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No. 12

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999*  
*Industrial Court Rules 1997*

NOTICE

The following Agreements have been certified by the Commission:-

No/s	Title	Date certified	Cancelling
CA253/00	Hayman Island Resort (Marine Operations) - Certified Agreement 2000	9/6/00	IA44/93
CA233/00	Walkers Pty Ltd (Clerical) - Certified Agreement 2000	15/6/00	CA121/98
CA264/00	Mueller College Kindergarten & Child Care Centre - Certified Agreement 2000	23/6/00	
CA297/00	Mueller College & Groves Christian College - Certified Agreement 2000	23/6/00	
CA296/00	Queensland Apprenticeship Services Pty Ltd - Certified Agreement 2000	26/6/00	CA427/98
CA298/00	J & P Richardson Industries Pty Ltd - Certified Agreement No 4	26/6/00	CA105/98
CA305/00	Intermix Australia Pty Ltd - Certified Agreement (No 3) 2000	26/6/00	CA82/98
CA190/00	Teys Bros. (Beenleigh) Pty. Ltd., Repair and Maintenance - Certified Agreement for Electricians	29/6/00	
CA208/00	Fullpak Pty. Ltd. - Certified Agreement 2000	29/6/00	
CA299/00	Nationwide Oil Pty Ltd - Vehicle Operators' - Certified Agreement	30/6/00	
CA322/00	Logan City Council - Certified Agreement No.4 2000	3/7/00	CA182/98
CA317/00	J.A.S.M Traffic Services Pty Ltd - Certified Agreement	4/7/00	
CA318/00	Traffic Manpower Pty Ltd - Certified Agreement	4/7/00	
CA319/00	Queensland Traffic Controllers Pty Ltd - Certified Agreement	4/7/00	
CA320/00	S & J Traffic Services Pty Ltd - Certified Agreement	4/7/00	
CA321/00	Traffic Management Pty Ltd - Certified Agreement	4/7/00	

E. EWALD  
Industrial Registrar

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 – s. 22(1) – orders on exhibitions

John Rigby AND Shop, Distributive and Allied Employees Association (Queensland Branch)
Union of Employees and Others (No. B394 of 2000)

PRESIDENT HALL
COMMISSIONER SWAN
COMMISSIONER BLADES

30 June 2000

DECISION

John Rigby has made an application under s. 22 of the Trading (Allowable Hours) Act 1990. He is a natural person. He is entitled to do so, see s. 23(1)(b).

The difficulty is that the application does not seek the fixation of opening and closing hours for a special exhibition or special display. The application expressly seeks an order "to fix trading hours with the right to trade for non-exempt exhibitors" at the proposed pre-Christmas fair. There is certainly power to fix trading hours for such a fair, see s. 21. However, only an "industrial organisation, or other organisation" may make such an application. We do not accept that a natural person is an "other organisation". Indeed, we notice that both under the Trading (Allowable Hours) Act 1990 and under the earlier Industrial Conciliation and Arbitration Act 1961-1989 "other organisation" at s. 23 and the earlier s. 96D(1) has consistently been held not to include an artificial legal person. (eg a trading corporation), see Van Mark Pty Ltd and Retailers' Association of Queensland Limited, Union of Employers and Others (1995) 149 QGIG 1179 and AMP Shopping Centres Pty Ltd v. Retailers' Association of Queensland Limited, Union of Employers and Others (1990) 134 QGIG 128.

We have considered whether the application might be saved by an amendment, to bring it within s. 22(1) as fleshed out by s. 22(2)(b). Given that the applicant has not sought to prove, and indeed has not pleaded, that the goods which he openly admits will be sold at the pre-Christmas fair are goods "other than goods which a reasonable person would expect to be sold in an exempt shop" such an amendment would be a futility.

In all the circumstances, we have decided to dismiss the application. In fairness to an unrepresented applicant, we should add that we are not confident that if the difficulties to which we have referred might be overcome, the application would succeed on its merits. No order would be granted in respect of Thursday and Friday because the hours sought are more restrictive than the hours which the pre-Christmas fair might trade in any event pursuant to the Trading (Allowable Hours) Act 1990. The applicant does not require an order to be allowed to trade between the hours of 8 a.m. and 5 p.m. on Saturday. An order is necessary only for the period 5 p.m. to 6 p.m. The applicant plainly needs an order in respect of the proposed opening and closing hours of 10 a.m. until 5 p.m. on Sunday. With the greatest respect to the applicant, the case made out seems prima facie to be insufficient to support an order about either the period 5 p.m. to 6 p.m. on Saturday or the period 10 a.m. to 5 p.m. on Sunday. It is not sufficient to ask permission. It is not sufficient to point in a vague way to various trade fairs which are conducted on a Sunday without identifying the orders pursuant to which those fairs are conducted or going to the materials on the basis of which the orders were made. We note the indication that certain charitable groups might benefit if the pre-Christmas fair were allowed. We are not satisfied that the benefits alluded to are comparable to the benefits which would have flowed in Building Owners and Managers Association of Australia Ltd. and Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (1995) 150 QGIG 1205 (The Fred Hollows foundation case). In that case the applicant was unsuccessful. However, since the application is to be dismissed for other reasons we do not formally decide the point.

We dismiss the application.

Dated this thirtieth day of June, 2000.

D.R. HALL, President.
D.A. SWAN, Commissioner.
B.J. BLADES, Commissioner.

Appearances:-
Mr J. Rigby for the applicant.
Mr D. Pratt for Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).

Mr C. Casey for Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

Released: 30 June 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 231 – mediation

Queensland Teachers Union of Employees AND Department of Education
(No. B905 of 2000)

COMMISSIONER BLOOMFIELD

4 July 2000

Mediation – Teachers – Enterprise Bargaining – Date of operation of first instalment of pay increase – Date of 10 April 2000 determined.

DECISION – MEDIATION

On 27 June 2000 the Industrial Registrar received correspondence on Queensland Teachers Union of Employees letterhead in the following terms:-

"Dear Sir

Re: Request for mediation pursuant to s231 of the Industrial Relations Act

We are writing to request mediation on the issue of establishment of the date of payment of a first instalment of pay increases (to be subsequently determined by arbitration) to promote the settlement of the enterprise bargaining dispute between the QTU and the Department of Education.

The parties have agreed to submit this issue to mediation as a preliminary matter as this issue will be relevant to the consideration of members of the QTU of the proposed settlement of the dispute.

The parties respectfully request, subject to the wishes of the Commission, that the mediation be conducted by a member of the Commission who has not previously been or is currently involved in the conciliation or arbitration of enterprise bargaining disputes between the parties in order to settle this issue without prejudice to other proceedings.

For the purposes of section 90 of the Industrial Court Rules 1997, the parties consent to the mediation of the date of the payment of the first salary increase arising from the enterprise bargaining dispute between the parties, and agree to accept any resolution achieved by the process including consenting to any formal orders.

Yours faithfully

G. Moloney (signed)

Graham Moloney  
Deputy General Secretary  
for the Queensland Teachers' Union

P. Henneken (signed)

Peter Henneken  
Deputy Director-General  
Department of Employment, Training and Industrial Relations."

Section 231 of the *Industrial Relations Act 1999*, is in the following terms:-

**"Mediation by Commission**

**231.** The commission may act as mediator in an industrial cause, whether or not it is within the jurisdiction of the commission –

- (a) on the request of the parties directly involved in the cause; or
- (b) if the commissioner is satisfied mediation is desirable in the public interest."

After establishing the availability of the parties I set the matter down for Mediation on 30 June 2000. On that date Mr G. Moloney appeared for the QTU, Mr P. Leitch appeared for Education Queensland and Mr P. Henneken appeared for and on behalf of the Minister for Employment, Training and Industrial Relations.

The parties made it clear that they were requesting the Commission to mediate the date of operation of the first proposed wage increase (to be subsequently determined by arbitration) in a Certified Agreement which the parties had been negotiating for some time. They also made it clear that they understood, and accepted, that the process under s. 231 and Rule 90 could lead to the Commission making formal orders if the parties could not agree an operative date.

Mr Moloney presented an extensive submission which traced the history of the negotiations between QTU and Education Queensland. He indicated that since July 1999, QTU had been attempting to negotiate a new Certified Agreement to replace the Department of Education Queensland Certified Agreement 1997.

He indicated that the date of payment sought by the Union for the first wage increase under the proposed replacement Certified Agreement was 1 March 2000, i.e. immediately after the nominal expiry date of the previous agreement on 28 February 2000.

He indicated that the Union was strongly of the belief that the delay in reaching agreement on a new Certified Agreement lay principally, if not solely, with the Government and the Department of Education.

QTU held those views because:-

1. the Department and Government failed to respond to the QTU claim or make an offer of their own for four months after the scheduled commencement of negotiations despite the provision in the 1997 agreement for negotiations to commence no later than 1 July 1999;
2. in spite of criticisms of the 'one size fits all' approach to enterprise bargaining in the 1998 arbitrated decision, the 1 November offer was virtually identical to the first core public service offer in spite of the different needs and environments;
3. the 1 November 1999 offer was non-negotiable, in contrast to the negotiability of the QTU claim;
4. the bulk of claims made by the QTU were rejected without negotiation and without explanation;
5. the Government and Education Queensland persistently refused to re-consider their offer in any substantive way over the subsequent 7 months in spite of its clear rejection.

Elaborating on the first point, Mr Moloney submitted that during the period 1 July 1999 to 1 November 1999 the Department had declined to negotiate on the claims. Instead it indicated that because of Government policy it was not able to make any offers nor was it able to respond to the QTU claim or its individual elements.

He also indicated that, unlike the core Public Service, no improvements (other than a proposed "GST safety net" clause) were forthcoming in the Department's offer until after the twenty-four hour strike held on 14 June 2000 – some seven months after QTU had formally rejected the Department's 1 November offer.

Mr Moloney indicated that QTU believed that the Department and the Government had simply decided that they would seek to have the claim determined by arbitration and, as a consequence, were unwilling to negotiate the QTU claim.

Speaking on behalf of both Education Queensland and the Government Mr Henneken also presented a detailed submission which traced the history of the negotiations. Save and except for the emphasis given to particular aspects of the history he agreed with the basic chronology of events set out by Mr Moloney. However, he did not agree with QTU's interpretation of events nor its interpretation of Education Queensland's negotiating approach.

In particular, Mr Henneken traced the history of the matter since the Department of Education wrote to the Industrial Commission on 24 March seeking a conference pursuant to s. 148 – “*Assistance in Negotiation by Conciliation*”. He also referred to the conciliation conferences held before the Commission on 10 April, 14 April and 10 May 2000, respectively. He indicated that on that latter date the Commission had decided to refer the matter to arbitration pursuant to s. 149 – “*Arbitration if Conciliation Unsuccessful*”.

Mr Henneken also indicated that after the Full Bench had considered the matter between 9 and 13 June and directed the parties to conduct further conferences, the parties *had* expended considerable effort, at very senior levels, to try to achieve an agreement. He said that whilst a total agreement had not been achieved the parties had agreed to have the operative date issue resolved by mediation and the wages claim subsequently determined by arbitration.

Mr Henneken also confirmed that the joint position of the Department of Education and the Government was that 1 June 2000 was the appropriate operative date for the first wage increase under the proposed new Certified Agreement.

He indicated that the operative date traditionally agreed by the Government was the first day of the month in which an agreement was concluded. He indicated that the parties had agreed on 22 June to the course of action now embarked upon i.e. mediation on the operative date issue and subsequent determination of the wages claim. Therefore, in accordance with custom and practice, 1 June was the appropriate date.

Mr Henneken also indicated that the Government had already conceded ground on the issue, in order to try to achieve agreement with the QTU, because the core public sector agreement applied prospectively from 1 July 2000.

Mr Leitch emphasised that any backpay beyond 1 June 2000 would be at considerable cost to Education Queensland. He indicated that a one percent wage increase would cost Education Queensland, i.e. the Government, approximately \$1.6 million per month. Having regard to the Department’s (rejected) offer of three percent, the Union’s claim for an operative date of 1 March 2000, if granted, would result in a backpay bill to the Department of the order of \$14.5 million.

After hearing the submissions from the parties, and discussing some of the points raised, the Commission discussed the matter with each of the parties privately.

