission to amend the award – where the Commission's decision was set aside by the Industrial Court and ordered injunctive relief against the applicant –whether the Industrial Court's decision involved a jurisdictional error – whether the Supreme Court has jurisdiction to entertain appeals from the Industrial Court

Industrial Relations Act 1999, s 248, s 277, s 341, s 349
Judicial Review Act 1991, s 18(2)

Bray v F Hoffman-Le Roche Ltd (2003) 130 FCR 317, cited
Carey v President of the Industrial Court of Queensland and Department of Justice & Attorney-General [2004] QCA 62, considered
Parisienne Basket Shoes Pty Ltd v Whyte (1937-1938) 59 CLR 369, applied
Re Racal Communications Ltd [1981] AC 374, applied
Squires v President of the Industrial Court of Queensland & Ors [2002] QSC 272, considered

COUNSEL: Mr D Hinson SC with Mr M O Plunkett for the applicant
No appearance by the first respondent
Mr A K Herbert for the second to eighth respondents
Mr J Logan SC with Mr D Marks for the ninth respondent

SOLICITORS: Hall Payne Lawyers for the applicant
Deacons for the second to eighth respondents
Crown Law for the ninth respondent

[1] The second to eighth respondents are 'State electricity entities' which transmit, supply or sell electricity. Between 30 May and 21 July 2005 they, and their employees, made certified agreements in accordance with the provisions of the *Industrial Relations Act* 1999 ('the Act') pursuant to which the terms and conditions of those respondents' employees' employment are regulated. All of the agreements will expire by effluxion of time in 2008.

[2] The certified agreements are not identical but are sufficiently similar in their terms to allow the application against the second to eighth respondents to proceed to determination on a common point and to allow the point to be illustrated by reference to one only of the agreements.

[3] The certified agreement to which the third respondent was a party provided (by cl 1.4) that it applied to the second and third respondents; their employees who are employed in, or in connection with any calling, trade, craft, vocation or profession referred to in the Electricity Generation, Transmission and Supply Award – State classification structure ('the Award'), or in the transmission, distribution, supply or sale of electricity; and the unions who signed the agreement. The applicant was a signatory.

[4] Clause 1.4 also provided that if there were any inconsistency between the terms of the agreement and the corresponding terms of the Award the terms of the agreement should take precedence, but that where the agreement was 'silent on an issue, the … Award shall apply.'

[5] Importantly for present purposes cl 1.7 of the agreement provided:

> 'It is agreed that during the life of this Agreement, no extra claims shall be made by either party in terms of employment conditions …'

[6] Clause 3.8 of the agreement dealt with the subject of allowances to be paid to employees to compensate them for the 'challenge' of 'meeting system reliability standards'. I presume this means the allowance was an incentive for the respondents' employees to ensure the supply of electricity to households and businesses. The allowance which was described as an 'all purpose allowance', was to increase progressively, from $54.37 per week from the execution of the agreement to $110.55 per week from 5 February 2007. It was expressly agreed that the 'allowance paid to employees who are engaged in removing asbestos … and any allowance that might otherwise be paid for Electrical Safety Allowance for work covered by … safety legislation … [have] been absorbed' in the allowance conferred by the agreement.

[7] On 13 December 2005 the applicant applied to the Queensland Industrial Relations Commission ('the Commission') to amend the Award by inserting an additional clause the effect of which was to confer an entitlement on those subject to the Award of an additional payment of $19 per week as an allowance for 'all employees who are required to hold an electrical licence for the performance of their work'. On 6 February 2006 the second to eighth respondents applied to the Commission for an injunction restraining the applicant 'from continuing to contravene … cl 1.7 and/or cl 3.8' of the certified agreement to which the second respondent and the applicant were signatories, and the cognate clauses in the other agreements made by the other respondents. The basis for the injunction was, of course, the contention that by seeking the additional allowance the applicant was making an 'extra claim during the life of the agreement in terms of employment conditions.' To meet one objection the applicant amended its application to add a proviso that the Award, if amended by the insertion of the additional allowance, should not take effect in relation to the respondents until their respective certified agreements came to an end.

