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**TRANSCRIPT OF PROCEEDINGS**

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**MAGISTRATES COURT**

**BENSON, Magistrate**

**MAG-00130619/19(3)**

**WORKPLACE HEALTH AND  
SAFETY QUEENSLAD**

**Complainant**

**and**

**ROLAND CUMMINS**

**Defendant**

**CAIRNS**

**9.06 AM, TUESDAY, 17 MARCH 2020**

**DECISION**

Any Rulings that may be included in this transcript, may be extracted and subject to revision by the Presiding Judge.

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BENCH: This is my decision in relation to the matter of Work Health & Safety v Roland Cummins. The matter proceeded before me by way of a defended hearing and it was then adjourned for submissions which I received on the 29<sup>th</sup> of January and it was then further reserved for me to deliver my decision, which I do now. You  
5 can take a seat, Mr Cummins, while I read my decision.

Mr Roland Cummins is charged with intimidating Inspector Duckworth, a Workplace Health & Safety Officer, in the performance of his duties. The particulars of that charge are set out in the complaint. It has been agreed that on the 4<sup>th</sup> of April  
10 2018 Inspector Duckworth lawfully attended the Cairns Performing Arts Centre worksite in his capacity as inspector under the Work Health Safety Act 2011 to view and address a number of safety concerns that had arisen on the site. He properly identified himself and held the relevant permits to attend. He had a colleague accompanying him. It's also agreed that Mr Roland Cummins also attended the site  
15 at that time in his capacity as a union representative for the Construction Forestry Mining and Energy Union. There were other union representatives also present. Otherwise present were workers on site and representatives of the builder involved.

The parties conducted a walkthrough of the site which took about two hours in total.  
20 A number of issues were raised throughout that time. The incident leading to this charge occurred towards the end of that time and involved a dispute between the two persons about the lack of visible exit plans on site. It is further agreed that Mr Cummins, whilst he and Inspector Duckworth were about an arm's length apart, said to the inspector, "You're a fucking dog", or words to that effect three times in  
25 succession and that he shouted those words. In the moments before this incident, Mr Cummins tried to have Inspector Duckworth look at an iPad that he held in his hand and, in doing so, placed the iPad directly in front of the inspector's face. Those matters, as I've indicated, were agreed upon by the parties.

30 The issues for me to determine include the following: the credibility and/or reliability of various witnesses, was the inspector biased towards the builder and against Mr Cummins and, if so, does this affect his credibility? Thirdly, before shouting at the inspector, did Mr Cummins move towards the inspector placing himself in close proximity to the inspector and/or did he place his face close to the  
35 inspector's face or was it, in fact, the inspector who placed himself in close proximity to Mr Cummins? Fourthly, did Mr Cummins behave and intimidate the inspector and, in considering that, I have looked at the definition of "intimidation", and what the inspector's behaviour to Cummins immediately before the incident was and whether that meant that he would not have been intimidated by Mr Cummins'  
40 behaviour?

Fifthly, was the inspector acting in the course of his duties at the time of the incident? Does the prosecution case prove that the inspector did not assault Mr Cummins shortly before Mr Cummins yelled at him? If not, was the inspector acting  
45 unlawfully and, therefore, no longer acting in his duties as inspector at the time of the incident. Was Mr Cummins' behaviour towards the inspector merely a reaction to stop the inspector assaulting or intimidating him and, if so, was it necessary for that

purpose? Was the apology by Mr Dalamaras to Mr Cummins at the end of the site viewing an apology for the way Inspector Duckworth had treated Mr Cummins and, if so, is that evidence that that witness agreed the inspector had intimidated or assaulted Mr Cummins.

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Turning to those issues in turn, firstly, the creditability or reliability of various witnesses. The witnesses fell broadly into three groups: Mr John Dalamaras, colleague of Inspector Duckworth, gave evidence in a way which was clearly designed to support him. He was, at times, reluctant to acknowledge matters which might see the inspector in a negative light. Peter Luppi, Benjamin Starchenko and David Atkinson represented the builder. They displayed somewhat negative views towards the attitudes of the union representatives and their evidence, where it favoured the account of the inspector, must be seen in that context.

