

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Vocational Education, Training and Employment Act 2000* - s. 230 - appeal to industrial commission against council

**BM Alliance Coal Operations Pty Ltd AND Training and Employment Recognition Council**  
(AT/2010/5)

COMMISSIONER THOMPSON

21 January 2011

Appeal against decision of Training and Employment Recognition Council - Nature of appeal - Objection to Training Council material - Critical questions to be addressed - Witness evidence - Witnesses not heard in proceedings - Misconduct rather than serious misconduct - Reprimand appropriate penalty - Appeal dismissed.

DECISION

**Background**

- [1] On 7 October 2010 BM Alliance Coal Operations Pty Ltd (the Employer) filed an Application to Appeal the whole of a Decision of the Training and Employment Recognition Council (the Council) given on 17 September 2010 relating to the Training Contract of the Employer and Jacinta Evans (an Apprentice employed by the Employer).
- [2] The grounds of the Appeal were:
- "The Apprentice engaged in serious misconduct in accordance with s. 64 of the *Vocational Education, Training and Employment Act 2000* (the Act).
  - The Council incorrectly:
    - (i) formed the view that the Apprentice's conduct did not constitute grounds for the cancellation of her contract;
    - (ii) formed the view that it was not unreasonable in the circumstances for the Employer to continue the training; and/or
    - (iii) exercised its discretion under the Act not to cancel the contract.
  - In reaching its decision, the Council failed to exercise its power and perform its function by fair procedures, including not giving sufficient consideration and weight to the Employer's submission in response to the Show Cause Notice issued by the Council on 25 August 2010.
  - Further, having regard to the circumstances of the employment relationship, it was impracticable to make an order other than for the cancellation of the contract.
  - Such other grounds as considered sufficient by the Queensland Industrial Relations Commission (the Commission)."
- [3] The terms of the decisions sought were identified as:
- "That the Commission overturn the decision of the Council:
    - (i) not to cancel the contract between the Employer and the Apprentice under s. 64 of the Act; and
    - (ii) to reprimand the Apprentice under s. 71(2)(a) of the Act.
  - That the Commission make a decision under s. 64 of the Act to cancel the contract between the Employer and the Apprentice.
  - That, further and in the alternative, the Commission make an order under s. 71(2)(d) of the Act to cancel the contract between the Employer and the Apprentice because the Apprentice has contravened the contract and/or has engaged in misconduct.
  - Any other order which the Commission considers as justified."

- [4] The chronology of events (agreed by the parties) that led to the matter being brought before the Commission were:
- On 8 February 2010 the Employer and the Apprentice entered into a registered Training Contract pursuant to the Act.
  - On 22 July 2010 the Employer suspended the Apprentice's Training Contract due to serious misconduct and at that time made an application to the Council to cancel the Training Contract in accordance with the provisions of the Act.
  - On 25 August 2010 the Council issued the Employer with a Show Cause Notice stating that its proposed action was not to cancel the Training Contract but instead order a reprimand.
  - On 10 September 2010 the Employer responded to the Show Cause Notice by providing reasons why the Training Contract should be cancelled.
  - On 17 September 2010 the Council issued an Information Notice confirming that it had determined not to cancel the Apprentice's Training Contract, but to instead order a reprimand.
  - On 7 October 2010 the Employer filed in the Commission an Application to Appeal the Decision of the Council and an Application to Stay the Decision pending determination of the Appeal.
  - The Stay Application was set down for hearing on 12 November 2010 however did not proceed at the request of the Employer.

#### **Nature of Appeal**

- [5] An Appeal to the Commission against a Council Decision is available by virtue of s. 230 of the Act with the nature of that Appeal identified at s. 232 of the Act:

#### **"232 Nature of appeal**

- (1) An appeal to the industrial commission is by way of rehearing on the record.
- (2) However, the commission may hear evidence afresh, or hear additional evidence, if the commission considers it appropriate to effectively dispose of the appeal."

- [6] At the commencement of proceedings the Commission informed the parties of the intention to hear evidence afresh and any additional evidence the parties sought to adduce in the course of proceedings.
- [7] Reference was made by the Commission to the matter of *Ergon Energy Corporation Limited v Training and Employment Recognition Council*<sup>1</sup> where Commissioner Asbury had formed the view that the following considerations apply to an Appeal under s. 232 of the Act:
- "the QIRC must make its own decision on the basis of the evidence before it;
  - before making its own decision the QIRC is not required to find that there was any error on the part of the Training Council in the decision subject to appeal or the processes by which that decision was made;
  - evidence to be considered by the QIRC in deciding an appeal includes the material which was considered by the Training Council at first instance or new evidence of events or circumstances which occurred after the decision of the Training Council or evidence which could have been put to the Training Council;
  - the QIRC may also hear afresh, evidence which was before the Training Council;
  - the question of whether the QIRC hears evidence on the decision afresh or hears new evidence not previously considered by the Training Council is a discretionary matter;
  - in any decision about whether that discretion should be exercised, case law dealing with leave being granted by a court on appeal, to adduce evidence which could reasonably have been put before a court at first instance, is not relevant because the proceedings at first instance are administrative in nature."

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<sup>1</sup> *Ergon Energy Corporation Limited v Training and Employment Recognition Council* [2008] 187 QGIG 230

- [8] The parties were informed of the intention to conduct the Appeal in line with the abovementioned considerations.
- [9] The Appellant was granted leave to be legally represented with consent of the Council.
- [10] The Employer made submissions around the nature of Appeal which was more in the nature of a hearing *de novo* rather than an Appeal in the strict sense where the Commission is confined to the evidence placed before the primary decision maker. The overarching requirement is that the Commission must make its own decision on the evidence before it.
- [11] Authorities relied upon supportive of the argument included:
- *Builders' Licensing Board v Sperway Constructions (Syd) Pty Ltd<sup>2</sup> Re Coldham; Ex parte Brideson (No. 2)<sup>3</sup>; and Coal and Allied Operations Pty Ltd v AIRC<sup>4</sup>;*
  - *Ergon Energy Corporation Limited v Training and Employment Recognition Council<sup>5</sup>;*
  - *Murrays v Training Recognition Council<sup>6</sup>* where President Hall stated:  

"In reliance upon the well known judgment of Thomas JA (with whom Pincus JA and Muir J agreed) in *Aldrich v. Ross* [2001] 2 QdR 235 at 248 to 249 and 252 to 258 the Commission rightly held that the function of the Commission under s. 232 of the *Training and Employment Act 2000* was to decide for itself whether the training agreements should be cancelled ... The Commission's responsibility was to give Murrays a full and fair hearing of the case and a decision quite independent of any view formed by any other adjudicators."
- [12] The Commission, it was said, must make its own determination on the evidence before it when dealing with an Appeal under s. 230 of the Act.

#### **Material from the Training Council**

- [13] The material considered by Council in determining their finding was tendered in the proceedings as attachments to a document titled "Submissions of the Respondent" and were identified in the List of Documents that were provided in accordance with the Directions of the Commission of 25 October 2010.
- [14] The documents in question included:
- Training Contract;
  - Suspension Notice given to the Apprentice;
  - Application for cancellation of training contract;
  - Letter of complaint by Apprentices Tristan Passman, Hayden Weight, Kyle Christmas and Bonita Orr - 8 July 2010;
  - Unsigned diary notes - 9, 11, 12, 13 July 2010 understood to be from Simon Pukk;
  - Apprentice's response to the complaint 12 July 2010;
  - Employer's Show Cause Letter - Termination of Employment - 16 July 2010;
  - Apprentice's response to Employer's Show Cause Letter - 21 July 2010.
  - Appraisal Forms for Apprentice 13 March - 28 April 2010;
  - Attendance Form for Code of Conduct training - 1 April 2010;

<sup>2</sup> *Builders' Licensing Board v Sperway Constructions (Syd) Pty Ltd* [1976] 135 CLR 616