During these lengthy discussions the Commission was able to persuade each of the parties to give ground on their earlier stated position in the hope that an operative date might ultimately be agreed or, if it was not, the current three month differential at least be reduced. I encouraged them, firstly, to look at the practical operation of their preferred operative date and, secondly, to make further concessions in the interests of conciliation, as well as to minimise their potential “loss” should the date fall to the Commission to determine.

Each of the parties accepted my proposition that it was preferable that any operative date coincide with the commencement of one of the fortnightly pay cycles used by the Department. In that regard (and not necessarily in this order) the Department indicated its preparedness – in the interest of trying to achieve an agreement – to advance its proposed operative date by approximately two and a-half pay cycles to Monday, 8 May 2000. QTU agreed to move its proposed operative date by a similar duration – for identical reasons – to Monday, 27 March 2000.

However, despite considerable encouragement and prodding I was not able to convince either of the parties to make any further advance/concession.

As a result I informed each of the parties that having regard to the provisions of s. 231 of the *Industrial Relations Act 1999* and Rule 90 of the Industrial Court Rules 1997, I would proceed to determine the operative date. In so doing I noted that each of them had agreed “to accept any resolution achieved by the process, including consenting to any formal orders.” (see Rule 90(2)(b)(iii)).

#### **Outcome**

As stated above, it was agreed by each of the parties that it was preferable that any operative date agreed between the parties, or determined by the Commission, coincide with the commencement of one of Education Queensland’s pay cycles.

Consequently, having regard to the position arrived at after the conciliation stage of the mediation process the following potential operative dates are available:–

- Monday 27 March 2000
- Monday 10 April 2000
- Monday 24 April 2000
- Monday 8 May 2000.

During the mediation process Mr Moloney put to me that having regard to the arbitrated decision of the Full Bench in 1997 to determine the matter based on the negotiating position of the parties (see *AMACSU v Western Australian Railways Commission*), QTU was unwilling to make concessions in an environment where the issues of the QTU claim and the Queensland Government offer were non-negotiable as far as the Government was concerned.

Mr Moloney said, however, that the QTU claim *was* negotiable throughout the whole period of time commencing from its lodgement in July 1999. However, QTU was not in a position to negotiate because of the position adopted by Education Queensland and the Government. He urged me to take into account the constraints placed on QTU, because of the other parties’ negotiating position, when I determined the operative date.

The history of the matter reveals that Education Queensland made its first wages offer on 1 November 1999. That offer was subsequently “topped up” in February 2000, when the Department indicated that it was prepared to include a GST clause along the lines of that determined following the Rail dispute in the same month.

Apart from that improvement, the position of Education Queensland does not seem to have varied until after a Full Bench of the Commission made it clear in the period between 9 and 13 June that it would not arbitrate the matter and directed the parties to have further negotiations. It is notable that after that direction was issued the parties *were* able to agree how the overall matter might be resolved relatively soon thereafter, on 22 June 2000, i.e. mediate the operative date and arbitrate the quantum of the wage increase.

After noting the operative dates advanced by the parties during the conciliation phase of the mediation proceedings, and after considering the whole history of the matter, I have decided that the most appropriate operative date for the wage increase, which the parties will seek to have determined by arbitration, is Monday 10 April 2000.

In arriving at that date I have taken account of:-

- The concessions on possible operative date made by each of the parties during the conciliation phase of the mediation process;
- The additional cost in backpay for Education Queensland compared to the date advanced by it;
- The history of the negotiation process as outlined above; and
- The proposed duration of the agreement viz. to 28 February 2003.

Consequently, for the foregoing reasons, it is the Commission's Order, pursuant to s. 231 of the *Industrial Relations Act 1999*, and Rule 90 of the Industrial Court Rules 1997, that the date of payment of a first instalment of pay increases, which the parties will subsequently request be determined by arbitration, in the proposed Certified Agreement between Queensland Teachers Union of Employees and the Department of Education, be Monday 10 April 2000.

The Commission so determines and Orders.

A.L. BLOOMFIELD, Commissioner

Released: 4 July 2000

*Appearances:-*

Mr G. Moloney for the Queensland Teachers Union of Employees.  
Mr P. Leitch for the Department of Education.  
Mr P. Henneken for the Minister for Employment, Training and Industrial Relations.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 284 – application for interpretation

**Anthony McDonagh AND Brisbane City Council (No. B783 of 2000)**

**BRISBANE CITY COUNCIL (WATER SUPPLY AND SEWERAGE DEPARTMENT) LABOURERS' AWARD**

COMMISSIONER BLOOMFIELD

26 June 2000

Interpretation – Travelling Allowance – No agreed statement of facts – Application out of time for claim of unpaid wages even if interpretation in favour of Applicant – Application struck out in public interest pursuant to s. 331.

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 26 June 2000 Commissioner Bloomfield said:-

“Mr Evans, I won't need to hear from you again.

Mr Williams, notwithstanding your strong advocacy this morning, I nonetheless propose to act pursuant to section 331 of the Act to dismiss the application for interpretation. I do so in the public interest for a number of reasons.

Firstly, it seems to me from reading the material and listening to everyone this morning that it will be a futile exercise if the Commission and the parties are required to expend their respective time and energy to hear and determine the matter.

At the end of the day the applicant can achieve absolutely nothing by taking the matter forward.

Even if he be successful in proving his argument, there is no remedy available to him through this jurisdiction. That is because any subsequent application for underpayment of wages will be statute barred pursuant to section 278 of the Act. That section indicates that 'Any application', and I use that word quite deliberately, 'Any application must be made within six years after the amount became payable'.

If the applicant seriously wished to pursue the matter, he would have needed to have made an application before 4 June 1996 in order to be fully able to claim what he says is an underpayment, and he would have had to have lodged it before November 1996 to achieve a partial claim.

Secondly, it would be futile to attempt to hear and determine the matter because of the fact that there is no agreed statement of facts. It is well established by case law, and impliedly by the terms of section 284 of the Act, that the Commission can only hear and determine an application for interpretation if there are agreed facts, and there are no agreed facts.

Thirdly, it will be very difficult to try to hear and determine the matter when it is ten years old, and where the recollections of people likely to have been required to give evidence will be extremely cloudy.

Fourthly, it is not clear whether all the employer's records will be available. The Act only requires that records be kept for six years, the Taxation Act might require them to be kept for something like seven years, but it is now ten years since the events.

Fifthly, if the applicant was seriously of a mind to prosecute the matter, the submissions disclose that he has had ample opportunity to do so on a number of occasions in past years. The failure to agree facts did not stop him from progressing the matter. If he was not advised that he could pursue the matter by way of an underpayment of wages claim then the advice given to him was deficient. It did not necessarily have to be that the matter could only come before the Commission by way of an application for interpretation.

In all the circumstances I think that the applicant has been defeated by the tyranny of time and by the provisions of the statute. I do not think it is in the public interest to allow it to proceed.

For all of the above reasons I have decided, as I indicated earlier, to dismiss the application.

I reserve the right to edit these reasons. The applicant can consider them and take whatever action he feels inclined to in respect of them.

As an aside I would indicate to you, Mr Williams, that an interpretation has recently been issued by the Commission as presently constituted in respect to the provision of transport at the Tarong Power Station. The view that is recorded in that decision might assist your client to understand what the words 'transportation free of cost' mean.

With that I thank the parties for their attendance this morning and I adjourn the Commission."

Dated this twenty-sixth day of June, 2000.

By the Commission,  
[L.S.] E.EWALD,  
Industrial Registrar.

*Appearances:-*  
Mr B. Williams, of Broadley Rees, for the Applicant Mr A. McDonagh.  
Mr G. Evans and Mr C. Beilby for the Brisbane City Council.

Released: 30 June 2000

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement*

**Earl Stanley Young AND Hay-Ric Pty Ltd T/A Sunfarm (No. B220 of 2000)**

COMMISSIONER BLOOMFIELD

22 June 2000

Reinstatement – Dismissal – Storeperson/Driver – No appearance for Respondent – Arbitrated Matter – Dismissal was harsh, unjust and unreasonable – Compensation awarded.

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 22 June 2000 Commissioner Bloomfield said:-

"During the course of the proceedings today we have heard uncontested evidence from Mr Young that his employment was terminated on 4 February 2000 by Mr Clive Gannon, who Mr Young understood to be a director of Hay-Ric Pty Ltd.

When Mr Young made inquires about why his services were being terminated he was informed by Mr Gannon that the company was 'restructuring its business'. When Mr Young asked for further clarification the same bland explanation about 'restructuring' was provided. Mr Young was then handed his wages and, after a brief exchange of words, escorted off the premises.

It is also Mr Young's uncontested evidence that:-

- several months prior to his termination he had spoken to Ms Elaine McAlpine, who was associated with the management of Hay-Ric Pty Ltd, about taking up a van salesperson's position;
- she acknowledged his interest in that job and also indicated that he would be well suited for the job;
- he was led to believe that he would be considered for the apparent vacancy when it was filled;
- despite the discussion with Ms McAlpine the company advertised for a van salesperson on the weekend following his termination;
- the position has been filled and someone else is now associated with the delivery of the company's product to stores and the like;
- during a recent visit to the organisation he noted that the number of employees had increased since his termination; and
- he was informed by a Mr Graham Hayes\* and Ms McAlpine that he would lose his employment if he associated with any member of the Ricketts family. In that regard it is noted that Mr Young agreed to be a witness on behalf of Mr Scott Ricketts in his unfair dismissal application against Hay-Ric Pty Ltd – a fact made known to Mr Gannon and Ms McAlpine several weeks prior to Mr Young's termination.

In the absence of the employer respondent, which indicated – via my Associate – that the application was 'not opposed' and that it did not intend to attend the proceedings, one can only assume that the material spelt out in the statement of Mr Young and in the statement of Mr Ricketts is not contested. Had the material been contested the employer surely would have attended the Commission proceedings in order to indicate its non-agreement with any of the material contained in either of those statements.

On the material available to the Commission there is nothing to support any suggestion that there was an actual restructuring of the business. Further, there was no prior warning to Mr Young or, on his evidence, to any of the other employees, that the business was to be restructured. Based upon his evidence about what he observed during his recent visit to the company one can only doubt that there has been any 'restructuring' at all.

If restructuring was to take place, i.e. change the company's method of delivery from a storeperson/driver to a van salesperson, there would have been a duty on the employer, as a result of the earlier discussion between Mr Young and Ms McAlpine, to talk to him about his suitability for the new role. That was not done. The employer simply advertised the van salesperson's position immediately after his termination and proceeded to fill it.

There is a strong inference that Mr Young's employment was terminated because of his announced intention to appear in unfair dismissal proceedings being taken against Hay-Ric Pty Ltd by Mr Scott Ricketts.

In all of the above circumstances, and having particular regard to the evidence that has been given by Mr Young about the warnings he received about potential termination if he associated with the Ricketts family, the Commission can only conclude that the termination of Mr Earl Stanley Young on 4 February 2000 was harsh, unjust or unreasonable within the meaning of the legislation. That leaves the question of remedy.

Exhibit 7 in the proceedings shows that since his termination on 4 February Mr Young has suffered an actual loss in wages of \$7,654.40. His evidence is that he has attempted to mitigate his loss by seeking other employment in a variety of occupations. He has also applied to join the Queensland Police Service. It is clear from his evidence that there is likely to be a continuing loss, at least into the immediately foreseeable future, before he secures any employment.

In the circumstances the Commission proposes to award compensation to Mr Young in the amount of \$9,000, being his actual loss to date as well as some small allowance for his expected on-going loss.

It is the further order of the Commission that Hay-Ric Pty Ltd, trading as Sunfarm, be directed to make payment of \$9,000 to Mr Young within 22 days of today's date."

[\* for details about Mr Hayes, and his possible role, see the decision of Blades C in *Scott Ricketts v Hay-Ric Pty Ltd* at 164 QGIG 24.]

Dated this twenty-second day of June, 2000.

By the Commission,  
[L.S.] E.EWALD,  
Industrial Registrar.

*Appearances:-*  
Mr A. Carroll, of Adrian Carroll and Associates, with Mr E.  
Young the Applicant.  
No appearance for the Respondent.

Released: 30 June 2000

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement*

**Malcolm MacDonald AND Mount Isa Mines Limited (No. B1752 of 1999)**

**Lindsay Perkins AND Mount Isa Mines Limited (No. B1761 of 1999)**

COMMISSIONER BROWN

29 June, 2000

DECISION

Applications were lodged on 21 December 1999 for the reinstatement of Malcolm MacDonald and Lindsay Perkins with Mount Isa Mines Limited (the respondent).