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Robert Hill, James White, Robert Gould were union officials. They were all negative in their view about the manner in which the inspector had addressed their concerns on the day and considered that he was biased towards the builder. Insofar as their evidence supported Mr Cummins's version, it must be seen in that context. Notwithstanding these particular partialities, which were apparent from all the witnesses, and which clearly gave rise to differences in perception, it is my view that all witnesses attempted to give truthful evidence. Was Inspector Duckworth biased towards the builder and against Mr Cummins and, if so, does this affect his credibility?

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Mr Cummins insisted that Inspector Duckworth ignored or dismissed his concerns and those raised by the other union officials throughout the inspection and that this was because he was clearly biased against them in favour of the builders. He argues that the court should, therefore, draw the conclusion that the inspector became frustrated and angry with him for challenging his repeated inactions on various issues and that his evidence should, therefore, not be accepted. For reasons that I will explain in more detail, I do not accept that such a conclusion can be drawn from the evidence.

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Mr Cummins alleges, as well as the inspector ignoring or brushing off his safety issues throughout the walkthrough of the building, that, at the end of the site inspection in the car park, he and his colleagues were threatened by another worker on site, that Inspector Duckworth did nothing about that issue and, further, that the inspector was heard to laugh with the builder about that issue. I do not need to determine if these facts occurred. I am not satisfied that the inspector's alleged response to any such alleged threat would support an allegation of bias against Mr Cummins. There is also not sufficient evidence to conclude that he did laugh or, if he did, that it had anything to do with the issue that was being raised at the time.

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The third issue that I have considered is whether, before shouting at the inspector, what did Inspector Duckworth do or say to Mr Cummins? Had the inspector placed himself in close proximity to Mr Cummins or did Mr Cummins move towards the inspector placing himself in close proximity and did Mr Cummins place his face

close to the inspector's face? Mr Cummins says that Inspector Duckworth said to him – and I quote – words like:

5           *Is that what the CFMEU teaches you? Is it? Is that what the CFMEU teaches you? Bad work practices or unsafe work practices?*

Inspector Duckworth agrees that he said words like,

10           *What does the CFMEU teach you?*

But that it was said to a different union official. The majority of witnesses who gave evidence say that the comment was more likely something along the lines of:

15           *Is that what the CFMEU teaches you? Unsafe work practices?*

And that it was only once. I accept that that is the case. The inspector recalls that the comment was made to the person who tried to make him look at the iPad. He incorrectly identifies that person to be Hill and not Mr Cummins. This, in my view, was not an attempt by him to give false evidence or to deflect his own behaviour. It was simply a mistake in his memory. Clearly, other union officials were engaging with him throughout the inspection and it was Hill who initially raised the issue of the exit plan and Hill who indicated that he had a copy of that plan on his iPad. Cummins later took that iPad from him. It is very likely, therefore, that Inspector Duckworth and Mr Hill engaged at some point during the walkthrough about that issue.

Mr Cummins says that at the time the inspector made the comments to him – and I quote again:

30           *I was probably about an arm's length away because I was trying to put it, the iPad, into his face for him to have a look at it.*

Mr Cummins claims that before making the comments, that is, before the inspector made the comments, the inspector – and I quote again:

35           *Come in and point at me CFMEU logo.*

At some point in his evidence he did say that the inspector poked him in the chest but later conceded that he had pointed at him closely. Inspector Duckworth denies that he pointed his finger at Cummins' logo when uttering comments about the CFMEU. The majority of witnesses say that he did so or may have and I find that he did. No witness says that the inspector touched Mr Cummins and I find, specifically, that he did not touch him but pointed at him. Mr White and Mr Gould both said that Inspector Duckworth physically stepped towards Cummins immediately before uttering the words to him. I do not accept that evidence because it is at odds with the evidence of the balance of witnesses.