<sup>3</sup> *Coldham; Ex parte Brideson (No. 2)* [1990] 170 CLR 267

<sup>4</sup> *Coal and Allied Operations Pty Ltd v AIRC* [2000] 203 CLR 194

<sup>5</sup> *Ergon Energy Corporation Limited v Training and Employment Recognition Council* [2008] 187 QGIG 230

<sup>6</sup> *Murrays v Training Recognition Council* [2002] QIC 46 (30 September 2002)

- Attendance Form for Code of Business Conduct and Anti-Discrimination training - 12 February 2010;
- Field Officer's [Kellie Leijen, Acting Senior Field Officer with the Department of Education and Training (DET)] notes taken during interview with Apprentices that had lodged the complaint - Tristan Passman, Hayden Weight, Kyle Christmas - interviewed 28 July 2010. Bonita Orr interviewed on 30 July 2010;
- Field Officer's notes on questions prepared for interview and subsequently transcribed into Department's computer record;
- Field Officer's notes of interviews with fellow workers - Ryan Gules - Shift Supervisor, Greg Mannie - Apprentice's Mentor, Michael Gar - Trade Qualified Subcontractor and John Gage - Forklift Trainer;
- Field Officer's notes taken during interview with Apprentice;
- Show Cause Notice sent to Employer and Apprentice;
- Employer response to Show Cause Notice;
- Information Notice;
- Information (emails) relating to exchanges with Employers Legal Representative; and
- DELTA computer printout of Apprentice's file.

[15] The Employer also, in a submission, challenged the consideration of certain documents sought to be relied upon by Council as constituting the record. Various documents filed by Council to which objection was taken were identified as:

Training and Employment Recognition Council (TERC) - 5, 6, 7 and 20:

5. "Field Officer's notes taken during interview with the apprentices that had lodged the complaint against apprentice Jacinta Evans.
6. Field Officer's notes taken during interviews with the fellow workers of Jacinta Evans.
7. Field Officer's notes taken during the interview with Apprentice Jacinta Evans.
20. Department of Education, Training and the Arts (DETA) computer print-out of Jacinta Evans' computer file."

[16] The objectionable documents purported to be summaries of Kellie Leijen's understanding of discussions that occurred rather than any transcript or record of those discussions. The suggestion by the Council in the course of the hearing that the notes were made in a proceeding in accordance with the *Industrial Relations (Tribunals) Rules 2000* (IR Rules) r. 109(2)(k) was refuted as it was incorrect to characterise the process conducted by the Council in making its decision as a "proceeding" for the purposes of the rules.

[17] The limited definition of the term "proceedings" in the IR Rules was said to be reflected in the *Industrial Relations Act 1999* (IR Act) therefore there was no basis for seeking to adopt a broad definition of "proceedings" in this matter.

[18] It was conceded that the Commission had a discretion to allow the record to be supplemented by other material however it was submitted that it would be highly inappropriate, unfair and an error of law for the objectionable documents to be included as part of the record or admitted into evidence. Should the Commission be minded to allow the objectionable documents into evidence against the strong objection of the Employer, no weight could be given to them in determining matters of fact and now the subject of the appeal.

[19] A number of grounds in support of the argument included:

- No sworn evidence called to confirm the accuracy, veracity or otherwise of notes contained in the relevant documents;
- Council failure to call Kellie Leijen and Jacinta Evans to give evidence swearing to the veracity and accuracy of the notes;

- The Employer not being afforded any opportunity to test the documentation through the cross-examination process; and
- The Council was aware that a number of matters contained in the documents were in conflict with the sworn evidence filed by the Employer but elected not to call any witnesses to give evidence on the facts in issue.

[20] The Council, in proceedings on 18 November 2010, argued that this matter was a rehearing on the record and that the record relied upon by Council had been assembled in accordance with r. 109 of the IR Rules and would be tendered in the proceedings in compliance with Directions of the Commission.

[21] Rule 109(1), (2), (3), and (4) of the IR Rules was said to identify the detail of what the record should consist of with the Commission taken particularly to the provisions of r. 109(2)(a) through to (k):

"2. The record for the appeal consists of the following -

- (a) the application to appeal, or notice of appeal under a Safety Act provision;
- (b) any of the following that is the subject of the appeal -
  - (i) an order;
  - (ii) an industrial instrument;
  - (iii) a training contract;
  - (iv) a registered training contract;
  - (v) a completion certificate;
  - (vi) a qualification or statement of attainment;
  - (vii) a declaration, variation of a declaration or refusal to vary a declaration of a prohibited employer;
  - (viii) a written refusal by the council to approve the temporary stand down of an apprentice or trainee from his or her apprenticeship or traineeship;
- (c) a notice to show cause under rule 120B(2) or 201(2) relating to the proceeding in which the decision was made;
- (d) a notice to show cause under section 233(7) of the Act relating to the decision;
- (e) a notice to show cause under the *Vocational Education, Training and Employment Regulation 2000*, section 25 relating to the decision;
- (f) any written representations made in response to a notice to show cause mentioned in paragraph (c) to (e);
- (g) an information notice for the decision given under the *Vocational Education, Training and Employment Act 2000*, section 230(3);
- (h) the decision, including the reasons for the decision;
- (i) any published reasons for the decision;
- (j) an industrial instrument or statement of principle mentioned in the decision, including reasons;
- (k) if the decision was made in a proceeding -
  - (i) a transcript or notes of oral evidence made in the proceeding; and
  - (ii) any list of exhibits, and each exhibit, in the proceeding; and
  - (iii) an affidavit or statement of evidence in the proceeding."

[22] In relation to r. 109(2)(k) of the IR Rules, the Council acknowledged that there may be an argument around the issue of a "proceeding" but in complying with the rule, it would be difficult to accept that a document could be admitted from the record.

[23] The procedures relied upon by Kellie Leijen as delegate of the Council were fair and the process was in accordance with Regulation 25 "Show Cause Notice" of the Act. In previous matters oral notes and the departments computer records have been handed up in Appeals and never questioned by the Commission.

### **Appellant**

[24] A written outline of submissions was provided in proceedings that went to a range of issues including:

- Reference to relevant sections of the Act:
  - Suspension and cancellation for serious misconduct;
  - Cancellation of a training contract due to misconduct; and
  - Decision of the Council;
- Employer's response to the decision;
- Unreasonable for Employer to continue with Apprentice's training;
- Relationship irrevocably broken down;
- Behaviour of Apprentice put Employer at a considerable legal risk;
- Need of Employer to take into account view of Employees;
- Undermining Employer efforts to ensure acceptable standard of conduct of Employees;
- Concerns on reasons relied upon by Council in reaching their Decision; and
- Failure of Council to exercise a discretion to order the cancellation of the Training Contract.

[25] Bilal Rauf of Blake Dawson, the legal representative of the Employer, in opening comments before the proceedings, offered comment in addition to the written submissions. The matters raised included:

- Nature of hearing;
- Critical questions to be addressed in the proceedings -
  - Did the Apprentice engage in the conduct alleged?
  - If so, is that conduct characterised as serious misconduct or simply misconduct?
  - Did the disciplinary action taken reflect the level of misconduct?;
- Apprentices conduct on the balance of probabilities substantiated. Training Council of the same view;
- Apprentice in Show Cause response acknowledged behaviour alleged through an apology and expressions of remorse;
- Employer investigation of complaint of a satisfactory standard;
- TAFE evidence in proceedings of limited assistance;
- Apprentice aware of standard of behaviour required;
- Questions of the weight given by the Council to statements from persons who did not witness the incidents subject of the complaint;
- Effect and impact of the Apprentice's conduct on other Apprentices;
- Exposure for the Company in respect of discrimination and WorkCover;
- Serious misconduct warranting the cancellation of the Training Contract;
- Authorities relied upon included:
  - *Cahill v Big W Ltd*<sup>7</sup>;
  - *Leadbetter v Qantas Airways Limited*<sup>8</sup>; and

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<sup>7</sup> *Cahill v Big W Ltd* [2000] 163 QGIG 287

<sup>8</sup> *Leadbetter v Qantas Airways Limited* [2009] AIRC 131

- *Wilson v Brisbane City Council*<sup>9</sup>.