In that the issues and the circumstances surrounding the dismissals of both applicants were similar and to some extent interwoven, the parties agreed for the matters to be joined.

I am satisfied that all avenues to resolve the issues by conciliation were exhausted through a series of inconclusive conferences with and without Commission involvement.

As a preliminary matter the respondent sought leave to be legally represented in the proceedings. Such leave was opposed by the applicants. At a hearing on 19 May 2000 leave was granted.

As a result of the time taken to complete the fair treatment procedures followed by the respondent, no issue was made of the fact that both applications were lodged out of time. Formally, the extension of time necessary to allow the matters to be properly before the Commission is granted.

Mr Murdoch for the respondent claimed that the respondent was justified in its decision to terminate the applicants in that the applicants had been in unauthorised possession of the respondent's property viz. 2 hand held 2-way radios and that through MacDonald they had sought to have the frequency changed on both radios so that they could be used off lease for private use.

The respondent maintains that they were alerted to this situation by a report from Radio Technician Andrew Stevens that an approach had been made to him to alter the frequencies and after investigations were conducted the applicants were summarily dismissed.

In reaching this conclusion the respondent evaluated information gathered through a series of minuted interviews with employees.

In a minuted interview of 24 November 1999 and in a hand written statement by MacDonald dated 24 November 1999, MacDonald indicated that:-

- He had been given the radios by Perkins for the purpose of having the frequencies changed;
- He had asked Steven Greenland to take the radios to the technician to place them on a new frequency; and
- He had said to Andrew Stevens (Radio Technician) that he wanted to get the frequency changed; and
- The reason for the change was to enable the radios to be used while fishing.

In a minuted interview on 25 November 1999 conducted between McPaul, Hastie and Stevens, Andrew Stevens (Radio Technician) claimed-

- Steven Greenland had asked him if the frequencies could be changed on the 2 radios for outside use;
- Greenland said MacDonald asked him to bring them to him (Stevens);
- MacDonald told Stevens that someone brought them to his house; and
- MacDonald indicated they were to be used for fishing.

In a further minuted interview conducted on 24 November 1999 between Steven Greenland, Coombes, Draffin, Whitworth and Hastie, Greenland stated-

- MacDonald gave him the radios to take to Stevens;
- He (Greenland) was wearing ear muffs and really did not hear what MacDonald said;
- He (Greenland) did not give any instructions to Stevens;
- Stevens requested that MacDonald talk to him (Stevens).

In a minuted interview of 25 November 1999 Lindsay Perkins claimed that –

- He had found the radios in a burnt out car;
- He had given the radios to MacDonald so that he could return them;
- He was rostered off duty and MacDonald was on at the time enabling MacDonald to return them more conveniently;
- He thought they were M.I.M. radios; and
- He made no request of MacDonald to have the frequencies changed.

On 25 November 1999, MacDonald presented a revised version of events (prepared on the evening of the 24<sup>th</sup>) which in essence supported the account presented by Perkins and claimed that –

- Due to medication he confused events relating to 2 CB radios for fishing with the radios returned on behalf of Perkins;
- As a PTSD sufferer he had both a short and long term memory problem; and
- The radios had been in his locker for so long he had forgotten why they had been given to him.

Following further interviews and fair treatment hearings, the respondent rejected both the account of events by Perkins and the second or revised statement made by MacDonald in coming to its decision to summarily dismiss the applicants.

Mr B. Swan of The Australian Workers' Union of Employees, Queensland (AWU) for the applicants called evidence from Stephen Sanderson, Steven Greenland, Sharon MacDonald, Adam Tencza, Gordon Dyball, James Atkinson, Dr John Rogers and the applicants.

The respondent called Anthony McPaul (General Manager – Metallurgical Plants), Anthony Coombes (Superintendent – Secondary Smelting at the Copper Smelter), H. Murdoch (Superintendent – Primary Smelting at the Copper Smelter), and Andrew Stevens (Metallurgical Plants Technical Officer) to give evidence and tendered a medical assessment report by Dr J. Richards pertaining to applicant MacDonald.

During a site inspection the Commission was shown the “dirty locker” used by MacDonald while employed by the respondent and where the radios allegedly were for some time.

Stephen Sanderson, an ex employee of the respondent, gave evidence that he was with Perkins, motorbike riding on the day that Perkins discovered the 2 radios in a burnt out car wreck. He stated that Perkins was looking for snakes. Perkins thought the radios looked like M.I.M. radios. Perkins placed the radios in his shirt, rode to his parked car, put the radios in the back seat whereupon Perkins and Sanderson continued riding. This was in late September/October.

Under cross-examination Sanderson claimed that –

- He and Perkins had stopped at the car wreck at about 3-4 pm (T. 30) in full day light;
- He didn't see the radios until they were removed from the car (T. 31);
- He didn't look inside the car (T. 31);
- The radios appeared clean (T. 32);
- The radios were filthy dirty (T. 55);
- He and Perkins rode for a further 2 to 3 hours, after putting the radios into Perkins car, until dark (T. 33);
- He did not recognise the two radios shown to him at the hearing as the radios found at the wreck;
- He had taped his interview with the respondent;
- Nobody knew he was making the recording at that time;
- The tape was at his mother's place in Mount Isa (T. 58);
- He did not tell Perkins that he was intending to make the tape nor subsequent to the taping that he had made a tape (T. 63);
- Sunset at that time of year in Mount Isa is about 7 to 7.30 pm (T. 67); and
- Despite not wearing a watch there was no chance of his being 3 to 4 hours out in his estimate of time (T. 67);

Sanderson's handwritten statement (Ex2) provided to the respondent differed from his statement tendered to the Commission and the answers elicited under cross-examination. In this statement he claimed that he looked inside the car and that the aerial of a radio looked like a snake. This was not the case in evidence or his statement tendered to the Commission.

Lindsay Perkins – an applicant – stated in evidence that he had worked for the respondent from June 1995 until his dismissal on 25 November 1999. He also worked casually as a Security Officer. That whilst motor-cycling with Sanderson somewhere between the hours of 3.30 and 5.30 pm, he inspected a car wreck for snakes (he is a licensed collector of snakes) and found 2 radios that he recognised as M.I.M. radios. He put the radios inside his shirt, rode to his car and placed them in the back seat.

Later that evening Perkins took the radios to MacDonald's home and during dinner Perkins told Sharon MacDonald about the radios and asked her to remind him to drop them on the table before he left. He asked that MacDonald take them to work and have the radio tech check them out. Perkins was rostered off and MacDonald was rostered on at the time making it more convenient for MacDonald to return them. Both radios were covered in a tar like substance.

There is no formal process to record radio users at M.I.M. Perkins claimed that he did not take the radios from M.I.M.

On 25 November 1999, Perkins was dismissed after being interviewed by Coombes, Whitworth and Hastie.

Perkins gained employment with a Contractor on the lease, however after one day was informed that he was barred from the M.I.M. lease.

Under cross-examination Perkins stated that he did not know that they were M.I.M. radios (T. 83). He recalled saying in his fair treatment hearing that he found the radios just on dark and that they were covered in crap and did not have wires on them (T. 83). In relation to the time of finding the radios, Perkins seemed to have a problem discerning the quality of light both at that time and in the Court room. He admitted that he could not ride in the dark.

Perkins in his statement to the Commission submitted that he knew they were M.I.M. radios, whereas under cross-examination he claimed that he wasn't sure but suspected they were M.I.M. radios (T. 86). Perkins agreed that at the time of signing his statement to the Commission he was satisfied in his mind that on the occasion that he found the radios he recognised them as hand held radios issued by M.I.M.

Perkins maintained, on the night of 24 November 1999, he was at his mother's and returned home approximately 10-11 pm. He claimed he did not speak to MacDonald or Sharon MacDonald about MacDonald's suspension or initial statement prior to Perkins' interview early on 25 November. He claimed he was unaware of the topic to be discussed at the interview.

He believed that returning the radios via MacDonald was preferable to giving them to Security as it would be double handling and Security would not normally be going to the area that the radios were to be returned to.

Perkins agreed that the radios he had come across were obviously "hot"(T. 96).

Perkins agreed he took them to a man he did not know well (MacDonald) and left them on the kitchen table and was not sure whether or not he spoke to MacDonald but claimed that Sharon MacDonald was aware of the position.

He was at the MacDonald residence for 2 to 3 hours on the night the radios were delivered (T. 97). He claimed that he retrieved the radios from his car and put them on the MacDonald's table just prior to his leaving.

Perkins did not follow up on the fate of the radios.

Perkins' account given to the respondent in the record of interview of 3 December 1999 included a statement that he told MacDonald to take the radios to the tech because they were probably stuffed from the fire. However, in evidence he stated that he did not think he spoke to MacDonald about the radios (T. 104). Again at T. 103 he thought that he spoke to MacDonald about the radios and again at T. 103 he was not 100% certain if he spoke to MacDonald.

Perkins was unsure that the radios shown to him at his interviews and at the hearing were the radios he found – the clips differed; hadn't seen green identification paint; one had a piece missing on the top and had a white piece underneath. Perkins felt that he had been set up by Coombes (T. 105). He maintained in evidence they he could not be 100% sure the radios presented were the radios he found. He admitted he had seen the radio marked "mullet" on the lease. "Mullet" was his brother's nick name. He did not test the radios for battery life when found at the wreck.

Perkins stated that he had never noticed an amnesty bin.

Perkins attempted unsuccessfully to have his alleged persecution at the workplace raised with Moreland. He raised the matter with Greg Brown (workplace delegate) but not with AWU organiser Harris.

Perkins acknowledged he was a long standing friend of Sanderson and suggested he tape record his interview with the respondent because Perkins thought that he was being set up. Perkins admitted he was in possession of the tape made by Sanderson. He was given the tape by Sanderson about an hour after Sanderson's interview. He put it away and played it a couple of days before the hearing to Ben Swan (T. 120-122). Perkins denied knowledge of Sanderson's evidence that only he (Sanderson) and his father knew about the tape. Perkins admitted on the day Sanderson was giving evidence in Brisbane, Sanderson contacted him to discuss the whereabouts of the tape.

Malcolm MacDonald, an applicant, claimed that his statement written on 24 November 1999 was a guesstimate. Although he had some doubts he believed it to be true at the time.

MacDonald claimed to have felt threatened by the circumstances of the first interview.

On the evening of 24 November Sharon MacDonald assisted him by going over his statement and reminding him of certain points.

Adam Tencza and MacDonald had spoken of radios and frequencies regarding the Rifle Club and MacDonald stated that he spoke with Stevens about CB radio frequencies approximately a week prior to his dismissal.

Coombes was unhappy when MacDonald presented his revised second statement.

MacDonald's evidence included asking Greenland to take the radios to the techs to check for condition and frequency "for hire" (T. 245). Again (T. 245) take them back to work and put them back into the system. He maintained he was not aware they were M.I.M. radios (T. 248). Could not identify exhibits 24 and 25 as the same radios as the ones handed in.

MacDonald was unable to recall a conversation with Stevens but recalled saying put the radios back into circulation (T.250).

MacDonald knew the difference between CB radios and hand held 2 way radios. He was able to recall the conversation he had with Tencza in November 1999. He recalled he was to obtain advice for the Club regarding radios.

MacDonald was either unable or unwilling to answer questions with clarity, I suspect a combination of both. Judging by his ability to recall issues or events which supported his account of events and his inability to recall other events with any consistency.

I am mindful of the evidence of Dr Rogers.

Dr John Rogers, a Psychiatrist, gave evidence via telephone from Townsville.

Dr Rogers stated that he had been seeing MacDonald on a regular basis since 1997.

Over the last 3 years, but in particular the last 6 months, there had been a substantial worsening of his war-caused disability P.T.S.D.

During 1999 MacDonald took stress leave because of an increase in anxiety symptoms which included chest pain, tremor and agitation. Other symptoms persisting to the present included severe impaired memory, agoraphobia, irritability, disturbed sleep and nightmares.

The symptoms, particularly his memory, have become worse since the allegations resulting in the dismissal were made.

The circumstances surrounding the interview by the respondent with MacDonald would have made him feel trapped. MacDonald was very distressed in the aftermath.

MacDonald finds small house tasks difficult because of markedly impaired concentration and memory.