Mr Hill said he leaned and pointed although he later added that he took half a step when leaning but Mr Cummins, himself, described the inspector – and I quote:

*Made a slight movement or leaning.*

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Before pointing and making the comments to him about the CFMEU. I find, on that issue, that the inspector pointed at Cummins' logo with his arm somewhat extended but did not touch him. Cummins' own evidence is that they were within an arm's length of each other already at that stage. The inspector could not, therefore, have physically moved towards Cummins other than slightly leaning towards him before pointing. Cummins says the inspector raised his voice when saying these words to him which evidence was supported by Hill. Cummins was taken aback as the inspector is usually quiet and has never raised his voice before.

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Dalamaras acknowledged that the inspector had raised his voice somewhat but was reluctant to describe him as shouting saying that he only raised it to speak over Cummins' already raised voice. Mr Luppi corroborated this in saying that, before the inspector made any comments to Cummins, Cummins was already speaking loudly over the top of Duckworth. Starchenko and Atkinson deny that the inspector used a raised voice or lost his temper but both agreed that his comments were cheeky. White described the inspector at that point as being agitated and Gould was the only witness who stated that the inspector's comments were aggressive. It was suggested in evidence that the inspector was red in the face which is evidence that he was angry.

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I find, on the balance of evidence, that the inspector was likely to be red in the face as he, himself, agreed to as well as sweating but that it was a hot day and most present were also red and sweating or hot and sweating. At least one witness described Mr Cummins in similar fashion. This does not, in my view, support that he was angry or aggressive. I find that the comments made by the inspector to Mr Cummins were said in a sarcastic or cheeky manner but they were not shouted or screamed.

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Did Mr Cummins move towards Inspector Duckworth before shouting at him? Inspector Duckworth describes that – and I quote:

*Without warning, the defendant stepped forward two to three inches from my face and screamed.*

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He later said:

*He virtually jumped in front of me.*

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John Dalamaras, Peter Luppi and Benjamin Starchenko stated that Cummins physically moved towards Inspector Duckworth immediately before uttering the words to him. Dalamaras described that Cummins launched at Duckworth, that he came towards him in an aggressive manner and swore and that:

*He took a couple of steps across me to Duckworth.*

Luppi describes that Cummins got into Rob, that is, the inspector's face and that he moved six to eight inches towards him. Starchenko says the defendant turned around in a red rage, came straight up to his face and swore. These witnesses were all in close proximity to both parties. Mr Hill did not specifically say that either man moved towards the other. Atkinson was the only witness who said that Mr Cummins was on a ladder at the time of the incident and I don't accept that evidence. Mr Luppi was the only witness to say that Mr Cummins pointed his finger at Inspector Duckworth's face when he shouted at him and I, again, do not accept that evidence. It is at odds with the balance of the evidence given.

Gould and White were the only two witnesses, apart from Mr Cummins himself, who were adamant that Mr Cummins did not move before uttering the words. I find that the inspector and Mr Cummins were in close proximity to one another immediately before the incident when Mr Cummins shouted the words that he did. Cummins had placed himself in front of Inspector Duckworth and within an arm's length in the course of discussion moments before the incident as he was trying to force the inspector to look at the iPad in his hand. The inspector was avoiding doing so. The inspector finally leaned towards Cummins and pointed at his logo making a comment which Cummins found insulting.

On his own evidence, Cummins had moved his feet to be in front of Inspector Duckworth moments before the inspector pointed and commented at him. Whether he then moved his feet to position himself closer or leaned towards the inspector, I find that he did move forward and placed his face to within several centimetres of Inspector Duckworth before he then shouted the words attributed to him. Did Cummins' behaviour intimidate the inspector? The definition of "intimidation" is that it is to be given its ordinary English meaning. It involves behaviour by one person towards another which causes that person to feel fearful or overawed. I was referred to a number of authorities in the submissions that support that and I don't need to refer specifically to those further.