[8] The respondents' application for the injunction was argued before the full bench of the Commission on 27 February 2006. On 2 March 2006 the Commission refused the injunction. On 8 March 2006 the second to eighth respondents appealed to the Industrial Court against the Commission's decision. The ninth respondent joined the proceedings as an appellant. On 10 March 2006 the Industrial Court, constituted

by the first respondent, allowed the appeal, set aside the decision of the Commission and ordered the applicant to 'refrain forthwith from prosecuting, or taking any further steps in, proceedings presently before the … Commission … insofar as those proceedings affect or apply to' the second to eighth respondents.

[9] On 21 March 2006 the applicant filed an application in this court for an order 'in the nature of *certiorari* to quash the orders of the first respondent made 10 March 2006 …' and for a declaration that those orders 'are null and void and of no effect'. The ground advanced to support the order and declaration was that the first respondent had no jurisdiction to entertain the appeal from the Commission because the application to amend the Award was not a contravention of the certified agreements. To appreciate the contention it is necessary to consider some of the provisions of the Act.

[10] Section 277 appears in Chapter 8, Part 2, Division 4 of the Act which is entitled 'Commission's functions and powers'. The section itself is headed 'Power to grant injunctions'. By subsection (1)(b) the Commission may grant the injunctive order it considers appropriate 'to restrain a contravention, or continuance of a contravention, of an industrial instrument.' Schedule 5 of the Act describes an industrial instrument to include certified agreements such as those made by the respondents.

[11] Section 341 appears in Chapter 9, Division 2 which provides for appeals from the Commission to the Industrial Court. The section reads:

> '(1) ... a person dissatisfied with a decision of the commission … may appeal against the decision to the court only on the ground of –
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> (a) error of law; or
>
> (b) excess, or want, of jurisdiction.
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> …
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> (3) The Court may –
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> (a) dismiss the appeal; or
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> (b) allow the appeal, set aside the decision and substitute another decision; or
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> (c) allow the appeal and amend the decision; or
>
> (d) allow the appeal, suspend the operation of the decision and remit the … cause … to the commission …'

[12] The applicant's submission has a narrow base. It is that when the Industrial Court allowed the appeal, reversed the decision of the Commission and granted the injunction it was, in law and in fact, exercising the power conferred on the Commission by s 277(1)(b) to restrain a contravention of the certified agreements. The Commission's jurisdiction to restrain a contravention, the argument continues, depends upon there being a contravention of the agreements. Unless there be such a contravention the Commission has no jurisdiction to grant the injunction and the court has a similar disability should it seek to exercise the power given by s 277(1)(b). An examination of the application to amend the Award, the terms of the Award and of the certified agreements is said by the applicant to reveal that no extra claim has been made 'in terms of employment conditions' so that the prohibition against such claims has not been contravened.

[13] The applicant's case was presumably structured this way to avoid the effect of s 349 of the Act. That section applies to a decision of the Industrial Court made under s 341 and provides that:

> '(2) The decision –
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> (a) is final and conclusive; and
> (b) can not be impeached for informality or want of form; and
> (c) can not be appealed against, reviewed, quashed or invalidated in any court.
>
> (3) The industrial tribunal's jurisdiction is exclusive of any court's jurisdiction and an injunction or prerogative order can not be issued, granted or made in relation to proceedings in the court within its jurisdiction'.

The Industrial Court is an 'industrial tribunal' for the purposes of subsection (3): see s 345.

[14] Furthermore, by s 18(2) the *Judicial Review Act* 1991 does not affect the operation of s 349.