The present situation is likely to continue indefinitely. MacDonald is no longer able to work.

Dr Rogers agreed generally with the comments contained in the assessment of Dr Richards.

Under cross-examination Dr Rogers stated that prior to November 1999 there was a deterioration but MacDonald had substantially recovered from his emotional problems. He had returned to work and was coping albeit not as well as previously.

Dr Rogers had no substantial difference with Dr Richards' comments under the heading "Mental State Examination" in his assessment of MacDonald dated 2 June and marked exhibit 26. Further, Dr Rogers substantially agreed with that assessment.

Dr Rogers submitted that giving MacDonald time to write his account of events was a reasonable way of approaching the issue of getting an accurate history from him. Although Dr Rogers had been advised by MacDonald and his family that there was confusion over involvement with radio equipment over a long period of time, MacDonald discussed with Dr Rogers that he got the incident he was charged with confused with other issues. Dr Rogers had not sighted MacDonald's initial attempt to explain.

Dr Rogers maintained that the closed door scenario during MacDonald's interview would have made him feel trapped. This feeling could be brought on by a number of things other than a sense of guilt. Based on comments by MacDonald, Dr Rogers believed that at the time MacDonald was overwhelmed by the situation – puzzled and perplexed – and his cognitive functioning was not very good at all. Dr Rogers stated that with MacDonald's impaired mental capacity he may be vulnerable to the influence of others but not to the extent that he would totally change his story. MacDonald has problems with a lack of trust and he has difficulty trusting people and he would be unlikely to fabricate a story in order to get rid of his daughter's suitor. Dr Rogers was sure that at the time of writing, MacDonald would have believed his account was genuine but thought it could have been a mistake. Dr Rogers was not in a position to judge which version was correct but believed the second to be correct. Dr Rogers claimed MacDonald would not automatically accept his wife's version of events.

Dr Rogers saw no written accounts and had only verbal accounts of events from MacDonald. Dr Rogers accepted that he too was at the mercy of MacDonald's ability to give a history.

Adam Tencza in evidence claimed he had known MacDonald for 8 years and that Tencza is captain of the Mt Isa Rifle Club. The Club had experienced difficulties with radios. Discussion had taken place with MacDonald in late October/November regarding improvements to the Club's radios.

MacDonald had helped to obtain information on radios and MacDonald passed it on to Tencza prior to his, MacDonald's dismissal in late November. Tencza said that MacDonald claimed to have received the advice from the "radio tech".

Tencza had told MacDonald that the club needed a better set of radios and that the number of radios needed was 2.

Tencza considered MacDonald to be of excellent character, reliable and trustworthy.

Gordon Dyball in evidence stated that he was a police officer prior to 1994 and now a Security Manager for the Irish Club and Managing Director of Check Security & Investigations. He had known Perkins for a "couple of years". Perkins worked at the Irish Club as a casual security officer for which Perkins holds a licence. He stated that Perkins is sometimes left in charge of large amounts of cash. Perkins is held in high regard for his honesty and trustworthiness. Perkins has access to, and would be able to borrow if necessary, Check Security radios. Perkins has never worked directly for Check Security as a casual – contrary to the sworn affidavit of Perkins. Perkins is capable of recording and reporting accurately on incidents. He recalls time accurately in his security work. Dyball sometimes tapes conversations and teaches other security employees the techniques.

James Atkinson in evidence stated that he was an AWU delegate employed by the respondent in the C.I.P. area. There is no official method of recording or reporting on the allocation of radios to employees or for reporting missing radios. Employees frequently exchange radios amongst themselves. Radios move between the different sections of the M.I.M. lease and between employees and contractors.

Some equipment is personally assigned to employees, such as safety equipment, however, radios are not.

Atkinson was aware of the August 1999 amnesty on returning stolen property and the policy of the respondent regarding theft of property. He was aware of the drums provided for the return of goods. He denied having seen them.

Atkinson was aware that the respondent had issued fresh warnings that any employee caught with the respondent's property irrespective of size or quantity would be sacked. Atkinson supported the policy.

Sharon MacDonald's (MacDonalds' wife) evidence revealed that the extent of her involvement was that she was present when Perkins delivered the radios to her house at about 8 pm. She maintained the radios were on the table during the evening meal. She was aware that Perkins had asked MacDonald to return the radios to M.I.M.

She said she had spoken to MacDonald upon his arrival at home on 24 November after his having been suspended over the matter of the radios.

She submitted that she had no contact with Perkins on 24 November nor prior to his interview on 25 November. She claimed she had discussed the inaccuracy of MacDonald's initial statement with MacDonald and assisted him to recall the events accurately. Her evidence was she did not help him write his second statement. She stated that she did not pressure MacDonald to re-write his statement nor did she display anger toward MacDonald.

She stated that MacDonald was in the lounge watching TV with the family when Perkins asked MacDonald to take the radios back to work. She recalled no conversation about frequencies.

Under cross-examination Sharon MacDonald admitted reading MacDonald's hand written statement upon his arrival at home on 24 November after having been suspended. She realised he had got some facts wrong in that the radios were not CBs but hand held (Note: MacDonald's statement referred to hand held radios and did not mention CBs) brought around by Perkins to be taken back to work.

Sharon MacDonald stated that the radios were on the dining room table for an hour, or a couple of hours, while she was making the evening meal. Perkins brought the radios in when he arrived (T. 190). Perkins was at the house for about an hour between when he arrived and when he left. She was present when Perkins had a short conversation with MacDonald.

She did not recognise the radios presented at the hearing as those delivered by Perkins but they were similar in size and shape.

Sharon MacDonald stated that MacDonald had experienced memory difficulties at the time of the dismissal which had become worse since. She agreed that until the dismissal he coped well enough with going to work and "pretty much" remembered things that a person had to remember (T. 192)

She maintained Perkins was not involved in the discussions between herself and MacDonald on the evening of 24 November 1999.

Steve Greenland's evidence was that MacDonald asked him to take 2 radios to the tech to be checked out.

He could not verify that the radios shown to him at the hearing were those he took to the tech.

Greenland stated he asked the tech if he could do some work on them and have a look at them. He was unsure what was to be done to them. At the tech's request he contacted MacDonald and asked that he go and talk with the radio tech.

Greenland saw MacDonald 10 minutes after he saw the tech. MacDonald appeared normal and said he had sorted it out.

Greenland maintained he did not ask the radio technician to change the frequency and denied being asked by MacDonald to have the frequency changed. Greenland later in cross-examination admitted that MacDonald may have asked that the frequency be changed but he couldn't remember (T. 232).

Greenland told MacDonald that Stevens (the tech) wanted to see him before any work was done on the radios (T. 233).

Greenland took no issue with his records of interview with the respondent.

He said that he wore earmuffs at the time he was approached by MacDonald about the radios and that this could have interfered with his hearing.

Anthony Mc Paul outlined the respondents' new policy on theft and its subsequent communication of such policy to employees via notices, advertisements and media releases.

Mc Paul's evidence covered the following:-

In relation to Perkins:-

- conducted fair treatment hearing on 17/12
- took into account statements and interviews of all parties concerned;
- reflect the reasons advanced by Perkins and upheld instant dismissal for misconduct.

In relation to MacDonald:-

- conducted interviews on 25 & 26/11 and sought statement of event;
- concluded that MacDonald changed his statement to protect Perkins;
- concluded MacDonald was an accomplice to improper dealing with MIM property;
- terminated MacDonalds' employment on the grounds of gross misconduct.

Anthony Coombes gave evidence that he interviewed MacDonald with Heath Murdock and others regarding 2 way radios. A summary of that evidence follows:-

- MacDonald maintained at all times he did not know they were MIM radios;
- MacDonald stated that 2 months ago Perkins brought radios around to his house and asked him if he knew anybody who could change the frequency so they could be used on fishing trips. MacDonald stated that he would take them to work and have the frequency changed at the electronics workshop.
- MacDonald stated forgot radios were in his locker;
- Asked MacDonald to write a statement 24/11 of the events that had occurred;
- MacDonald attended a further interview and gave information in line with the statement he had previously written;
- MacDonald advised he was stood down;
- On 25/11 MacDonald submitted a changed statement of events after discussion with his wife regarding his first statement of 24/11
- That statement denied Perkins asked that the frequency on the radio be changed;
- Denied that they were to be held by Perkins for fishing;
- Confused Rifle Club radios with Perkins radios;
- MacDonald remained stood down.

McPaul's evidence of the interview with Perkins on 25/11 regarding allegation by MacDonald that Perkins wanted the frequency changed on the radios drew the following conclusions and action:-

- satisfied Perkins had access to both radios during his (Perkins) employment with MIM;
- satisfied that Perkins' account of finding the radios off lease was not credible;
- advised Perkins of the rejection of his explanation and Perkins was dismissed instantly for misconduct.

The highlights of the evidence of Heath Murdoch regarding MacDonald were:-

- received phone call from Stevens (Radio Tech) stating that he had received 2 radios from the CIP area to have the frequency changed;
- Stevens removed black material from the radios which revealed they were from the CIP area;
- Stevens stated Steve Greenland brought the radios in to have the frequency changed;
- Stevens asked Greenland who the radios were for and he replied MacDonald;
- Greenland maintained he did not want the frequency changes only the batteries charged;
- Reported to Anthony Coombes and an interview with MacDonald took place;
- MacDonald maintained he did not realise they were M.I.M. radios;
- MacDonald wanted frequency changed so they did not interfere with M.I.M. frequency; and
- MacDonald when advised of the consequences of his actions then admitted Perkins gave him the radios, wanted them for fishing and needed the frequency changed.

The evidence of Andrew Stevens noted the following points:—

- Duties included the maintenance and repair of hand held 2 way radios;
- Approached by Steve Greenland on 24 November 1999 with 2 radios with black epoxy on the front of them and asked for the frequency to be changed for use outside of M.I.M.;
- Removed black epoxy and realised they were M.I.M. radios;
- Greenland, when asked, stated MacDonald had given him the radios;
- MacDonald came to the workshop and asked that the frequency be changed so the radios could be used outside of M.I.M.;
- Such request for reprogramming of frequency was denied and MacDonald was informed they were M.I.M. radios;
- MacDonald replied – OK, put them back into circulation;
- Some time later phoned Heath Murdoch regarding what had taken place;
- Interviewed by Coombes on 24 November 1999 regarding radios; and
- Interviewed by McPaul on 25 November 1999 regarding request by MacDonald to change the frequency of the 2 radios.

## CONCLUSIONS

When Stevens first made his report to management, the respondent was alerted to a set of circumstances that gave rise to a suspicion that one or more employees were involved in an attempt to alter M.I.M. equipment in order to put that equipment to private and personal use off the M.I.M. lease.

An examination of the respondent's actions from that point in its quest for the facts and how they evaluated and acted upon information gathered must be made.

In this case, the respondent made a decision between two versions of events based on information available to it at the time. The Commission, on the other hand, whilst obviously considering the circumstances surrounding the respondent's decision, has the advantage of gathering and testing evidence to a greater extent during the course of the hearing.

Broadly, the questions confronting the Commission primarily are:—

1. On the evidence presented to the Commission, was the respondent justified in concluding that the version of events provided by Anderson and supported by MacDonald's written initial statement and interview on 24 November 1999 true? and
2. In the event that 1. is answered in the affirmative, was the decision to summarily dismiss the applicants either harsh, unjust or unreasonable?

Within the first question is the issue of whether or not information gathered by the respondent was gathered having regard to procedural fairness in all instances and in particular in relation to MacDonald, considering his personal circumstances.

Dr Richards was sure that major memory and concentration problems were present in MacDonald during the period under review.

While Dr Rogers considered the approach taken in the first instance in obtaining information from MacDonald as "reasonable" and based on information provided to Dr Rogers by MacDonald, Dr Rogers believed the circumstances surrounding MacDonald's involvement would have been stressful. He would have felt "trapped" in the closed door circumstances. Yet in MacDonald's second statement, the one he claims to be the true statement, MacDonald went to the trouble to add a postscript describing the processes of 24 November 1999 as "cordial", although he subsequently gave evidence to the contrary.

Sharon MacDonald's evidence was that MacDonald was coping reasonably with the requirements of employment at the time.

The evidence of Dr Rogers, supported by Dr Richards, and the evidence of Sharon MacDonald was that MacDonald had suffered memory problems for some years, however, his capacity had deteriorated markedly since his dismissal.