## Witness Evidence

### Appellant

[26] The Appellant relied upon witness evidence from:

- Bonita Orr;
- Tristan Passman;
- Hayden Weight; and
- Simon Pukk.

### Orr

[27] Bonita Orr commenced an Apprenticeship with the Employer in February 2010 at which time she undertook an induction process that included training on procedures and policies including:

- Charter of Values;
- Code of Business Conduct; and
- Workplace Conduct Policy.

[28] On 8 July 2010, along with three other Apprentices, she lodged a written complaint in relation to the workplace behaviour of Jacinta Evans with whom she had worked closely since the commencement of her employment.

[29] The complaint (attached to her affidavit) signed by the four Apprentices brought to the attention of the Employer incidents said to be of inappropriate behaviour and were identified as:

"In the early days of our six week induction, Jacinta Evans, has made a point of having something against Hayden Weight and Bonita Orr and has over time begun to start on Tristan Passman and Kyle Christmas.

- At the town office one morning Jacinta threatened to punch Hayden in the head over the temperature of the air conditioner.
- Hayden brought a new ute at the start of our inductions. Jacinta came into work and started saying 'Your ute is a piece of shit'. This has continued for the last five months.
- Jacinta makes fun of Hayden about his looks calling him 'poker dot face' and saying he is an 'ugly cunt'.
- Jacinta also says things to Hayden along the lines of 'You only got a job here because your father works here' and that he is a 'daddy's boy'.
- Jacinta came up to Tristan at work one day and said to him 'I reckon I can give better head than your Missus'. She then asked if Tristan's 'missus' could deep throat at which he replied 'That is none of your business and don't ask me personal questions'.
- Jacinta has also made racial comments to Tristan in conversation which are offensive.
- On two different incidents Jacinta has said in front of a group of people that she reckons Tristan has a 'pin dick'. A witness to this was a Down Under fitter by the name of Zim on B crew.
- On a few occasions she has just walked up and started talking about sex, her personal life and says stuff about her family members that are inappropriate.
- Jacinta has regularly put her inappropriate opinion in about Bonita and her family's current situation involving Bonita's father.
- Jacinta has a habit of talking badly about Bonita on a regular basis.
- Jacinta constantly makes fun of Kyle in regards to him not speaking much and being a quiet person. Jacinta has told Kyle that he won't last out at BMA because of the way he is.
- Jacinta calls Kyle names like 'Have-a-chat', 'karate kid' etc."

[30] The complaint went on to provide details of particular events on 14, 23 and 28 April, 14, 15 and 16 June and 5 July 2010.

[31] The 23 April 2010 incident went to Bonita Orr and Tristan Passman giving Brett Wallace (Human Resources Advisor - Training and Development) the "heads up" on matters between Jacinta Evans and the other Apprentices.

[32] On 28 April 2010 probation meetings were held for all first year Apprentices and when Jacinta Evans came out of her meeting she told all the Apprentices to "get fucked" and asked each apprentice individually who had "dobbbed" her in to the Employer.

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<sup>9</sup> *Wilson v Brisbane City Council* [2002] 170 QGIG 250

- [33] The 16 June 2010 incident is said to relate to inappropriate racial comments made by Jacinta Evans that "Aboriginals are nothing but lazy dole bludgers and the Government are idiots for helping Aboriginal people".
- [34] Tristan Passman was said to be offended by the comments on the basis of his family and heritage.
- [35] The complaint mentioned that on 5 July 2010 Jacinta Evans had been rude and talked over "Gagey" (John Gage - Forklift Trainer).
- [36] The final paragraph of the complaint document stated:
- "We aren't looking to get anyone fired however we want this situation dealt with before it gets too far out of control. It is hard for us to concentrate on our work at hand when we have to deal with this on a daily basis and it won't stop when it is asked."
- [37] Bonita Orr's evidence-in-chief provided further detail of the incidents mentioned in the complaint document and in the view of the witness there had been a positive change in the work environment in the absence of Jacinta Evans.
- [38] Whilst Bonita Orr did not want to be responsible for someone losing their Apprenticeship, she expressed anxiety at the potential return of Jacinta Evans.
- [39] Attached to the witness's affidavit were extracts from her work diary where reference had been made to Jacinta Evans. The Commission had the opportunity to view the actual diary in the course of the proceedings.
- [40] Under cross-examination, Bonita Orr was taken to entries in her work diary relating to Jacinta Evans and questioned about the nature of entries where work-related matters were double-line spaces and the entries around Jacinta Evans of single-line spaces. Further questioning went to the dates upon which certain entries were made about Jacinta Evans with the inference being that those entries were put in to the diary on days after the incident was said to have occurred.
- [41] Bonita Orr agreed that swearing was a feature of the workplace accepting that language included such terms as "fuckwit", "wanker" and "cunt".
- [42] The letter of complaint was also featured in the cross-examination.
- [43] In re-examination the witness explained the change in her position of 8 July 2010 where it was not her intention to have Jacinta Evans fired to why it would now be difficult to have her back in the workplace.

#### **Passman**

- [44] Tristan Passman, a first year Apprentice, commenced employment in February 2010 and worked closely with Jacinta Evans until 22 July 2010. He provided two affidavits in proceedings filed on 2 and 5 November 2010 respectively.
- [45] Along with three other Apprentices, he lodged the written complaint against Jacinta Evans on 8 July 2010.
- [46] The first affidavit, in general terms, reflected the evidence given by Bonita Orr in relation to what was described as inappropriate behaviour by Jacinta Evans towards the four Apprentices.
- [47] Jacinta Evans was said to often be rude and aggressive referring to people as "fuckhead" or "cunt". The witness stated that he was conscious that Jacinta Evans was one of the few females in the workshop and he had tried to give her support and advice to assist her settle in. At times he noticed her becoming frustrated at performing work due to "her small build".
- [48] According to the witness, the use of words such as "fuckhead, cunt and polka dot face when in a joke sort of way it'd probably be acceptable" [Transcript p. 2-39], but Jacinta Evans was using the language on a regular basis to intimidate people. The witness gave evidence that whilst there was more swearing in a male dominated industry, he did not often hear the word "cunt" mentioned.
- [49] Jacinta Evans was said to have made numerous inappropriate comments to the witness including:
- "I reckon I can give better head than your missus";
  - on two occasions called him "pin dick";
  - "I love sex"; and

- described Bonita Orr as a "fucking bitch".