[15] Despite the forcefulness of the language chosen for s 349(2) and (3), and its inviobility from the operation of the *Judicial Review Act*, a decision of the Industrial Court which it had no jurisdiction to make is amenable to judicial review and may be set aside or quashed. This is established by *Carey v President of the Industrial Court of Queensland and Department of Justice & Attorney-General* [2004] QCA 62 per McPherson JA, paras 4 and 22, and *Squires v President of the Industrial Court of Queensland & Ors* [2002] QSC 272 in which Mullins J pointed out that:

> '… s 349(3) … specifically proscribe[s] prerogative orders … in relation to proceedings in the industrial tribunal within the jurisdiction of the industrial tribunal. The express provisions of ss 349(2) and (3) … therefore have the effect of excluding this Court's jurisdiction in granting prerogative relief in respect of the decision of the [Industrial Court], if it was made within jurisdiction.'

[16] The applicant submits that this is a case in which the Supreme Court may review the decision of the Industrial Court 'because s 277(1)(b) creates a jurisdictional fact', and if it be demonstrated that the application to amend the Award did not contravene cl 1.7 of the certified agreement the jurisdictional fact 'does not … exist', and the Industrial Court had no jurisdiction to grant the injunction restraining the contravention.

[17] The critical question for the applicant's submissions is whether the application to amend the Award amounted to a contravention of the certified agreements. It submits that that fact is to be determined by this court exercising its powers of judicial review which will be enlivened if the 'jurisdictional fact' is found not to have existed.

[18] This approach is attacked by the respondents, including the ninth respondent, the Minister with responsibility for the administration of the Act. The respondents (other than the first respondent who took no part in the proceedings) submit that the Industrial Court was acting within jurisdiction and that any examination of whether the application to amend the Award amounted to a contravention of the agreement is unnecessary. The respondents take immediate issue with the submission that the Industrial Court in granting the injunction was exercising the jurisdiction conferred by s 277(1)(b). The respondents point to the terms of s 248 which defines that court's jurisdiction. That section provides:

> '(1) The court may –
>
> (a) perform all functions and exercise all powers prescribed for the court by this or another Act; and
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> …
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> (2) In proceedings, the court may –
>
> (a) make the decisions it considers appropriate, irrespective of specific relief sought by a party; …'

[19] I have already pointed out the terms of s 341. By subsection (3)(b) the Industrial Court may allow an appeal to it and substitute 'another decision' for the decision appealed against. This provision, together with the widely expressed powers conferred by s 248 indicate that the Industrial Court was exercising its own power and jurisdiction, and not that of the Commission, when it enjoined the applicant from proceeding further with its application to amend the Award. The conclusion is supported by the observation that ss 277 and 341 appear in different chapters of the Act which deal separately with the powers and jurisdiction of the Commission and of the Industrial Court.

[20] This is not the only answer to the applicant's point, and it is not, perhaps, the best one. The other answer is that the 'jurisdictional fact' which is a necessary precondition to the Industrial Court's jurisdiction to embark upon an appeal is not the same as the 'jurisdictional fact' which must exist before the Commission may injunct a contravention. Section 341 gives the Industrial Court jurisdiction to entertain appeals from the Commission where there is an error of law, or where the Commission has acted in excess of jurisdiction, or refused to act where it had jurisdiction. The present application concerns the first of those bases: an error of law. The 'jurisdictional fact' which must exist before the Industrial Court may entertain an appeal is that the Commission made an error of law in coming to its decision. This is the relevant jurisdictional fact whether the Industrial Court, in allowing an appeal and substituting its decision for the Commission's, exercises power under s 341(3)(b) or s 277(1)(b). As I have said it is my opinion that the court in such a case is exercising its own jurisdiction and the powers conferred by s 248 and/or s 341 and not the jurisdiction given to the Commission by s 277. But even if it be right to say that in granting the injunction the Industrial Court was exercising the power given by s 277(1)(b) the court was not subsumed into the Commission so that its power to make that order was limited to the circumstances upon which the Commission's powers to grant an injunction is conditional. The jurisdiction of the Industrial Court depends upon the existence of the 'jurisdictional

fact' peculiar to it, found in s 341 *viz* that there was an error of law in the decision of the Commission. The jurisdiction of the Industrial Court did not depend upon there being, however determined, a contravention of an industrial agreement.