Whilst acknowledging his difficulties, on the evidence, MacDonald's memory capacity was better at the start of the events in question than at any time since.

I accept that the respondent acted responsibly toward MacDonald and that he was offered procedural fairness on 24 November 1999 and subsequently.

There was no claim by any other individual alleging a lack of procedural fairness nor was it suggested by Mr Swan that circumstances surrounding MacDonald's subsequent interviews caused him to give an incorrect version of events.

I accept that the respondent gathered information in a reasonable manner.

Andrew Stevens, Radio Technician, brought the issue in question to his employer's attention. He gave his initial account of events in a minuted interview on 24 November 1999. MacDonald was interviewed and provided a statement on 24 November 1999. There was no suggestion that Stevens and MacDonald had colluded in the preparation of MacDonald's statement of 24 November 1999. MacDonald's statement and the record of interview sat perfectly with the account of Stevens.

The comments made by Greenland were inconclusive.

The respondent at this stage had formed a view. That is, its suspicions, aroused by the initial report of Stevens were confirmed by its subsequent investigations.

The following day the applicant Perkins presented his "car wreck" version and a second changed version of events is provided by MacDonald.

The respondent gave no credence to Perkins' version nor to the second version of MacDonald. Dismissed Perkins and dismissed MacDonald (who was stood down the previous day). These decisions remained unchanged following further fair treatment hearings.

Perkins claimed to be unaware of the reason why he was being interviewed and that he had not spoken to anyone regarding the radio issue.

On this basis he could not have known the detail of the statements made by MacDonald. MacDonald's first statement included a passage "He told me he wanted them to go fishing". Yet in the interview with Perkins on 25 November 1999, without reference to MacDonald's statement of 24 November 1999, Coombes says "The information you are giving does not mesh with what we are getting from others.". Perkins responds "The last time I went fishing

was 4 years ago, what would I need radios for?" Again, later in the interview Perkins states "Don't see why people would say things about me needing these for fishing, I don't fish."

At this interview no mention was made by Perkins of Sanderson being a witness to the events at the car wreck.

The respondent formed the view that the account provided by Perkins was far fetched and reaffirmed its belief in the statements of MacDonald and Stevens of the 24 November 1999.

MacDonald on 25 November 1999 presented his revised version together with an explanation of his medical condition and accompanying memory problems. After further interviewing MacDonald, the respondent was again unmoved in its belief that the information of 24 November 1999 was the true version.

In line with agreed practice fair treatment hearings were conducted. Perkins, on 3 December 1999, at his hearing mentions his witness Sanderson for the first time.

Again, the respondent, maintained its position on the dismissals.

Given the matching statements of MacDonald and Stevens of 24 November 1999, I accept, that in the absence of the most plausible alternative account of events, it would have been reasonable for the respondent to conclude that the original (24 November) account was the reliable account and that the alternative account was unreliable.

In determining the truthfulness of the alternative or second version, the Commission has to closely examine the consistency of the evidence and as a consequence assess the reliability of the witnesses.

Two issues can be dispensed with quickly.

*The respondent's theft policy.*

I accept that the respondent had widely publicised this policy in 1999. I further accept that it's plausible – but only just – that some employees were unaware of the re-invigorated approach to this policy.

Whether or not MacDonald or Perkins were aware is not crucial to the outcome of this matter as no one has seriously argued that the alleged behavior would have been acceptable in the absence of the respondent's efforts to highlight its policy.

*Personal issue of radios.*

In the absence of accurate recording methods, I accept that persons other than Perkins and his brother could have used and been in possession of the radios marked exhibits 24 and 25 at different times. I also accept it's reasonable that the applicants may not have recognised the exhibits as the radios found given the evidence that the radios had a black coating on their face which was subsequently removed.

However, I am satisfied that on the evidence the radios involved in the matter were M.I.M. radios.

Sanderson's recollection of certain events was inconsistent. Initially, he claimed the radios when found were clean, however, he later said the radios were filthy dirty. He claimed that no one other than his father knew of the taping of his interview with the respondent. Perkins gave evidence that he and Sanderson had discussed the taping of the interview and that after the interview Sanderson gave Perkins the tape.

Sanderson's account of the time of the events at the car wreck differed markedly from the account of Perkins.

The statement provided to the respondent by Sanderson claimed that he looked in the car and that he mistook a part of a radio for a snake. His later evidence directly conflicted with these claims.

I am not comfortable relying on the evidence of Sanderson considering the inconsistency in his accounts of events and my observations of his demeanor while a witness.

Perkins' recollection of the times that he and Sanderson were at the car wreck conflicted with that of Sanderson. When questioned about his claim that he found the radios just on dark and the conflict between that statement and Sanderson's statement, he made the ludicrous claim that he considered the Court Room to be dark. The Court Room was lit by no less than 34 two foot by two foot fluorescent light banks.

There were other inconsistencies both within his evidence and between his evidence and the record of his interviews with the respondent as to the condition of the radios viz. whether or not he recognised them as M.I.M. radios. He claimed he did not know about the amnesty (T. 109). In his record of interview of 25 November 1999 he said he thought there was an amnesty on these things anyway.

His evidence and that of Sharon MacDonald differed significantly with respect to the time he allegedly deposited the radios at the home of MacDonald.

Again, the demeanor, inconsistent account of events and the manner of response to questions by Perkins caused the Commission to lack confidence in his evidence.

With respect to Sharon MacDonald, her account differed notably with Perkins' account of the time and circumstances when the radios were allegedly taken to her house.

In dealing with the evidence of MacDonald, the evidence of Dr Rogers and Dr Richards regarding his condition and the deterioration of his condition since the events of November must be taken into account. It is not useful in the circumstances to point out the inconsistencies in his evidence given during the hearing. Suffice to say that most of the symptoms alluded to by the psychiatrists were displayed whilst under cross-examination. I am not inclined to rely on his evidence.

MacDonald's initial statement was corroborated by Stevens and not seriously challenged by the evidence of Greenland who, under cross-examination admitted to being unsure. On the balance of probabilities I find it difficult to believe MacDonald's claim that he did not ask Greenland to ask Stevens for the frequency of the radios to be changed.

If the evidence of Dr Rogers that it would be unlikely that MacDonald could be coerced or forced to write an incorrect statement by his wife holds true, then it would be equally unlikely that some other person could have tricked or forced him into writing his first statement.

Moreover, if MacDonald's first statement was as a result of a memory problem and I am to believe that in truth MacDonald did not ask Stevens for the frequencies to be changed, then, I would also have to believe that Stevens made a mistake in his recollection of events which exactly mirrored MacDonald's so called error. I am not inclined to do this.

Although the car wreck version of events coming as it did so closely behind the first version, may have seemed far fetched, it none the less had to be fully examined by the respondent and subsequently this Commission in order to determine its credibility.

Had the second version been supported in a consistent and reliable fashion by the key witnesses, the Commission may have been sympathetic, at least to some extent, towards the applicants. However, there are serious inconsistencies, both within the evidence of key witnesses and between the evidence of witnesses supporting the applicants.

Having considered all of the evidence, together with the information both referred to and contained in submissions, I believe the actions of the respondent in summarily dismissing the applicants to be neither harsh nor unjust or unreasonable.

The applications are refused.

I note that the respondent has fulfilled its undertaking given on 19 May 2000, making no application for costs.

Finally I would point out that this decision relates only to the direct employment relationship between the applicants and the respondent. It in no way is meant to impact on the ability of the applicants to seek and obtain work with other Employers, even if those Employers be contractors providing services to the respondent.

I consider it is not appropriate for the respondent to hinder the employment prospects of the applicants by refusing access to the lease, if access to the lease is required in order to perform duties on behalf of another Employer contracting to the respondent.

Order accordingly.

D.K. BROWN, Commissioner.

*Appearances:-*

Mr B. Swan, with him Mr R. Harris, for The Australian Workers' Union of Employees, Queensland.

Mr J.E. Murdoch SC (instructed by Mr N. O'Connor) for Mount Isa Mines Limited.  
Released: 29 June 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s.277 application for injunction*

**Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland AND  
Mount Isa Mines Limited and The Australian Workers' Union of employees, Queensland  
(Case No. B704 of 2000)**

COMMISSIONER BALDWIN

28 June 2000

REPORT ON DECISION (as edited)

In giving her decision from the Bench on 28 June 2000, Commissioner Baldwin stated:-

“The three 1996 CA's recognised and incorporated the s. 45 Order that made all three parties the parties to all three (3) CA's.

In the present situation I'd like to stress that because AMWU have no representational rights, it does not also follow that they have no rights.

In my view including the AMWU in the negotiations does not increase or decrease the rights of any of the parties. Further, their inclusion does not, of itself, disturb the s. 45 order.

In my view, including the AMWU, in the entire agreement process for the current round of negotiations for all three (3) CA's does no more than satisfy the terms of the existing CA's.

Further their presence should provide transparency, uniformity, fairness and equity between the members of different unions operating within different sections of the company and under the one award.

Should any party wish to change the representational rights that have been set out in the s. 45 order, then they would need to make an application to the Commission to vary that order.

Any attempt to change the terms of the s. 45 order by any other means would appear to be in breach of that order. Therefore, today, I am prepared to issue interim injunctive orders in the terms of the relief sought by the applicant pending my final determination in which I propose to address the matters raised more fully.”

Dated this twenty-ninth day of June, 2000.

By the Commission,  
[L.S.] E. EWALD,  
Industrial Registrar.

*Appearances:-*

Mr S. Reidy of Reidy & Tonkin, for the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland.

Mr J. Murdoch, with him Mr N. O'Connor, on behalf of MIM Holdings Limited.

Mr A. Herbert, with him Mr B. Swan, on behalf of The Australian Workers' Union of Employees, Queensland.

Released: 29 June 2000

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s.277 application for injunction*

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Mount Isa Mines Limited and The Australian Workers’ Union of employees, Queensland  
(Case No. B704 of 2000)**

COMMISSIONER BALDWIN

29 June 2000

INTERIM INJUNCTION ORDER

This Commission doth order, on an interim basis, that until further order:–

1. Mount Isa Mines Limited be restrained forthwith from taking any step to seek or obtain the approval of employees of Mount Isa Mines Limited or any section or group of those employees, whether by taking steps in relation to the holding of a vote or ballot or any other step directed towards seeking or obtaining approval, of any Agreement proposed to be certified pursuant to Chapter 6 of the *Industrial Relations Act 1999*, which Agreement seeks or purports to cover employees in the Mining or Metallurgical Plants Areas of Mount Isa Mines Limited where such proposed Agreement does not include the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland as a party.
2. The Australian Workers’ Union of Employees, Queensland be restrained forthwith from taking any step to seek or obtain the approval of employees of Mount Isa Mines Limited or any section or group of those employees, whether by taking steps in relation to the holding of a vote or ballot or any other step directed towards seeking or obtaining approval, of any Agreement proposed to be certified pursuant to Chapter 6 of the *Industrial Relations Act 1999*, which Agreement seeks or purports to cover employees in the Mining or Metallurgical Plants Areas of Mount Isa Mines Limited where such proposed Agreement does not include the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland as a party.
3. Mount Isa Mines Limited in seeking or obtaining the approval of employees or any section or group of employees of Mount Isa Mines Limited to any agreement proposed to be certified pursuant to chapter 6 of the *Industrial Relations Act 1999*, is to include in such proposed agreement a provision whereby the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland is a party to that agreement.
4. The Australian Workers’ Union of Employees, Queensland in seeking or obtaining the approval of employees or any section or group of employees of Mount Isa Mines Limited to any agreement proposed to be certified pursuant to chapter 6 of the *Industrial Relations Act 1999*, is to include in such proposed agreement a provision whereby the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland is a party to that agreement.

Dated this twenty-ninth day of June, 2000.

By Order of the Commission.

D.B. BALDWIN  
Commissioner.

Operative Date: 29 June 2000  
Order – Interim Injunctive Order  
Released: 29 June 2000

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement*

**Grant Nicholas Raby AND AEC Electrics Pty Ltd. (Case No. B1081 of 1999)**

COMMISSIONER BALDWIN

27 June 2000

Application for reinstatement – Non-compliance with directions orders – Respondent’s witness statement not received and evidence disallowed – Applicant’s evidence accepted – Wages complaint – Finding s. 73(1)(b) breached – Dismissal for an invalid reason – Compensation of \$7,000.00 less tax ordered.