- [50] On 23 April 2010, the witness and Bonita Orr complained to Brett Wallace about the inappropriate behaviour and were told that the behaviour issues would be raised with Jacinta Evans during her probationary meeting the following day. In the course of the witness's probation meeting, he made a further complaint about her behaviour.
- [51] Following the probationary review meetings the behaviour of Jacinta Evans improved but this was to last for a couple of weeks only.
- [52] He found comments made by Jacinta Evans about Aboriginal people totally inappropriate and was embarrassed and offended by them. He was also highly offended and humiliated in respect of comments about his weight and sex life.
- [53] Evidence was given about a meeting in mid July 2010 with Simon Pukk and Brett Wallace where the witness was asked to respond to a number of allegations Jacinta Evans had raised against him. All allegations were denied.
- [54] The impact of Jacinta Evans' behaviour was to create a hostile working environment where he had regularly felt bullied and harassed and distracted from his work. He had in the period of June to July 2010 contemplated resigning his Apprenticeship as a result of the behaviour. He noted a positive change in the workplace following Jacinta Evans' suspension.
- [55] The witness was aware of the Employer's attempt to cancel Jacinta Evans' Apprenticeship and is of a view that it is not appropriate to allow her to return to work for fear of continued bullying, harassment and retaliation against him for making the complaint.
- [56] In the second affidavit filed three days after the first affidavit, the witness provided further evidence in relation to the conduct of Jacinta Evans said to have impacted on his self-esteem. Incidents said to have arisen outside the workplace were raised with specific times not given as to when they had taken place.
- [57] Jacinta Evans' behaviour at TAFE in October 2010 was said to have been inappropriate and aggressive toward the witness and other Apprentices following a comment that related to a motorbike sponsorship and that was said to have been a joke.
- [58] Jacinta Evans had questioned him and Hayden Weight over an incident which resulted in minced meat being put under her car door handle.
- [59] A return to the mine by Jacinta Evans caused the witness to state in his affidavit that he would have no choice but to resign his employment thus leaving this Apprenticeship.
- [60] Note: Upon questioning from the Commission he altered his affidavit indicating he "might" resign.
- [61] Cross-examination of the witness was extensive commencing with questions around the lodgement of the second affidavit which was said to become necessary after spending time with Jacinta Evans at TAFE where her behaviour had convinced him that if she returned to work, her behaviour would not change. Other evidence in the second affidavit about the witness feeling hurt, depressed and about being called fat was questioned on the basis that when interviewed by Kellie Leijen on 29 July 2010 and when executing the first affidavit this was not raised.
- [62] That Tradesmen had never stepped in and taken action in respect of Jacinta Evans' behaviour was acknowledged as was the proposition that swearing and bantering occurred in the workplace. The witness accepted that when undertaking work at the workshop, there was "quite a deal of supervision from tradesmen" [Transcript p. 2-50].
- [63] The racial comments alleged to have been made by Jacinta Evans were, in the view of the witness, directed at him and after he had taken the time to explain his experiences as a part-Aboriginal person to Jacinta Evans, she had replied "I still think it is wrong that they get help like that, they should be made to go out and get jobs like everyone else" [Transcript p. 2-53].
- [64] Whilst giving evidence that Jacinta Evans continued to act inappropriately towards him and other Apprentices at TAFE, the witness accepted that he had not sought to have the seating arrangements at TAFE changed [Transcript p. 2-54]. The witness denied having been responsible for putting minced meat under the door handle of Jacinta Evans' car during the TAFE block.

- [65] When questioned in relation to the 8 July 2010 complaint that did not seek to have Jacinta Evans fired, he acknowledged that when interviewed by Kellie Leijen on 28 July 2010 that the comment had been made by himself that he did not want anyone to lose their job [Transcript p. 2-58].
- [66] The witness gave evidence that he and the other Apprentices were the "biggest dogs" on site after lodging the complaint and that there were a heap of Tradesmen not impressed with them. It was alleged that he had been threatened by Mark Beasley, a Tradesman who had said "that if I ever fucking done it to him, he'd shoot me". The witness felt threatened by the comments at first, however after some discussion with Mark Beasley an apology had been forthcoming and no complaint had been lodged with the Employer [Transcript p. 2-59].
- [67] On the issue of Jacinta Evans calling him fat, he did recall her making such a comment directly to him, however he did recall her asking Bonita Orr if she thought he was fat [Transcript p. 2-62].
- [68] In re-examination, he evidenced that whilst swearing was used in general discussion in the workshop, apart from Jacinta Evans it was not directed towards others. Supervision in the workshop was said to be direct [Transcript p. 2-69] however at times the Tradesmen may go to the computer to look up parts. The majority of the inappropriate behaviour had happened in the lunch and class rooms, although the comment about the size of his penis was made in the presence of a Tradesman in the workshop.

### **Weight**

- [69] Hayden Weight, a first year Apprentice, commenced employment 8 February 2010 and worked closely with Jacinta Evans during that time. He was one of four Apprentices that lodged the written complaint of 8 July 2010.
- [70] He gave evidence that on one occasion Jacinta Evans had threatened to punch him in the head because he had tried to adjust the settings on an air conditioner in a classroom and on other occasions had called him names such as "fuckhead", "polka dot face", "ugly cunt" and "daddy's boy".
- [71] The witness had been both angry and embarrassed at comments made by Jacinta Evans that he only got his Apprenticeship because his father was employed at the mine. He had witnessed Jacinta Evans making racist comments about Aboriginal people that was said to have offended and embarrassed Tristan Passman.
- [72] In a meeting with Simon Pukk and Brett Wallace in or around mid July 2010 in relation to the complaint he and others had made he was asked to respond to allegations that he had called Jacinta Evans a "warthog". The allegation was denied.
- [73] As was the evidence of Bonita Orr and Tristan Passman, he noticed a positive change in the workshop since the suspension of Jacinta Evans and he was less stressed about coming to work. Initially he did not mind if Jacinta Evans returned to work, however her behaviour and attitude at a recent TAFE block had seen him change his mind. Jacinta Evans had continued to refer to him at TAFE as "fuckhead" and "cunt" and was said to be "always arguing with the teacher whenever he asked her to do something".
- [74] Under cross-examination, the witness acknowledged that he had not felt threatened when Jacinta Evans had threatened to punch him in the head over the air-conditioner incident [Transcript p. 2-94]. He accepted that swearing occurred in the workplace however Jacinta Evans' use of language was offensive and aggressive [Transcript p. 2-95].
- [75] When questioned on the interview with Kellie Leijen (28 July 2010) he could not recall much about the meeting at all and certainly did not remember saying that he did not want Jacinta Evans' training contract cancelled [Transcript p. 2-96].
- [76] When questioned by the Commission in respect of comments made to Kyle Christmas such as "karate kid" and "have-a-chat" he informed the Commission that he found the terms offensive. Additionally he held the same view in respect to being called "daddy's boy" by Jacinta Evans [Transcript p. 2-92].

### **Pukk**

- [77] Simon Pukk is employed as the Senior Human Resources Advisor at the Employer's Blackwater Mine, having occupied that position since July 2008.
- [78] In November 2009 the Employer had recruited ten Apprentices and three Trainees, all of whom commenced their employment on 8 February 2010. All had undertaken training on Company policies and procedures including:

- Code of Business Conduct;
- Charter of Values;
- Anti-discrimination and harassment awareness training; and
- Cultural Induction.

- [79] Evidence was given in respect of the written complaint against Jacinta Evans received by the Employer on 8 July 2010 and of his subsequent investigation of the complaint. Jacinta Evans was interviewed on 9 July 2010 in which she was taken through the complaint three times with her response changing from total denial of all allegations to varying levels of admittance. A view was formed at that time that she was unreliable, that seemed to bring a higher level of admission in relation to the allegations.
- [80] Examples were given of her responses and the changed answers in respect of course language and comments in respect of Tristan Passman's weight. Jacinta Evans denied vilifying Aboriginals but questioned whether they should receive extra money from the Government. The allegation in relation to threatening violence was denied.
- [81] At the conclusion of the interviews she returned to work however after approximately one hour returned visibly upset and claiming to be a victim of bullying herself. She was advised to go home (on full pay) and to put her complaint in writing.
- [82] Interviews were undertaken with Tristan Passman, Bonita Orr, Kyle Christmas and Hayden Weight with copies of diary notes made from those interviews attached to the witness's affidavit. The interviews had provided positions consistent with the written complaint.
- [83] Based upon those interviews, Brett Wallace and the witness determined the allegations raised in the complaint were substantiated and the allegations raised by Jacinta Evans were unable to be substantiated.
- [84] On 16 July 2010 a Show Cause letter was issued by the Employer to Jacinta Evans asking her to show cause as to why her employment should not be terminated on grounds of serious misconduct. A response was received on 21 July 2010 and after consideration of the response over a 24 hour period, it was concluded that no new evidence was provided and Jacinta Evans was suspended without pay and an application to cancel her Training Contract was lodged.
- [85] A three week investigation into the complaint by Kellie Leijen culminated in a Show Cause Notice being provided on 25 August 2010 proposing that the Training Contract not be cancelled and instead a reprimand ordered.
- [86] On 10 September 2010 submissions on behalf of the Employer were lodged outlining why the Training Contract should be cancelled. On 17 September 2010 an Information Notice from Kellie Leijen stated the Training Contract would not be cancelled and a reprimand ordered.
- [87] The Employer was requested to make arrangements for Jacinta Evans to return to work on 20 September 2010. Concerns were raised with Kellie Leijen that there was insufficient time to make appropriate arrangement to return to work in the time frames specified.
- [88] The witness was advised by Brett Wallace that Jacinta Evans presented for work on 20 September 2010 at which time she was advised that the Employer would be appealing the decision, her employment was suspended without pay (pending the appeal decision) and was asked to leave site and not return until directed.
- [89] Arrangements were made for Jacinta Evans to attend TAFE in Emerald for the period 5 to 29 October 2010 and she was then provided with employment consistent with her Training Contract.
- [90] The Employer was said to have lost trust and confidence in Jacinta Evans with a return to work posing an unacceptable risk to other Employees and detrimentally affecting other Employees who had been subject to bullying and harassment by her.
- [91] The witness gave evidence confirming the content of the training packages for the Apprentices and the methods utilised in providing the various training sessions.
- [92] The allegation relating to Jacinta Evans calling Tristan Passman "pin dick" was described as of a less serious nature than other claims and inconsequential to the extent that the Tradesman said to be present at the time was not interviewed [Transcript p. 2-107]. The other Tradesman (John Gage) referred to in the complaint was not spoken to for the reason that the witness had expectations that John Gage would have dealt with the issue in an appropriate manner.