[21] The need to determine whether there was an error of law which would enliven the Industrial Court's appellate jurisdiction immediately gives rise to the question who should determine the existence of the jurisdictional fact. The question admits only one answer. It must be the Industrial Court which determines whether there has been an error of law in the decision of the Commission and therefore whether it has jurisdiction to entertain an appeal. Any other answer would make s 341 unworkable and introduce severe restrictions of the effectiveness of s 349 which is a clear expression of legislative intention that judicial review by the Supreme Court of the Industrial Court's functions be minimal. If judicial review were available and prerogative orders were made in every case where the Supreme Court disagreed with the Industrial Court on a point of law which determines not only the outcome of the appeal but the jurisdiction of the Industrial Court with respect to the appeal, there would come into existence a right of appeal in every case from the Industrial Court to the trial division of the Supreme Court and thence to the Court of Appeal. Such an outcome was clearly not intended by Parliament when it enacted the *Industrial Relations Act*. This unwelcome outcome is a powerful reason for concluding that it is the Industrial Court, not the Supreme Court, which should determine whether there is an error of law in a decision of the Commission and therefore whether the Industrial Court's appellate jurisdiction is called into play.

[22] The conclusion is supported by authority. In *Parisienne Basket Shoes Pty Ltd v Whyte* (1937-1938) 59 CLR 369 Dixon J said (391):

> 'It cannot be denied that, if the legislature see fit to do it, any event or fact or circumstance whatever may be made a condition upon the occurrence or existence of which the jurisdiction of a court shall depend. But, if the legislature does make the jurisdiction of a court contingent upon the actual existence of a state of facts, as distinguished from the court's opinion or determination that the facts do exist, then the validity of the proceedings and orders must always remain an outstanding question until some other court or tribunal, possessing power to determine that question, decides that the requisite state of facts in truth existed and the proceedings of the court were valid. Conceding the abstract possibility of the legislature adopting such a course, nevertheless it produces so inconvenient a result that no enactment dealing with proceedings in any of the ordinary courts of justice should receive such an interpretation unless the intention is clearly expressed.'

Evatt and McTiernan JJ agreed.

[23] The case involved the application of a limitation period to a prosecution in the Magistrates Court. Unless an information were laid before a magistrate within a certain time of the occurrence of an alleged offence the complaint was bad and the court could not determine the prosecution. The High Court unanimously held that the magistrate must determine whether the complaint was brought within time even though the conclusion on that fact would also determine whether or not the court had jurisdiction.

[24] Latham CJ said (375-6):

> 'The only question therefore is whether the court has jurisdiction to decide upon a question arising in relation to a statutory provision imposing a time limitation upon proceedings. If it has no jurisdiction to decide the question wrongly, then it has no jurisdiction to decide it at all – even rightly. Thus, if the court has no jurisdiction to decide upon such a question, the court could not even decide that a debt which was incurred within a week before the making of a complaint was a debt in respect of which the cause of action arose within six years from the commencement of the proceeding. … Thus, the justices would have no jurisdiction in any such case until a higher court had determined this particular question. A principle which brings about such a result almost provides its own refutation.'

[25] Starke J said more succinctly (384):

> 'But where an inferior tribunal has jurisdiction a mistaken exercise of that jurisdiction is no ground for prohibition, for that is a ground of appeal, if an appeal be provided.'

[26] The Industrial Court is, of course, a court. It has existed since at least 1932 when established by the *Industrial Conciliation and Arbitration Act* of that year. Earlier legislation had established a Court of Industrial Arbitration as a branch of the Supreme Court but the 1932 Act established the Industrial Court and gave it the same powers and jurisdiction as the prior court had had. Successive legislation has recognised and provided for the continuous existence of the Industrial Court as 'a superior court of record'. The legislation is: the *Industrial Conciliation and Arbitration Act* 1961 s 7; the *Industrial Relations Act* 1990 s 3.1; *the Workplace Relations Act* 1997 s 252; and the *Industrial Relations Act* 1999 s 242.

[27] The presumption described by Dixon J is even stronger in the case of superior courts than it is in the case of inferior courts. See *Bray v F Hoffman-Le Roche Ltd* (2003) 130 FCR 317 para 160.