Mr Cummins either shouted or screamed the words at Inspector Duckworth. He claimed that he was not angry but that he was embarrassed and, himself, intimidated by the inspector's behaviour which caused him to react. The two men were, as I have found, in very close proximity to one another at the time he yelled those words three times in succession. The witnesses' described Mr Cummins' demeanour as follows: Mr Dalamaras said – and I quote:

*In an aggressive manner.*

Mr Luppi said – and I quote:

*Rolly lost control and got into Rob's face. He said it with aggression.*

Starchenko said – and I quote:

*He turned around in a red rage and came straight up to his face. He screamed the words centimetres from his face.*

Atkinson described Mr Cummins as being – and I quote:

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*A little bit aggressive. The words were said emotionally and aggressively and in an angry voice.*

Hill agreed that Mr Cummins had raised his voice but he said that was only to meet Duckworth. Mr Gould agreed that it was said in a raised voice and was forceful. Mr Cummins, himself, gave evidence that – and I quote:

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*I've yelled them, that is, the words. So you could argue that's aggressive, yeah.*

15 He then further admitted:

*I had an outburst at that moment.*

I find that Mr Cummins was clearly angry and aggressive at the time he shouted or yelled the words at the inspector and that their faces were centimetres apart at the time. Would that behaviour have intimidated the inspector in the circumstances? Inspector Duckworth says that the words were screamed at him, that Mr Cummins' face had an expression of anger or hatred, that he appeared to be on the brink of losing control. A description which is largely supported by the other witnesses and Mr Cummins' own account. The inspector further says that he was shocked and feared being assaulted. He was described by at least one witness as being visually distressed.

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Mr Cummins would not concede that his comments or behaviour were unwarranted and insisted that others would have acted the same way in his shoes. He said he retaliated against the behaviour of the inspector who had – and I quote:

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*Pushed the argument first.*

35 He did admit that – and I quote again:

*He regretted what I'd done instantly and he then removed himself from the situation.*

It is clear from Mr Cummins' own evidence that he knew that he had overstepped the line of appropriate behaviour. He conceded that in other circumstances his behaviour would intimidate someone but insisted that, in the context of his interaction with the inspector, Duckworth would not have been so intimidated. Mr Cummins had had a number of dealings over the previous 12 to 18 months on different worksites with Inspector Duckworth. He considered that the inspector rarely took his issues seriously and rarely resolved safety complaints. On this occasion, he insisted that

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nothing was resolved for the various safety issues that had been raised. His evidence that he – and I quote again:

*Saw him –*

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the inspector:

*...walking around, looking at the ground, if that's what he calls a risk assessment, I guess.*

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Was clearly sarcastic and dismissive of the inspector's actions regarding asbestos concerns in the car park on his arrival. Cummins was clearly annoyed and frustrated with the inspector at this early stage. He became more frustrated and angry as the time proceeded. A very large number of safety issues were raised over the course of two hours. Cummins was clearly of the opinion that the inspector was not dealing with the issues adequately and, in his view, was not carrying out his duties satisfactorily.

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The ultimate dispute was about the availability of exit signs versus the availability of emergency exit plan. This issue was raised early to the inspector by another union official and then taken up and raised repeatedly by Mr Cummins throughout the walkthrough. He felt that the inspector had ignored or brushed him off repeatedly about the issue. This finally led to the confrontation directly between the two that has been described. Mr Cummins stated that confrontation by placing himself in front of the inspector and sticking the iPad close to the inspector's face insisting that he look at it. The inspector reacted by pointing at Mr Cummins' logo and making a sarcastic remark.

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I find that Mr Cummins was clearly angry at the time that he reacted. He then placed his face closer to the inspector and shouted or yelled the words described. He felt that his integrity had been questioned by Inspector Duckworth and that his union had been denigrated. To use his own words, he retaliated. He reacted and then yelled or screamed the words at the inspector three times in succession for emphasis. The intention was to cause the inspector to be fearful or overawed and I accept that Inspector Duckworth was shocked and that he feared for his personal safety at that moment. He was, therefore, intimidated by that behaviour. The inspector's own behaviour towards Mr Cummins shortly before this incident did not meet the same level of anger or aggression and would not have meant that Cummins's behaviour would, therefore, not have had the effect of intimidating him.