- [93] The witness stated that he had been present when Kellie Leijen had interviewed a Tradesman when carrying out her investigation and had concerns that the outcome had been premeditated [Transcript p. 2-109], although he did acknowledge that was an assumption on his part [Transcript p. 2-110].
- [94] On the matter of the probationary review meeting held in April 2010 the witness said that it was regarded as a formal procedure and treated accordingly.
- [95] The cross-examination of the witness took place across two days (18 November and 1 December 2010) and dealt with a range of significant issues starting with his first exposure to the letter of complaint. Whilst said to contain serious allegations, the letter of complaint did not disgust or horrify the witness at the time [Transcript p. 2-116].
- [96] On the investigation undertaken of the complaint, the witness was questioned on the failure to interview the two Tradesmen named in the complaint and of a similar failure to interview other staff directly involved with the Apprentice's employment, about Jacinta Evans' behaviour in the workplace [Transcript p. 2-117]. He indicated he did not believe that interviews with the people in question would have added to the investigation [Transcript p. 2-119].
- [97] The witness was taken to his evidence that Kellie Leijen had premeditated an outcome in the earliest stages of her investigation process where it was put that she had interviewed more witnesses, collected a full gamut of evidence and found that Jacinta Evans' behaviour was no worse than the other Apprentices. Whilst accepting that a wider investigation could possibly have resulted in a different outcome [Transcript p. 2-118] he believed that his investigation had been thorough.
- [98] On the investigation undertaken of the complaint against Jacinta Evans, it was acknowledged that two tradesmen named in the letter of complaint were not interviewed by the witness. The witness also agreed that a number of tradesmen were made available (with Employer assistance) to be interviewed by Kellie Leijen in her investigation process [Transcript p. 3-16] and in fact was present when an Employee, Ryan Giles, was interviewed.
- [99] On the matter of swearing, bantering and competition in the workplace, the witness had a "vague recollection" of Kellie Leijen informing him of the outcome of interviews with employees confirming such activity [Transcript p. 3-17].
- [100] The witness was of a view that Kellie Leijen had premeditated the outcome of her investigation well before the investigation had been finalised.
- [101] On the issue of the Employer response to the Council's Show Cause Notice the witness accepted that certain matters were overlooked in the response [Transcript p. 3-24].
- [102] A further oversight was said to have occurred in the Employer response with the failure to address properly the matters raised in the probationary period of her employment [Transcript p. 3-41].
- [103] The witness had no direct knowledge of allegations relating to Jacinta Evans' behaviour at the TAFE block and when he was informed of that behaviour did not make contact with TAFE personnel to confirm or otherwise the allegations [Transcript p. 3-26].
- [104] When questioned further on the investigation he carried out into Jacinta Evans' behaviour he confirmed that she had changed her "story" three times although his diary did indicate that there had been two changes [Transcript p. 3-29]. The witness was of the belief that the investigation had been carried out impartially [Transcript p. 3-35].
- [105] In re-examination, a number of questions were put in respect of the Council's Show Cause Notice response provided to the Council [Transcript p. 3-48].

### **Council**

- [106] The Council relied upon witness evidence from:

- Claudio Favero;
- Martyn Boxall; and
- John Gage.

**Favero**

- [107] Claudio Favero, a Metal Fabrication Teacher at the Emerald Campus of TAFE, gave evidence that he had taught Jacinta Evans at TAFE between 4 and 27 October 2010. The class was made up totally of the Employer's students, numbering 13 or 14 students in the class.
- [108] He taught Jacinta Evans for approximately 20 hours per week in both theoretical and practical modes of training delivery during which time no complaints were made against her and her behaviour was good. The class was said to be the best he had taught all year.
- [109] Evidence from the witness in cross-examination confirmed that the classes at TAFE attended by Jacinta Evans and the other Apprentices were supervised at all times except for a two minute toilet break [Transcript p. 2-78]. He also informed the proceedings that he had little knowledge of the allegations against Jacinta Evans.

**Boxall**

- [110] Martyn Boxall, a Diesel Fitting Teacher at the Emerald Campus of TAFE taught Jacinta Evans between 4 and 27 October for approximately ten days covering theory and practical classes.
- [111] Jacinta Evans was said to be bright, cheerful, keen, and eager with her behaviour being no different from any of the other apprentices.
- [112] In cross-examination, the witness gave similar evidence to Claudio Favero in respect of supervision and awareness of allegations against Jacinta Evans. In the twenty-five years he had been a TAFE teacher, he had noticed change in student behaviour with the authority of the teacher being eroded. The "F word" and "C word" were often heard in the classroom to the extent that he chose not to reprimand students [Transcript p. 2-87]. He had also witnessed students address each other as "fuck wit" said to be without malice [Transcript p. 2-88]. Similar language was in use in the recent BMA Group classes [Transcript p. 2-89].

**Gage**

- [113] John Gage, employed at the Blackwater mine, provided evidence that one of his responsibilities was to train Apprentices in forklift driving by way of a two to three week program involving both theory and practice.
- [114] He gave evidence of knowing the four Apprentices that had made a written complaint against Jacinta Evans (who he knew as well). He had been made aware that he had been named in the complaint as being witness to Jacinta Evans being rude to him by not listening to him and talking over him and did not agree with the allegation. Prior to the apprentices presenting for training, he had been aware of "friction and issues between them all".
- [115] The investigation of the previously mentioned complaint had been conducted by Simon Pukk and Brett Wallace with neither seeking to interview him about the allegation.
- [116] Cross-examination of the witness was brief and, in the main, concentrated on his interactions with Jacinta Evans in the four weeks she trained with him.

**Submissions****Appellant**

- [117] The submission dealt with the options available to the Commission with the preferred option of the employer being that the original decision be set aside and that another decision be substituted, namely that it is appropriate for the registered training contract to be terminated.
- [118] The critical questions to be addressed (previously mentioned in the decision) were capitulated in the evidence before the proceedings.
- [119] As to whether Jacinta Evans had engaged in misconduct, the evidence of Bonita Orr, Tristan Passman and Hayden Weight confirmed that a pattern of behaviour had existed constituting misbehaviour. In particular the comments made by her in relation to Aboriginality were not, as suggested by Council, comments of a general nature, but offensive and humiliating causing hurt to Tristan Passman. Evidence brought by Council through the witness Martyn Boxall, confirmed a more frequent use of robust language by apprentices that he trained but that the language was not used with malice or personally directed at persons as had been the case in this matter.