[28] A similar approach to the statutory construction of statutes conferring jurisdiction on courts was adopted by the House of Lords in *Re Racal Communications Ltd* [1981] AC 374. Lord Diplock, with whom Lord Keith agreed, said (383):

> '… but on any application for judicial review of a decision of an inferior court in a matter which involves … interrelated questions of law, fact and degree the superior court conducting the review should not be astute to hold that Parliament did not intend the inferior court to have jurisdiction to decide for itself the meaning of ordinary words used in the statute to define the question which it has to decide.'

[29] Lord Edmund-Davies' judgment is instructive. It points out that in cases (like the present) the question which is given to the subordinate court to answer will necessarily involve the very question the answer to which will decide whether the court has jurisdiction. The Act gives the Industrial Court the power to hear appeals where the Commission has made an error of law. The same inquiry is necessary to

determine the outcome of the appeal and the existence of jurisdiction. In such cases the legislative intention must be that the court does have power to decide for itself whether it has jurisdiction.

[30] The effect of the judgments in *Parisienne Basket* is that s 341 of the Act should be construed as conferring on the Industrial Court the power to decide whether the Commission has made an error of law so as to enliven its appellate jurisdiction unless the legislation clearly expresses an intention that some other court should determine whether the Commission has made an error of law thus allowing an appeal to proceed to the Industrial Court. I can detect no such intention. Indeed s 349 provides strong support for the opinion that the Industrial Court should decide for itself whether there has been an error of law, and that the Supreme Court is not to perform that role.

[31] The conclusion for which the applicant contends would not only be inconvenient; it would be intolerable. As Latham CJ pointed out, if the Industrial Court lacks jurisdiction to decide an appeal from the Commission incorrectly, it lacks jurisdiction to decide it correctly. Every decision on appeal pursuant to s 341 would be provisional: whenever the Industrial Court held that a decision of the Commission involved (or did not involve) an error of law its conclusion in that regard would be subject to the opinion of the Supreme Court on an application for judicial review. A ground for such review is, of course, that the decision-maker erred as to the existence of its jurisdiction. Every disgruntled litigant in the Industrial Court which exercised jurisdiction under s 341 could seek the opinion of a judge of the Supreme Court as to whether or not the Commission had made an error of law. A finding that there was no error of law where the Industrial Court had thought there was, or a finding that there was an error of law where the Industrial Court thought there was not, would lead to a quashing of that court's orders. This, as I have said, would be to substitute a right of appeal against the Industrial Court's orders where the Act clearly intended its decision should be final. This consideration points strongly in favour of the conclusion suggested by *Parisienne Basket*.

[32] The Industrial Court's evident jurisdiction is to investigate whether there has been an error of law and, if there has been, to correct it. If the Industrial Court should conclude, in an appeal brought pursuant to s 341, that there had been no error of law in the Commission's decision it would, on the applicant's argument, have established that it had no jurisdiction to determine the appeal and its decision would be a nullity. I am reluctant to accept that this is the proper meaning to be given to the statute.

[33] I accept the respondents' submissions that the decision of the Industrial Court did not involve any jurisdictional error. The question whether or not the Commission had erred in law was a question which s 341 expressly committed to the Industrial Court and an error (if there was one) by that court would not be an error which deprived it of jurisdiction. Section 349(2) and (3) operate so as to preclude this court in the exercise of its jurisdiction conferred by the *Judicial Review Act* from considering whether the Industrial Court erred in law in reaching its conclusion. It is therefore unnecessary to consider the further point agitated by the parties that the application to amend the Award did not contravene cl 1.7 of the second respondent's certified agreement. The applicant submitted that there was no contravention and therefore no error of law giving rise to an appeal to the Industrial

Court. The respondents argued to the contrary. The point was not without difficulty, but it is not for that reason that I decline to examine it. It seems to me that that question has been committed to the exclusive jurisdiction of the Industrial Tribunals and that this court should not intrude.

[34] I order that the application be dismissed.