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Did Mr Cummins merely react to stop the inspector's intimidation of him? Mr Cummins claims that he yelled the words in order to make the inspector stop yelling at him – and I quote:

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*To get him out of my face.*

He also said he had been shocked by Inspector Duckworth's behaviour as the inspector had always been quietly spoken and mild-mannered. A description also given by other witnesses. Whilst he may have been shocked at the inspector's behaviour, he was not frightened or intimidated by him. There was no reason for Mr Cummins to react in the way that he did in order to stop the inspector from repeating his comments.

The evidence is that the men were in close proximity to one another because Cummins had placed himself there. The inspector's voice was raised when he made the comments but he did not shout or yell the words. The words said were not threatening. The inspector said his words once only. There was no reason to make him stop repeating them. There is also no suggestion that Cummins was hemmed in in any way or that he was unable to step away from the situation.

Was the inspector acting in the course of his duties at the time of the incident? I'm asked to find that the inspector had threatened or assaulted Mr Cummins in some way which would mean that he was acting unlawfully and, therefore, no longer acting in his duties as inspector. The evidence given was that there was a momentary hushed silence from the group following Mr Cummins' outburst. This is an indication that all present were taken aback by his behaviour. There is no evidence that they reacted in a similar way to the inspector's comments or that any of them was as shocked by the inspector's behaviour.

Inspector Duckworth did not move towards Mr Cummins other than leaning towards him, as previously described. He did not touch Cummins, he did not threaten Cummins, he did raise his voice above his normal tone but did not shout or yell. He did make a sarcastic or cheeky comment about Mr Cummins' union. This did not amount to an assault or behaviour which would be considered illegal and which would have left Inspector Duckworth acting outside his approved powers. Inspector Duckworth's comments were not said in a manner which would have or did intimidate or cause fear to Mr Cummins. I find that he was acting, at all times, within his powers and responsibilities as an inspector.

Finally, was the apology by Mr Dalamaras to Mr Cummins at the end of the site viewing an apology for the way Inspector Duckworth had behaved? I do not accept that it was. Mr Dalamaras had touched or grabbed Cummins after his outburst and had been accused by one of the union officials of having assaulted Cummins. He says he approached Mr Cummins afterwards and apologised specifically for that issue. Mr Cummins claimed, in cross-examination, that he couldn't recall what the apology was specifically about. Mr Dalamaras' evidence on this issue was clear and credible and I prefer it. He says he told Mr Cummins why he was apologising and that Mr Cummins accepted his apology. I accept that evidence and I find that Mr Cummins' evidence, on this aspect, was vague and entirely unconvincing.

I am unable, nor am I required, to make any findings as to whether Inspector Duckworth did, in fact, carry out his duties properly, that is to say address the issues as would have been expected of him. I do find, however, that Mr Cummins had a

preconceived perception about the inspector based on previous dealings with him. He was dismissive and sarcastic in his evidence about the way the inspector conducted a search of the car park for asbestos and was clearly frustrated and angry that the inspector would not list workers' names on the asbestos register. This was  
5 early in the issue and before the walkthrough the site had commenced.

Mr Cummins then insisted that the inspector did nothing – and that's to use his words – about the concerns raised throughout the walkthrough and that this was consistent with the approach of the inspector over the previous 18 months or so that they had  
10 found themselves dealing with in similar matters on different worksites. That led, in my view, to a build up of frustration on Mr Cummins' behalf and not the other way around. His retaliation to the inspector's behaviour immediately prior was excessive, was designed to intimidate the inspector and did so intimidate the inspector.

15 For those reasons, I find that the elements of the offence have all been made out to the required standard and that the defendant is guilty.

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