- [120] The Council's Show Cause Notice seemed, to some extent, to find that Jacinta Evans' use of language was more conversational than directed at persons, however the Information Notice provided by the Council had made reference to her as being contrite and wishing to apologise for her behaviour which, in effect, amounted to an admission of the allegations surrounding her behaviour. Further, the letter of response to the Employer by Jacinta Evans did not, in any form, include a denial of the allegations. In respect of the evidence adduced by the Council from the TAFE Teachers it was said to be of little assistance.
- [121] As to whether the conduct was serious misconduct, or just misconduct, the Employer and the Council diverged on this issue, however it is an accepted outcome of both investigations undertaken that inappropriate behaviour had been engaged in by Jacinta Evans and the standard of behaviour expected from all Employees (including Apprentices) was above that level of behaviour as a result of the extensive induction processes put in place by the Employer.
- [122] The Information Notice had placed reliance upon the culture of robust language in the workplace, however Jacinta Evans had engaged in a similar type of behaviour identified in the matters of *Wilson*<sup>10</sup>, *Cahill*<sup>11</sup> and *Leadbetter*<sup>12</sup> which was beyond that of just using robust language.
- [123] The challenge in the proceedings to the appropriateness of the Employers investigation was said to be not of importance in that the Commission must determine whether the conduct was misconduct or serious misconduct and this is not affected by the argument of process. It was said that decisions of this Tribunal had found similar types of conduct as serious misconduct. The challenge made of the notes taken at the time of the investigation by Simon Pukk was not of significant relevance, in that the sworn evidence of the three Apprentices confirmed the conduct engaged in by Jacinta Evans. The Apprentices had been deeply affected by the conduct and were apprehensive and stressed when giving their evidence. The conduct must be considered in the context of the legislative requirements that had to be met by the Employer.
- [124] On the final question as to whether the decision to issue a reprimand was appropriate, the submission was that the position of the Employer that Jacinta Evans had engaged in serious misconduct should be accepted and the cancellation of the Training contract was warranted and appropriate in the circumstances.
- [125] A return to the workplace by Jacinta Evans would mean an impact on the other Apprentices as it is likely that the conduct would continue due to the interaction that would occur in the course of the employment. Whilst it was the initial position of the complainants that they did not want to see Jacinta Evans lose her job, they had now resiled from that position. The evidence before the proceedings would indicate that Jacinta Evans at TAFE continued to engage in the same type of conduct.
- [126] The submission reaffirmed the objection to the admission of previously mentioned material (in Exhibit 9) and to the nature of the Appeal. Also raised was the decision of the Council not to call direct evidence from Kellie Leijen and Jacinta Evans, with the Commission requested to make an adverse inference on this matter.
- [127] At the conclusion of the submission, the Commission raised a number of matters with Bilal Rauf, the Solicitor acting on behalf of the Employer, on the position of the three Apprentices not wanting Jacinta Evans to return to the workplace considering the Commission was requested to consider the impact of such a return. The Commission was informed that the position of the Apprentices was not a determinative or overarching factor but the effect of a continuing behaviour pattern was the concern.

## **Council**

- [128] The submission in the first instance went to a previously submitted outline of submissions and the number of authorities that were attached.
- [129] The Commission would need to make a decision based upon the evidence that Council had before it at the time of their decision making, in addition to a significant body of additional and new evidence.
- [130] On the evidence before the Commission from the Apprentices, it was acknowledged that bantering was common in the workplace, it was also agreed that coarse language was also common place in the workplace. Friction and competitiveness was also in existence according to the Apprentices.
- [131] On the demeanour of Bonita Orr and Tristan Passman, whilst they exhibited signs of stress and anxiety whilst giving evidence, it was of question as to whether Jacinta Evans' behaviour was the sole reason, bearing in mind there had been very little contact with her since her employment was suspended. In the case of Tristan Passman,

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<sup>10</sup> *Wilson v Brisbane City Council* [2002] 170 QGIG 250

<sup>11</sup> *Cahill v Big W Ltd* [2000] 163 QGIG 287

<sup>12</sup> *Leadbetter v Qantas Airways Limited* [2009] AIRC 131

feeling threatened by comments made by Mark Beasley and criticism from other Employees over the lodgement of the complaint could have increased his stress levels. Criticism was made in respect of the evidence from the Apprentices in that they appeared to have been "fairly well schooled up", quoting, as an example, the change in attitude on Jacinta Evans returning to the workplace. There was the use of common terminology such as "I'll be watching my back" by the Apprentices, Tristan Passman and Hayden Weight were said to be vague when being cross-examined especially on matters relating to their interviews with Kellie Leijen on 28 July 2010. The affidavits of the witnesses in various places were identical in their wording. In the case of Bonita Orr, there were concerns raised about the validity of her diary entries that went to the reliability of her evidence. Tristan Passman had provided considerable more evidence in the proceedings than he had to Kellie Leijen when interviewed in July 2010. Hayden Weight gave evidence that he did not take the threat by Jacinta Evans to punch him in the head as a genuine threat.

- [132] Simon Pukk's investigation was said to have the appearance of bias or premeditation in that he had readily accepted the views of the Apprentices in respect of the two complaints and rejected Jacinta Evans on both occasions. The failure to interview tradesmen in respect of the complaint on his evidence in cross-examination may have led to a different outcome. There was a question of credibility over certain parts of his evidence. The investigation undertaken by Simon Pukk was said to be seriously flawed and less thorough than that of Kellie Leijen.
- [133] The evidence provided to the Commission by the TAFE teachers (Claudio Favero and Martyn Boxall) was that Jacinta Evans' behaviour at the TAFE block was good, with no complaints being made about her conduct or behaviour. She was said to be bright, keen and eager to learn. This evidence contradicted that given by Tristan Passman and Hayden Weight about her behaviour at the TAFE block. Martyn Boxall gave specific evidence that student behaviour had eroded in the 25 years he had been teaching and that the "f" and "c" words seemed to be part of the lexicon of students these days.
- [134] The evidence of John Gage was said to be primarily unchallenged in that he refuted the allegation by the four Apprentices that Jacinta Evans had continually talked over him. According to his evidence, her behaviour at work was reasonable.
- [135] The Council acknowledged the contribution of the Employer to the training of Apprentices and expressed a willingness to continue to work closely with them into the future.
- [136] The Council acknowledges the serious allegations that had been levelled against Jacinta Evans and also the requirement of the Employer's duty of care to provide a safe and healthy workforce.
- [137] The behaviour of Jacinta Evans was inappropriate, thus the issuing of an formal reprimand which could be taken into account, should there be a subsequent misconduct episode in the future with the real likelihood that the training contract may be cancelled.
- [138] On the grounds relied upon by the Council to go with misconduct rather than serious misconduct, the Council had relied upon the provisions of s. 64 of the Act where serious misconduct is defined. The conduct was not considered to be so grave that it was unreasonable in the circumstances for the employer to continue training. There had been no previous warning on her record and to have cancelled the training contract would have been manifestly unfair.
- [139] Brief reference was made to the decision not to call on Kellie Leijen to give direct evidence in the proceedings.

### **Submissions in Reply**

- [140] Bilal Rauf raised issue with comments made in respect of the demeanour of the witnesses and of the attempt to cast doubt over the affidavits of the three Apprentices. The same question in respect of the TAFE teacher affidavits where strong similarities existed could just have easily been advanced.
- [141] The suggestion that Simon Pukk had an element of bias or premeditation in relation to his investigation was said to be an irrelevant distraction.
- [142] On the concept of serious misconduct, the Commission was taken to the decisions, *Ergon*<sup>13</sup> and *The Australian Workers' Union of Employees, Queensland (for Charles Bellchambers) v Mount Isa Mines Limited*<sup>14</sup>.