DECISION

This matter first came before me on 23 February 2000. At that time the applicant sought orders for discovery and costs in relation to the further directions hearing. The further directions order that ensued required both the applicant and the respondent to supply to each other certain documents. At the hearing of the matter on 1 June 2000, both parties argued that the other had not complied with the orders. On reviewing the issues I find that the applicant complied with the order albeit approx one (1) week late and that the respondent failed to provide the documents sought by the applicant. One of the documents the applicant alleged not to have received was the respondent’s witness statement. Despite the respondent’s submission that the statement had been forwarded to both the applicant and the Registry when I adjourned the hearing to make inquiries of the Registry it was confirmed that the statement had not been received. When I put this to the respondent at the hearing he accepted that it had not been received. In view of this I accepted the applicant’s submission that Mr Groidis’ evidence not be allowed. This turn of events frustrated the hearing as did Mr Groidis’ representational inexperience.

The applicant’s evidence was that he had been employed by AEC Electrics Pty Ltd, the respondent, on a full-time basis from 13 October 1998.

The background to the applicant’s loss of employment with the respondent was as follows:–

- The applicant had contacted Wageline on 21 May 1999, and later had discussions with Mr Terry Dodds from DETIR about his wages concerns.
- On 21 June 1999, the applicant had been provided with a company vehicle.

- Despite previous discussions with his employer regarding his wages concerns, there had been no change and on Friday, 9 July 1999, he again raised the issue with his employer.
- On Monday, 12 July 1999, after attending a building site the applicant had become ill and gone home. The applicant had not contacted his employer before he had been phoned at home by the respondent's Mr Andrew Wyeth. The first phone call had been interrupted firstly by Mr Wyeth receiving another call and then by the applicant's illness. Eventually the two spoke again and Mr Wyeth reluctantly told the applicant to call them when he was better. Later that day the applicant phoned Wageline again and made an appointment to see Mr Dodds on Tuesday, 20 July 1999, to lodge a wages claim. By Monday evening, the applicant's condition worsened as he developed flu symptoms.
- On Tuesday, 13 July 1999, the applicant gave Mr Simmons a letter to deliver to his employer on his behalf and a request that he advise them that he was sick and may be off work for a couple of days. The letter was dated Saturday, 9 July 1999, and made no mention of his illness. It read:-
- "On Tuesday the 20<sup>th</sup> July at 2.00pm I am lodging a complaint to WAGELINE about discrepancies in my pay. This relates to the Rostered Days Off I never received over eight months, the filling in of the wage pay book of annual leave, of which I had never taken after I had signed for my wages in the book, the travel allowance for eight months for using my own vehicle during work hours between jobs, the pay slips not being filled out correctly and also to find out what exactly I should be paid as I have been manipulated into believing your lies for too long.

Unless this is dealt with to the full extent of my askings, keeping in mind what is Legal I will be going ahead with lodging this complaint."

- At 11.00am on Tuesday, 13 July 1999, a tow truck arrived at the applicant's home to pick up his company van.
- On Friday, 16 July 1999, the applicant was feeling well and returned to work. Mr Wyeth told the applicant that he was not dealing with it and to wait for Mr Groidis.
- The applicant stated:-

"... he started telling me how because of the action I've taken, he can no longer offer me the same work and - or - but he's going to offer me the same hours in sub-contracting.

I said, 'I want to work the way it is.'. I kept on telling him I wanted to work the way it was. I couldn't see any reason why it had - had to be changed and he goes, 'Well, this is what I'm offering you. Go away, have a think about it and call me next week.' "

- On Tuesday, 20 July 1999, the applicant had attended an interview with Mr Dodds. The applicant had also phoned Mr Groidis and had been informed that there was no work for him and to come in on Friday, 23 July 1999, and that he (Mr Groidis) would pay him the same rate.
- At the meeting on Friday, 23 July 1999, Mr Groidis had told the applicant he had fired himself and referred to items he had found in the company van and made a threat concerning certain items of company property. Mr Groidis again offered the applicant work as a sub-contractor and the applicant refused. The applicant had not been paid for the week 19-23 July 1999, and he then filed a wages complaint with DETIR.
- The application for reinstatement was signed on 5 August 1999.

I largely accepted the applicant's evidence and version of events.

I did not accept the construction placed upon the applicant's behaviour in the respondent's submissions. The respondent submitted that Mr Raby had walked off the job, without notifying AEC, without paying them the courtesy of telling them that he was sick so that they could make other arrangements. I similarly did not accept Mr Groidis's contention that Mr Raby did not ring his employer until Friday, 16 July 1999. I accepted that the applicant's sickness predicament had guided his actions on Monday, 12 July 1999. I further accepted the applicant's evidence that his employer had made it difficult for him to take time off on account of illness on a previous occasion and that for this reason he had not telephoned his employer before his employer had made contact with him.

The applicant's evidence was that he had attended a doctor's surgery on either Wednesday 14 or Thursday, 15 July 1999, and that he had provided the respondent with a Medical Certificate for his absence during that week. Although this was denied by the respondent in submissions, I found this aspect of the applicant's evidence credible.

The employer had not provided details of wages paid for the week of 12-16 July 1999, and there had been no subsequent termination payment made to the applicant.

In consideration of the circumstances outlined above, I find that the applicant's employment with the respondent came to an end on Friday, 16 July, 1999.

It was clear that the employment relationship had become strained as a result of the applicant's presumption that his employer had not been paying him appropriately. No persuasive evidence was presented on this issue and Mr Raby accepted that after his departure from the respondent's employ, Mr Dodds had addressed the staff to assure them that they had received their entitlements.

However, given the background described above, I could appreciate the respondent's attitude to Mr Raby's illness from Monday, 12 July until Friday, 16 July 1999, and the assumption that they seem to have made that he had walked off the job. Although by Friday, 16 July 1999, Mr Groidis ought to have been in a position to clarify the applicant's position and resolve any outstanding issues. In my view, because of the letter dated 9 July 1999, containing the threat of a further complaint to DETIR, the respondent chose to place a particular construction on the applicant's behaviour which amounted to the applicant's constructive resignation. I do not accept the respondent's construction of the events of the week 12-16 July 1999.

Mr Groidis stated:-

"So we actually accepted the fact that he may be ill. But, on the same day, and in - according to his application, he had already made arrangements not to go to a doctor but to go see the Department of Industrial Relations. And it was the date after in - according to him again, Grant Raby this is, that it was the day after that he apparently developed flu-like symptoms."

On the evidence presented, I find that the employer has breached s. 73(1)(b) and that the dismissal occurred for an invalid reason described at s. 73(2)(e).

That is – “filing a complaint, or taking part in proceedings, against an employer involving alleged violation of laws or recourse to competent administrative authorities.”.

The applicant was unemployed for a period of twenty-five (25) weeks from 16 July 1999, until 6 January 2000. At the time of his termination from the respondent’s employ he was earning \$549.00 per week gross. This amounts to a loss of income of \$13,725.00. During this time he was paid Social Security payments amounting to \$7,147.94. Therefore, I order that the respondent pay an amount of \$7,000.00 gross to the applicant as compensation for his unlawful dismissal within 21 days of the release of this decision. The respondent is to make the necessary deduction in respect of tax payable on the gross amount on the applicant’s behalf.

The Commission orders accordingly.

D.B. BALDWIN, Commissioner.

Released: 29 June 2000

*Appearances:-*

Mr S. Royce, of Australian Industrial Reinstatement Services) for the Applicant.

Mr N. Groidis for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 319 – application for representation of parties*

**Kalliope Comino AND Eagle Recruitment Pty Ltd (No. B395 of 2000)**

COMMISSIONER SWAN

5 July 2000

Respondent seeking leave for legal representation – Applicant opposed request – Respondent claim of special circumstances – Applicant claims circumstances are not special – Commission accepts that special circumstances exist – Application successful.

PRELIMINARY DETERMINATION

This is an application made by Solicitors representing a respondent Company in a reinstatement hearing to be heard in September 2000. That Company seeks leave from the Commission to be legally represented at the reinstatement hearing.

Mr Harding, of Counsel, on behalf of the applicant in the reinstatement hearing opposed that request.

Mr Betros (a Solicitor representing the Company) claimed that special circumstances would arise in the reinstatement case which justified the use of legal representation. The special circumstances raised included a consideration of the following points:-

- That the claim made by the applicant may be a substantial claim;
- That the issues in the matter were complex;
- That there was a question of whether the applicant was in fact dismissed;
- That a jurisdictional point would arise that the applicant was an excluded employee;
- That the respondent, a solicitor by profession, could be seriously affected within his profession were a finding adverse to him to be made by the Commission.

Mr Harding, for the applicant in the reinstatement hearing, stated that the reinstatement case to be heard in September 2000 did not exhibit any special circumstances sufficient for the Commission to exercise its discretion to permit legal representation during the case.

Mr Harding viewed the jurisdictional question (ie the matter relating to wages received) as one which would be relatively easy to determine. One simply needed to review the contract in question to determine the point.

It was conceded by Mr Harding that the question of constructive dismissal, while not a common feature in reinstatement hearings before the Commission, nevertheless was not unusual.

With regard to the question of the potential for the respondent solicitor (the “respondent” in the reinstatement hearing) to be adversely affected in his profession were a finding to be made against him, Mr Harding responded as follows. Mr Harding said, in this instance, the solicitor concerned in fact ran a recruitment company which traded its services and it was not the case that the solicitor was working solely as a solicitor within that profession. In that regard, Mr Harding viewed the situation as not being dissimilar to that which confronted many respondents who appear before the Commission.

Mr Harding also stated that there would be no expert witnesses called during the course of this case.

In terms of the comments made by Mr Betros that the claim of the applicant could be “substantial”, Mr Harding understood the estimate of the claim to be around \$10,000.

It appeared that, at the conciliation conference, both parties were legally represented. The records show that, at that stage, the applicant recorded an objection to legal representation by the respondent were the matter to proceed to a formal hearing.

That objection is now being tested before the Commission.

Section 319 of the *Industrial Relations Act 1999* (the Act) relevantly states at s. 319(2)(b)(iii):-

- “(b) for proceedings before the commission, other than proceedings under section 278 –
- ...
- (iii) on application by a party or person, the commission is satisfied, having regard to the matter the proceedings relate to, that there are special circumstances that make it desirable for the party or person to be legally represented;”.

This section is relied upon by Mr Betros and, in the alternative, he sought to rely upon s. 319(2)(b)(iv) of the Act which states –

- “(iv) on application by a party or person, the commission is satisfied the party or person can be adequately represented only by a lawyer;”.

Are there any "special circumstances" in the matter listed before the Commission sufficient to permit legal representation in these circumstances?

It appears to me, firstly, that a jurisdictional point may be raised at the commencement of the case in order to establish whether the applicant was eligible to pursue her reinstatement as a consequence of wages paid to her and, secondly, that the question of a constructive dismissal would arise.

It seems that whilst these issues may not necessarily be complex, it is reasonable to accept that such issues often are difficult and could be better dealt with by legally qualified representatives.

It has been put to me by Counsel for the applicant that his client would feel competent in representing herself at the reinstatement hearing. In considering this, it seems odd to me that, on the one hand at the conciliation conference the applicant sought the assistance of a lawyer and later at this hearing Counsel has been utilised, but on the other hand, at the reinstatement hearing the applicant believes that she can dispense with such legal assistance. From my perspective, the reinstatement hearing would require the use of greater skills than would be required at a conference. However, I accept that the applicant holds those views. Usually, at conciliation conferences, it is the unrepresented party who objects to the legal representation by the other party.

After considering all of the issues, I accept that special circumstances exist in this matter sufficient for me to exercise my discretion to permit the respondent (in the reinstatement hearing) to be legally represented.

Order accordingly,

D.A. SWAN, Commissioner.

Released: 5 July 2000

*Appearances:-*

Mr A.C. Harding, instructed by Mr P. Johns of Gilshenan and Luton, for the Applicant.

Mr P.G. Betros, of Russell and Co Solicitors, for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement*

**Renee Gai Dowling AND Bruce Low Medical Pty Ltd (No. B1763 of 1999)**

COMMISSIONER SWAN

4 July 2000

Application for reinstatement – Applicant resigned – Allegation of constructive dismissal rejected – Conflict between Applicant and Respondent's wife – Applicant indicated intention to stay employed for only twelve months – Application dismissed.