<sup>13</sup> *Ergon Energy Corporation Limited v Training and Employment Recognition Council* [2008] 187 QGIG 230

<sup>14</sup> *AWU (for Charles Bellchambers) v Mount Isa Mines Limited* [2002] 171 QGIG 1

## **Conclusion**

### **Nature of Appeal and the Record**

- [143] The nature of appeal is clearly defined at s. 232 of the Act with the Commission informing the parties at the commencement of the proceedings of the matters to be taken into consideration in the Commission's determination.
- [144] The Commission allowed the Council to tender material (Exhibit 9) said to form the record of the Council's investigation and subsequent decision to apply the penalty of a reprimand to Jacinta Evans for unacceptable and inappropriate behaviour which was said to be misconduct in accordance with s. 70(a)(1)(B) of the Act in that she had not complied with the employer's various codes of conduct.
- [145] Objections were raised by the Employer in respect to four documents contained within that material with the Commission informing the parties that consideration of the objections would be undertaken at the time of writing the decision.
- [146] The Employer's objection went to documents TERC 5, 6, 7 and 20 having been made on grounds previously mentioned in this decision.
- [147] The Commission is of the view that the Council, in tendering the material said to be the "record" had met its obligations in accordance with the provisions of r. 109 of the IR Rules. In respect of r. 109(k), it is not the intention of the Commission to make a finding as to whether the process of the Council through the delegations of Kellie Leijen was a proceeding or otherwise for the purposes of the rules, however the Commission has placed little or no weight upon documents TERC 6, 7 and 20 accepting reasons that the Employer has advanced in their objection.
- [148] The issue of TERC 5 is, in the view of the Commission, a different set of circumstances in that Kellie Leijen's notes taken in the interview with the complainants were able to be addressed in the evidence of Bonita Orr, Tristan Passman and Hayden Weight to the extent that if there was disagreement or conflict, such matters could have been put before the Commission. No such evidence was before the proceeding therefore TERC 5 has been a document considered by the Commission, along with the other 16 documents that make up the record (Exhibit 9).

### **Witnesses not heard in the proceedings**

- [149] The argument was made by the Employer in objection to the admission of TERC 5, 6, 7 and 20 into proceeding that the failure of the Council to call evidence from Jacinta Evans, Kellie Leijen and the Tradesmen (with the exception of John Gage) interviewed by Kellie Leijen that they had been denied an opportunity to bring evidence before the Commission through the avenue of cross-examination. That argument is not without some substance however the same argument would equally apply to the failure of the Employer to call evidence from Brett Wallace who had carried out the probationary interview with Jacinta Evans in April 2010 having at the time been given the "heads up" from Bonita Orr and Tristan Passman about her alleged behaviour. Brett Wallace along with Simon Pukk had considered the response from Jacinta Evans to the Employer's Show Cause letter on 21 July 2010. Another possible witness Kyle Christmas had an integral role in the decision of the Employer to terminate the training contract of Jacinta Evans as one of the four complainants, yet provided no evidence in the proceedings.
- [150] Whilst the "non" evidence of persons may be of interest to each of the parties, the Commission simply has to consider the evidence, material and submissions that actually form the proceedings and takes no issue in respect of evidence not called by either party.

### **Questions to be Addressed**

- [151] The Employer, in opening submissions, suggested that three critical questions needed to be addressed in the course of the proceedings, a position not opposed by the Council and accepted by the Commission as appropriate in the circumstances:
- Did the Apprentice engage in the conduct alleged?
  - If so, is that conduct characterised as serious misconduct or simply misconduct? and
  - Did the disciplinary action taken reflect the level of misconduct?

***Did the Apprentice engage in the conduct alleged?***

[152] The conduct of Jacinta Evans in the workplace first came before the Employer on 23 April 2010 when Bonita Orr and Tristan Passman spoke to Brett Wallace at the time of the probationary interviews for all first year Apprentices. There is no evidence before the proceedings in respect of what discussion may have occurred between Wallace and Evans except for the Apprentice or Trainee Appraisal Form dated 28 April 2010. The appraisal takes no issue with Jacinta Evans in respect of the following categories:

- safety;
- quality of work;
- dependability;
- reliability;
- attitude; and
- work ethic.

[153] All ratings attributed to Jacinta Evans were in the medium range of three out of five. A section at the bottom of the form under the heading "Goals to be met before the next appraisal" said the following:

"Good effort needed (clearly) to not get involved in any altercation. Seek help."

[154] The complaint (signed by Bonita Orr, Tristan Passman, Hayden Weight and Kyle Christmas) was served on the employer on 8 July 2010 and on the evidence that is the first occasion the matter had formally been raised with the Employer. In fact, apart from the informal approach to Brett Wallace, there is no evidence that any issues relating to Jacinta Evans had been raised with Supervisors or Tradesmen in the workplace by any of the four complainants.

[155] The evidence of Bonita Orr confirmed the substance of the complaint indicating she had witnessed Jacinta Evans being abusive through the use of inappropriate language to other Apprentices and herself. She witnessed inappropriate comments to Tristan Passman about Indigenous Australians and allegedly calling Tristan Passman "fat" at a training course on 5 July 2010. In his evidence Tristan Passman did not recall Jacinta Evans calling him "fat" [Transcript p. 2-62]. There was an altercation between Bonita Orr and Jacinta Evans when Bonita Orr is said to have taken Jacinta Evans' car space on 14 April 2010. Bonita Orr attached a number of work diary entries to her affidavit where references to Jacinta Evans appeared to be written in a different format, begging at least the question that the entries may have been entered at a date later than when appearing in the diary. The Commission heard evidence from Bonita Orr about the diary entries, however has a reluctance to accept that evidence as being truthful.

[156] Tristan Passman, the author of the complaint letter was said to have had numerous comments made to him by Jacinta Evans of an inappropriate sexual nature and also witnessed her being abusive to the other Apprentices. He also gave evidence in respect of comments made about Indigenous Australians by Jacinta Evans and of taking the time to provide her with some background on the issue. The comments ("pin dick") relating to the size of his penis was said to have been offensive.

[157] Tristan Passman gave evidence that Mark Beasley had threatened him a short time after he had lodged the complaint but he had chosen not to report the incident. The threat by Mark Beasley was of a serious nature and he acknowledged in the first instance that he had felt threatened yet the fact he failed to raise the issue formally (or otherwise) with the Employer raises questions about the differing approaches in respect of Jacinta Evans and others.

[158] Hayden Weight gave evidence of witnessing and being the subject of abusive and inappropriate language from Jacinta Evans but interestingly found the terms "karate kid" and "have-a-chat" also offensive which may make his ongoing working life in a workshop on a mining site interesting to say the least. His evidence in general is of question in that in cross-examination he had what may be best deemed "selective recall". In those areas favourable to his testimony his recall was good and in other areas such as his interview with Kellie Leijen on 28 July 2010 his recall was non-existent.

[159] On consideration of the evidence and material before the Commission, I find that Jacinta Evans' used language, at times directed towards Tristan Passman, Bonita Orr and Hayden Weight, that made them feel uncomfortable. The language used by her was no different to that commonly used by other Employees in workplaces or at TAFE training courses attended by Apprentices.

[160] In the matter of *Cahill v Big W Ltd*<sup>15</sup> Commissioner Swan (as she was then) made the following comments:

"I accept that, as a matter of common sense and knowledge, language used on the dock would not necessarily be genteel. Whilst offensive language directed personally at another has a greater propensity to offend, in a general sense, conversationally, language which was once deemed to be inappropriate is now commonplace. Regrettably, in many areas of work, words such as 'fuck' and 'dickhead', by way of example, are quite common, and previously used swearwords such as 'bugger' and 'bloody' are deemed to be less offensive so much so that they now have currency on television ads, for example. Those words may well continue to be offensive to many people and for those people the use of such words under any circumstances in their presence is anathema to them. However, one would not be facing reality if one thought that language such as that described above was not becoming more the norm.

Notwithstanding those comments, however, abusive language personally directed at one's work colleagues, or for that matter anyone, is always fraught with danger. I believe that general community standards would continue to deem such occurrences as inappropriate."

[161] The abovementioned comments were made in a decision released in March 2000 and it is not unreasonable to conclude that the general usage of such language would not have improved in that time. There is no evidence that any other employee, apart from the three Apprentices, found the language used by Jacinta Evans to be offensive to a level that would generate an intervention or complaint.

[162] Other comments made by Jacinta Evans such as "polka dot face", "pin dick" and the like were not in the view of the Commission appropriate when directed personally towards Hayden Weight and Tristan Passman however they are not of a nature in this particular type of work environment that would fit under the category of serious misconduct.

[163] The other comments made by Jacinta Evans in relation to "giving better head than his missus" whilst offending Tristan Passman, appear not to have heard by others but in any case would fit with those comments previously mentioned as not being of serious misconduct.

[164] The racial comments to Tristan Passman which the other Apprentices took offence to were in the view of the Commission "ill-formed" and have no place in either work or social environments however they were made by a 19 year old woman who, on the evidence of Tristan Passman, had made no further comments of a similar nature once he had explained his heritage and of the hurtful nature of such comments.

[165] It is folly to suggest the comments of Jacinta Evans were similar to those in the matter of *Wilson v Brisbane City Council*<sup>16</sup> where an account of an incident had stated the following:

"A third party asked who he was talking about and what was he talking about. He then said to that person 'That fucking Aboriginal trainee welder.' He then looked at me and said 'Aborigines all rort the fucking system.' 'They fucking get everything for free, fucking cars, the lot.' I then said to him 'I've worked for everything I ever fuckin' got MATE! I've never gotten anything for free.' He then said out loud to me 'Aborigines get in the fucking Council easy and once they're in they get an easy fucking run. Then as soon as they get in trouble they start crying fucking discrimination.'

He then said 'What the fuck is this Cultural Leave? What kind of fucking rule is that? Just because your Aunties, Uncles fucking cousin dies you all want time off work. That's fucking bullshit, when we (meaning whites) have someone die in our family we don't give a fuck, we're straight back at work.' 'There's one set of rules for everyone and another set of rules for fucking Aborigines in the Council. That's fucked.' He then went on to say to me 'Who the fuck is this Flo or Jo? (meaning Flo Watson). Who the fuck are they? We don't get fucking help like that, that's bullshit.'

I then said 'What about the murris (Aboriginals) like Gary Richardson and I, who are trying to get a trade? We don't rort the system! What about Gary Richardson getting Apprentice of the Year twice.' He then said to me 'Those awards are not for the whole of Council, that was for you people (Aborigines) in City Fleet.' I told him 'No! They were awards for the whole of Council.'

A third party then asked Chris Wilson 'How do you know about Aboriginals?' He then said loudly 'I lived in an Aboriginal community for 6-7 years and they're all just FUCKING BLACK SCUM' and he looked straight at me, directing what he said to me."

<sup>15</sup> *Cahill v Big W Ltd* [2000] 163 QGIG 287

<sup>16</sup> *Wilson v Brisbane City Council* [2002] 170 QGIG 250

- [166] Whilst the comments made were, in the view of the Commission, inappropriate, they were a "once off" occurrence and more in breach of Company policy than serious misconduct.
- [167] The Commission accepts that there is sufficient evidence to support the allegations that Jacinta Evans engaged in the use of inappropriate language and comments in the workplace and that the language and comments were at times directed towards the three complainants who had given evidence in the proceedings.

***If so, is that conduct characterised as serious misconduct or simply misconduct?***

- [168] As mentioned under the previous heading "*Did the Apprentice engage in the conduct alleged?*", the Commission found that the conduct engaged in by Jacinta Evans was not considered to be that of serious misconduct. Under s. 64(11) of the Act, serious misconduct is defined as:

"***serious misconduct*** means any of the following -

- (a) theft;
- (b) assault;
- (c) fraud;
- (d) at work -
  - (i) being under the influence of liquor or a drug; or
  - (ii) causing an imminent risk of serious bodily injury or work caused illness or a dangerous event happening; or
  - (iii) behaving in a way that is inconsistent with the continuation of a registered training contract."

- [169] An objective reading of s. 64 of the Act could only identify s. 64(11)(d)(iii) as having any possible connection with the behaviour engaged in by Jacinta Evans as there are certainly no allegations of theft, fraud, assault, under the influence of liquor/drugs, or causing safety risks before the Commission. The "threat" made to Hayden Weight over the air-conditioner was, on his evidence, not a threat that had left him feeling threatened.
- [170] The fact that Jacinta Evans engaged in the use of language, commonly used by other employees within the work environment, would mean that to accept that the behaviour was sufficient to cease the continuation of her registered training contract would, in the view of the Commission, be a somewhat unreasonable proposition.
- [171] The comments made by Jacinta Evans directly to the three complainants that were deemed by them to be offensive would fit into the category of misconduct requiring a form of intervention by the Employer and a level of discipline fitting misconduct rather than serious misconduct.

***Did the disciplinary action taken reflect the level of misconduct?***

- [172] The level of disciplinary action taken by the Council was set out in the Information Notice at "Reasons for the Decision" at point 5:

"However, I do reasonably believe that the Apprentice's behaviour is unacceptable and inappropriate and is misconduct as defined in s. 70(a)(i)(B) of the Act in that she has failed to comply with the Employer's Code of Business Conduct; Charter of Values and Workplace Conduct Policy. Therefore an Order by the Council that she be reprimanded for her actions is the appropriate penalty in this case."

- [173] On the evidence and material before the Commission, the Employer on 23 April 2010 was given the "heads up" by Bonita Orr and Tristan Passman about Jacinta Evans' behaviour in the workplace. The Employer appears to have not taken the opportunity (at the probation meeting with Jacinta Evans) to deal with the informal complaint in any serious manner.
- [174] The Employer, on 13 March 2010 and on 28 April 2010 had provided appraisal forms to the Council on the conduct and performance of Jacinta Evans with no inclusion of any issue of concern about her conduct, yet they had been given the "heads up" on 23 April 2010 some five days prior to submitting the 28 April 2010 appraisal. It would seem that the "heads up" was not given the same status of the later formal complaint and in the opinion of the Commission it was the correct status to apply the "heads up".
- [175] As a consequence, the Employer's actions in not taking a proactive approach in April 2010 in respect of Jacinta Evans' alleged behaviour when the formal complaint was lodged on 8 July 2010, for all intents and purposes she was a "clean skin" in that there were no previous warnings recorded in response to any alleged inappropriate behaviour. It is of record that the Employer, having found that the behaviour was serious misconduct, made an application to cancel the Training Contract which was refused by the Council and a reprimand issued. The reprimand was based upon the provisions of s. 70(a)(i) of the Act in that Jacinta Evans failed to carry out reasonable and lawful instruction in not complying with the Employer's policies.

- [176] At the commencement of her Apprenticeship in February 2010, Jacinta Evans had undergone an extensive induction process including exposure to the policies of the Employer that were to be followed in the workplace. Prior to the investigation of the 8 July 2010 she had received no formal warnings in relation to her behaviour and conduct. Once confronted with the allegations, she was subjected to an investigation undertaken by the Employer, an investigation that seems to have been conducted "differently" than the investigation of a complaint made by her in respect of some of those whom had complained about her behaviour, however this is not of significant issue.
- [177] There is however material before the Commission that, at some stage, Jacinta Evans apologised and was remorseful for her behaviour which, in the view of the Commission, suggests a realisation that such conduct into the future would be inappropriate and that there are policies dictating proper levels of behaviour that have to be adhered to by all employees.
- [178] The Commission finds that in the absence of any previous warnings or disciplinary notices that the issuing of a reprimand was an appropriate penalty to be applied in the circumstances.

### **Finding**

- [179] Having considered the evidence, material and submissions before the proceedings, the Commission determines that Jacinta Evans engaged in conduct whilst inappropriate was that of misconduct rather than serious misconduct (as suggested by the Employer) and that the penalty of a reprimand handed down by the Council was sufficient punishment for actions engaged in by Jacinta Evans. The Commission makes the observation that a return to similar types of inappropriate behaviour in the future by Jacinta Evans now that a reprimand is on her record would likely lead to a more severe outcome than the present penalty that has been instituted by the Council.
- [180] The Appeal is dismissed.

J.M. THOMPSON, Commissioner.

#### *Hearing Details:*

2010 25 October  
18 November  
1 December

#### *Appearances:*

Mr B. Rauf, of Blake Dawson, on behalf of the Appellant.  
Mr R. McColm on behalf of the Training and Employment  
Recognition Council.

Released: 21 January 2011