DECISION

B1763/99 is an application made by Ms Renee Dowling for reinstatement (or other appropriate relief) to her former position as Administrative Officer with Bruce Low Medical Pty Ltd (the Company).

Ms Dowling commenced employment with the Company around December 1997 (in a casual position) and from around November 1998 as the Administrative Officer in a full-time capacity. Ms Dowling claims to have been constructively dismissed by the Company around December 1999. Ms Dowling is the niece of Dr Bruce Low's wife, Mrs Maureen Low.

Many issues were raised in this case which can best be described as peripheral. They were peripheral in as much as they related to interactions between family members (ie Ms Dowling's immediate family and Mrs Low). Those issues need not be referred to in this decision.

The crux of the matter is whether Ms Dowling resigned from her position with the Company voluntarily or whether, as a consequence of alleged harassment by Mrs Low towards her, she had no other choice but to resign her position.

Ms Dowling accepts that she had discussed with Dr Low the possibility of staying in her employment with the Company only for some twelve months after being appointed to her full-time position.

She states that discussions around this issue were heightened because she perceived Mrs Low's allegedly poor attitude during the last few months of her employment towards her as increasingly pronounced during this period.

Mrs Low was employed elsewhere in a full-time position unconnected to her husband's business, although in the area of health administration. However, Ms Dowling alleges that Mrs Low directed the performance of her duties on an increasingly intrusive basis. Upon advising Dr Low that his wife was interfering with the performance of her duties, Ms Dowling claims that Dr Low was supportive of her views in that he advised her to accept assistance from Mrs Low but that he did not want his wife to be in charge of the practice.

From the applicant's evidence, there appeared to emerge over time a serious conflict between herself and Mrs Low over how the practice should be run. On the one hand it appeared that Mrs Low would advise her of a certain course of action to be followed, and on the other, the applicant was advised by Dr Low to ignore his wife.

From the applicant's evidence, over time, Mrs Low's behaviour towards her became verbally abusive, so much so that the applicant took sick leave. During the period in question, the applicant conferred with Dr Low, always finding Dr Low supportive of her views and stating that he would talk to his wife and the situation would improve.

Around October, 1999, the applicant claims that she became aware that Mrs Low had written to the applicant's family denigrating her. Ms Dowling raised this issue with Dr Low and, allegedly, he tried to defuse the situation.

During October 1999, the applicant received an inter office communication stating that Mrs Low had been appointed the "Business Manager, Administration and Finance". Upon raising concerns with Dr Low regarding the status of her own position, the applicant alleges that Dr Low said he was "made" to sign the correspondence by his wife but that Ms Dowling should ignore the content.

Over this period of time the applicant claims she began receiving distressing letters and telephone calls at her home from Mrs Low. It was also claimed by the applicant that Mrs Low continued verbally abusing her at the workplace referring to her as a "druggie" and a "psychotic".

During November 1999, after one of these alleged abusive sessions, the applicant telephoned Dr Low (who was away from Townsville) advising him that she could no longer work for him because of his wife's behaviour. Ms Dowling states that Dr Low asked her to stay with the practice.

Ms Dowling, considering her position, again telephoned Dr Low stating:

"That if Dr Low could promise that Maureen Low would not come near her, then she would continue to do the job until it was convenient for her to finish up. This was a temporary solution only."

On 4 December 1999, the applicant received a letter from Mrs Low confirming a date of resignation of the previous day, December 3, 1999.

Upon telephoning Dr Low, the applicant was advised that Dr Low had not authorised the letter and that he had wanted her to continue her employment.

The applicant determined to leave the employment of Dr Low believing that "Maureen Low had gone too far this time and she could not take anything further."

According to Mrs Low, Ms Dowling had indicated early in her employment that it was her intention to work for Dr Low for 12 months and then to travel to Sydney to join her boyfriend.

Mrs Low expressed concerns regarding the applicant's behaviour at work stating that she often appeared to be overly tired and that she neglected her office duties.

Dr Low had approved and paid for the attendance of Ms Dowling at a Practice Management Course in Brisbane and had also provided computer training for the applicant.

Tensions appeared to become escalated between Mrs Low and the applicant over time to the point where Mrs Low stated that, upon attending at the surgery on a particular day, Ms Dowling "hissed" at her stating "What are you doing here, I told you not to come here."

Mrs Low claims that she was informed by Dr Low that Ms Dowling had determined to leave his employ at the end of the following month. It was claimed that Ms Dowling responded to this information by calling Mrs Low "a crazy psychotic bitch".

Mrs Low believed that as Ms Dowling would be leaving at the end of November 1999, she and Dr Low would simply "soldier on" until then.

Ms Robyn Ferrier, currently the Office Administrator for the practice, believed that a "power struggle" existed between the applicant and Mrs Low. Ms Ferrier was adamant that Ms Dowling had often stated that she had promised Dr Low that she would work on a full-time basis for Dr Low for a period of twelve months, which would expire in December 1999. Ms Ferrier's evidence was that she was always of the view that Ms Dowling was leaving the practice in early December 1999. To her mind, Ms Dowling had made her intentions perfectly clear.

A patient of Dr Low's, Mr Terence Lincoln claimed that he had discussed living in Sydney with Ms Dowling whilst at the surgery, and that she had informed him that she was leaving the practice around late November 1999.

Dr Low, in his evidence, stated that it was always understood between himself and Ms Dowling that she would work at his practice for twelve months only. Dr Low was aware of the friction which existed between his wife and the applicant, but that he had afforded the applicant significant support.

Dr Low believed that he had been a good employer in that he had paid Ms Dowling some \$150 per week above the Award; arranged for the applicant to attend a Practice Management Course in Brisbane; permitted Ms Dowling to spend extra time in Sydney with her boyfriend; compensated Ms Dowling for jewellery stolen (\$1000); took no action against the applicant when it was found that the applicant had been overpaying herself and did not deduct money from her wages when she frequently did not attend work on Monday or Friday.

Dr Low states that around 22 November, 1999 Ms Dowling advised him that this would be her last week and that she would be flying to Sydney around 22 December, 1999.

Dr Low was emphatic that Ms Dowling had always intended living in Sydney with her boyfriend and that she had fixed a date to leave some time in early December, 1999.

An unchallenged statement made by Mr Sebastian Saitta (a patient of Dr Low's) claimed that Ms Dowling had discussed with him moving to Sydney to be with her boyfriend. Mr Saitta further claims that Ms Dowling advised him that, on a particular day, it was her last day at work and that she appeared to be "wrapped" about shortly moving to Sydney.

This matter has been somewhat difficult to determine. This is primarily so because it involves considerable elements of family feuding interspersed with an employment engagement.

I formed the view, after considering Mrs Low's evidence, that she may well be a difficult person to be around. Notwithstanding the fact that she held a full-time position with a Government Department in Townsville, she appeared to find the time to play a reasonably active role in her husband's practice. That she was appointed as Business Manager, Finance and Administration of the practice seems unusual to say the least.

From correspondence tendered during this case, there is little doubt that family friction existed between Mrs Low and Ms Dowling's parents. This friction manifested itself through correspondence sent by Mrs Low to Ms Dowling, and regrettably also flowed into the work environment.

Dr Low's evidence that he seemed to be caught in the middle of a family feud at the workplace, is believable.

Dr Low's evidence showed him to be a good employer in that he treated his employee, Ms Dowling, well. However, he appeared to be deficient in one respect – he seemed unable to curtail the excesses of his wife, which in turn had an adverse affect on his employee, Ms Dowling. He appeared to be ready to put up a fight to defend his employee's interests but then seemed to acquiesce to his wife's demands at the crucial moment.

It has been put to me by the applicant's Counsel that Ms Dowling was forced out of her employment by Mrs Low. In effect, that she was constructively dismissed. I am unable to accept this proposition.

I accept the evidence from a range of people previously referred to that Ms Dowling had always intended leaving the employ of Dr Bruce Low around early December, 1999. The fact that she had experienced an unpleasant relationship with her aunt, Mrs Low, was simply that. I accept that it was highly

probable that Mrs Low was the more aggravating and unpleasant person in this relationship. This unpleasantness may have exacerbated Ms Dowling's desire to leave the employ of Dr Low, but I accept that she was leaving in any event. I also accept that Mrs Low may have wanted Ms Dowling to leave the practice so that she could assume greater control over it, but this was not the reason for Ms Dowling to leave the practice. The reason Ms Dowling left the employ of Dr Low was because she wanted to travel to Sydney for her own personal reasons.

I am unable to find that Ms Dowling was forced out of her employment. Her period of employment with Dr Low (through an oral contractual arrangement between both the parties) had expired. The fact that Ms Dowling had wanted to escape from the unpleasantness of her aunt, Mrs Low, coincided with her intention to resign her employment. There was no dismissal, constructive or otherwise.

I dismiss the application.

Dated this fourth day of July, 2000.

D.A. SWAN, Commissioner.

Appearances:-

Mr M.E. Pope, instructed by Wilson Ryan & Grose, for the Applicant.

Released: 5 July 2000

Mr C.A. White, instructed by Roberts Nehmer McKee, for the Respondent.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 –s. 22 – application to amend order

**Retailers Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) (No. B1231 of 1999)**

PRESIDENT HALL  
COMMISSIONER BLADES  
COMMISSIONER SWAN

29 June 2000

INTERIM ORDER

THIS Commission doth Order that until further order of the Commission the TRADING HOURS ORDER – NON-EXEMPT SHOPS TRADING BY RETAIL – STATE ORDER be amended as follows from the first day of July, 2000:-

By adding to 3.2 of the **Trading Hours Order – Non-Exempt Shops Trading by Retail – State** the following:-

“(i) Whitsunday Shire Tourist Area: –

	Opening Time	Closing Time
Monday to Friday	8.00 am	9.00 pm
Saturday	8.00 am	5.30 pm
Sunday	10.30 am	4.00 pm
Public Holidays (except twenty fifth of December, the twenty fifth of April and Labour Day)	8.30 am	5:30 pm”;

and by adding to Schedule 1 – Definitions of the **Trading Hours Order – Non-Exempt Shops Trading by Retail – State** the following:-

“(22) Whitsunday Shire Tourist Area

Commencing at the junction of Coconut and Shute Harbour Road. Then due east to the shoreline of Boat Haven proceeding along the foreshore in a northerly and then westerly direction to the mouth of Waite Creek. Then south along Waite Creek to the junction of Waite Creek and Shute Harbour Road and continuing south along Shute Harbour Road to its junction with Milk Depot Road. Then in a line of a north easterly direction to the eastern end of Tropic Road, then to the eastern most end of Eshelby Drive, then to the junction of Orana Street and Waterson Road. Then proceeding in a line back to the junction of Coconut Drive and Shute Harbour Road crossing the intersection of Harper Street and Golden Orchard Drive.”.

Dated this twenty-ninth day of June, 2000.

By the Commission,  
[L.S.] E. EWALD,  
Industrial Registrar.

Operative Date: 1 July 2000  
Interim Order: Trading Hours  
Released: 29 June 2000

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – order for unpaid wages

**Rodney James Whitson of the Department of Employment, Training and Industrial Relations AND Gaphill Pty Ltd (No. W56 of 2000)**

COMMISSIONER BLOOMFIELD

27 June 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 19 May and 27 June 2000, this Commission, after having decided that Greg James Adair was underpaid wages by Gaphill Pty Ltd, in accordance with the provisions of the Transport, Distribution and Courier Industry Award – Southern Division and the Food and Drug Store Employees’ Award – Southern Division (Eastern District), doth order as follows:-

1. That Gaphill Pty Ltd pay to Greg James Adair the amount of seven hundred and twenty-three dollars and eighty-nine cents (\$723.89) in respect of unpaid wages for the period between 6 July 1998 and 14 August 1998.
2. That the amount set out in paragraph 1 of this Order is to be paid within twenty-two (22) days of the date of this Order.

Dated this twenty-seventh day of June, 2000.

By the Commission,  
[L.S.] E. EWALD,  
Industrial Registrar.

Operative Date: 27 June 2000  
Order – Unpaid wages  
Released: 29 June 2000

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – order for unpaid wages*

**Rodney James Whitson of the Department of Employment, Training and Industrial Relations  
AND Gaphill Pty Ltd (No. W59 of 2000)**

COMMISSIONER BLOOMFIELD

27 June 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 19 May and 27 June 2000, this Commission, after having decided that Georgina Rose Dolan was underpaid wages by Gaphill Pty Ltd, in accordance with the provisions of the Food and Drug Store Employees' Award – Southern Division (Eastern District), doth order as follows:–

1. That Gaphill Pty Ltd pay to Georgina Rose Dolan the amount of nine thousand five hundred and eighteen dollars and fifty-three cents (\$9,518.53) in respect of unpaid wages for the period between 4 May 1994 and 14 August 1998.
2. That the amount set out in paragraph 1 of this Order is to be paid within twenty-two (22) days of the date of this Order.

Dated this twenty-seventh day of June, 2000.

By the Commission,  
[L.S.] E. EWALD,  
Industrial Registrar.

Operative Date: 27 June 2000  
Order – Unpaid wages  
Released: 29 June 2000

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s.125 – application for amendment*

**Motor Trades Association of Queensland Industrial Organisation of Employers  
AND The Australian Workers' Union of Employees, Queensland (No. B456 of 2000)**

**GARAGE AND SERVICE STATION ATTENDANTS' AWARD – STATE  
(EXCLUDING SOUTH-EASTERN DISTRICT)**

COMMISSIONER BECHLY

4 May 2000

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 11 April and 4 May 2000, this Commission doth order that the said Award be amended *by consent* as follows from the twenty-sixth day of June, 2000:–

1. By inserting a new subclause (l) into clause 2 (Application of Award) as follows:–

“(l) Employees in catering services attached to or in association with petrol service station roadhouses:

Provided that where there is a conflict or inconsistency between the appendix and the body of the Award, the appendix shall take precedence to the extent of that inconsistency or conflict:

Provided further that, for employees covered by the appendix to this Award, the area of operation shall be as set out below:–

*Divisions*

For the purposes of the appendix the following divisions shall apply:–

*Northern Division.* – That portion of the State north of the line commencing at the junction of the 21<sup>st</sup> parallel of south latitude with the sea-coast; thence by that parallel due west to the 147<sup>th</sup> degree of east longitude; thence by that meridian of east longitude due south to 22 degrees 30 minutes of south latitude; thence by that parallel of latitude due west to the western border of the State, including all islands north of the 21<sup>st</sup> parallel of south latitude which are within the State of Queensland.

*Mackay Division.* – That portion of the State within the following boundaries:– Commencing at the junction of the sea coast with the 21<sup>st</sup> parallel of south latitude; thence by that parallel of latitude due west to 147 degrees of east longitude; thence by that meridian of longitude due south to 22 degrees of south latitude; thence by that parallel of latitude due east to the sea coast; thence by the sea coast northerly to the point of commencement; and including all islands situated between the 21<sup>st</sup> and 22<sup>nd</sup> parallels of south latitude and within the State of Queensland.

*Southern Division.* – That portion of the State not included in the Northern or Mackay Divisions and excluding that area within the following boundaries:– Commencing at Point Danger, and bounded thence by the southern boundary of the State westerly to 151 degrees of east longitude; thence by that meridian of longitude bearing true north to 24 degrees 30 minutes of south latitude; thence by that parallel of latitude bearing true east to the sea coast; and thence by the sea coast southerly to the point of commencement and all islands situated south of 24 degrees 30 minutes of south latitude and within the State of Queensland.

#### *Districts*

For the purposes of the appendix the following districts shall apply:–

*Northern Division. – Eastern District.* – That portion of the above area along or east of 144 degrees 30 minutes of east longitude.

*Western District.* – That portion of the above area west of 144 degrees 30 minutes of east longitude, including Thursday Island.

*Southern Division. – Eastern District.* – That portion of the Southern Division along or east of a line commencing at the junction of the southern border of the State with 150 degrees of east longitude; thence by that meridian of longitude due north to 25 degrees of south latitude; thence by that parallel of latitude due west to 147 degrees of east longitude; thence by that meridian of longitude due north to the southern boundary of the Mackay Division.

*Western District.* – The remainder of the Southern Division.”.

2. By inserting at the end of the Award an Appendix as follows:–

#### “APPENDIX

#### EMPLOYEES IN CATERING SERVICES ATTACHED TO OR IN ASSOCIATION WITH PETROL SERVICE STATION ROADHOUSES

##### 1. Definitions

(1) *Food and Beverage Stream.* –

(a) ‘Food and Beverage Attendant Grade 1’ shall mean an employee who is engaged in any of the following:–

- picking up glasses;
- emptying ashtrays;
- general assistance to Food and Beverage Attendants of a higher grade, not including service to customers;
- removing food plates;
- setting and wiping down tables;
- monitoring, cleaning and tidying of associated areas during normal opening hours where such duties are incidental to the employees main duties.

(b) ‘Food and Beverage Attendant Grade 2’ shall mean an employee who has not achieved the appropriate level of training, and who is engaged in any of the following:–

- supplying, dispensing and mixing of liquor;
- undertaking of general waiting duties of both foods and/or beverages including cleaning of tables and restaurant equipment;
- receipt of monies;
- selling of specialist stock lines;
- attending a snack bar;
- engaged on delivery duties;
- general receivable and distribution of goods;
- taking reservations, greeting and seating guests under general supervision;
- assist in maintenance of dress standards and goods order of the establishment;
- setting up on site for small parties.

(c) ‘Food and Beverage Attendant Grade 3’ shall mean an employee who has the appropriate level of training and is engaged in any of the following:–

- supplying, dispensing or mixing of liquor;
- undertaking all general waiting duties of both food and liquor, including cleaning of tables;
- receipt of monies;
- selling of specialist stock lines;
- taking reservations, greeting and seating guests;
- general security including security of keys and supervision of dress standard maintenance and goods order in the establishment;
- assisting in the training and supervising of Food and Beverage Attendants of a lower grade;
- setting up on site for small parties.

(d) ‘Food and Beverage Attendant Grade 4’ shall mean an employee who has the appropriate level of training, and is engaged in any of the following:–

- Full control of cellar or liquor storeroom (including the receipt, delivery, recording and ordering of goods within such an area);
- mixing a range of sophisticated drinks;
- supervision and training of Food and Beverage Attendants of a lower grade.

(e) ‘Food and Beverage Attendant Grade 5’ shall mean an employee who has completed an apprenticeship in waiting, or who has been accredited as such, or who is assessed as having skills of a similar level and who is engaged in the following:–

- general and specialised skilled duties in a fine dining room or restaurant.

- (f) 'Food and Beverage Attendant Grade 6' shall mean an employee who has the appropriate level of training including a supervisory course, and who is engaged in any of the following:-
- responsibility for the supervision, training and co-ordination of food and beverage staff;
  - stock control for bar or bars including administrative and accounting activities;
  - responsibility for the maintenance of service and operational standards.
- (2) *Kitchen Stream* -
- (a) 'Kitchen Attendant Grade 1' shall mean an employee engaged in any of the following:-
- general cleaning duties within a kitchen or food preparation area and scullery, including the cleaning of cooking and general utensils, used in a kitchen and restaurant;
  - assisting employees who are cooking;
  - preparation of salad ingredients and/or distribution to a salad bar;
  - general pantry duties.
- (b) 'Kitchen Attendant Grade 2' means an employee who has the appropriate level of training, and who is engaged in any of the following:-
- specialised in non-cooking duties in a kitchen or food preparation area;
  - assisting in the supervision and training of Kitchen Attendants;
  - general receipt and distribution of goods.
- (c) 'Kitchen Attendant Grade 3' shall mean an employee who has the appropriate level of training including a supervisory course, and who is engaged in the following:-
- responsibility for the supervision, training and co-ordination of Kitchen Attendants of a lower grade.
- (d) 'Cook Grade 1' shall mean an employee who is engaged in the following:-
- cooking of breakfasts and snacks, baking, pastry cooking or butchering.
- (e) 'Cook Grade 2' shall mean an employee who has the appropriate level of training and who is engaged in any of the following:-
- cooking duties including baking, pastry cooking or butchering;
  - setting up of an on-site kitchen.
- (f) 'Cook (Tradesperson) Grade 3' shall mean an employee who has completed an apprenticeship or who has passed the appropriate trade test, and who is engaged in any of the following:-
- cooking, baking, pastry cooking or butchering duties;
  - setting up of an on-site kitchen.
- (g) 'Cook (Tradesperson) Grade 4' shall mean an employee who has completed an apprenticeship or has passed the appropriate trade test, and who is engaged in any of the following:-
- general or specialised cooking, butchering, baking or pastry cooking duties;
  - supervision and training of other cooks or kitchen employees.
- (h) 'Cook (Tradesperson) Grade 5' shall mean an employee who has completed an apprenticeship or has passed the appropriate trade test in cooking, butchering, baking or pastry cooking and has completed additional appropriate training and who performs any of the following:-
- general and specialised cooking, butchering, baking or pastry cooking duties;
  - supervision and training of other cooks and kitchen employees;
  - ordering and stock control;
  - sole responsibility for other cooks and kitchen employees including co-ordination in a single kitchen establishment.
- (3) 'Introductory Level' shall be applicable if an employee has not achieved the appropriate level of training and has less than three months experience either in the restaurant and catering industry or in another industry where the employee performed work similar to that which the employee is required to perform under this Award.
- (4) Appropriate Level of training shall mean:-
- (a) Completion of a training course deemed suitable according to guidelines issued through Tourism Training Australia for that particular classification. After 1 January 1992, such course to be accredited by the Australian Hospitality Review Panel.
- (b) That the employee's skills have been assessed to be at least the equivalent of those attained through the suitable course described in provision (a) such assessment to be undertaken by a qualified skills assessor, or
- (c) That for a transitional period until 1 July 1996, the employee can be deemed to have the appropriate level of training.
- (d) Any dispute arising in relation to this clause shall be resolved in accordance with the provisions of clause 24 (Settlement of Disputes) of the Award.
- (5) 'Casual employee' shall mean any employee engaged as such and who is employed by the hour on the class of work for which he or she is engaged with a minimum of four hours' pay for each engagement.

(6) 'Caterer (other than Industrial Caterer)' shall mean any employer carrying on the business of catering for wedding receptions, parties, dances, conventions, seminars, social functions, sports grounds, race, trotting and greyhound meetings, Agricultural or Industrial shows, or any similar functions or events.

(7) 'Industrial Caterer' shall mean any employer carrying on the business of catering and/or providing accommodation for any number of persons involved in Industrial Undertakings on location where catering is provided for on the basis of a minimum of two main meal times per day.

(8) 'Full day off' shall mean twenty-four hours from 12 midnight to 12 midnight.

(9) 'Half day off' shall mean the balance of the day from 1.30 p.m. till the time of starting next day; ordinary time worked on such half-day shall not exceed four hours.

(10) 'Part-time employee' shall mean an employee who is regularly employed for a minimum of not less than 12 hours each week and a maximum of 40 hours each week.

(11) 'Junior employee' shall mean those employees under the age of twenty years:

Provided that employees engaged and/or employed on duties normally performed by a drink waiter/waitress or bar attendant shall not be regarded as a junior employee for the purposes of this definition.

#### **Engagement**

2. (1) Employees may be engaged on a weekly, part-time or casual basis, provided that the nature of the employment contract is specified at the time of engagement.
- (2) Employers shall at the time of engagement provide to their employees in writing the following details:
  - (a) The classification under which the employee has been engaged, including the level;
  - (b) The rate of pay applicable to the position under this Agreement;
  - (c) Confirmation of the date of employment;
  - (d) All other conditions of employment applicable within the property in which the employee is to be employed.

#### **Hours of Work**

3. (a) The ordinary hours of work for employees employed in catering services attached to Petrol Service Station Roadhouses shall not exceed forty in any one week or eight in any one day to be worked on five days of the week:
 

Provided that the two days off duty shall, wherever practicable, be consecutive.
- (b) The ordinary daily working hours shall be worked between the hours of 7.00 a.m. and 12.00 midnight. There shall not be more than one break exclusive of meal hours in any one day.
- (c) By agreement between the employer and the majority of employees concerned, full-time and part-time employees may work up to a maximum of ten ordinary hours per day without the payment of overtime.
- (d) The roster for all employees shall provide for a minimum of ten hours break between the finish of ordinary hours on one day and the commencement of ordinary hours on the following day.

#### **Shift Work**

4. Shift work may be performed in accordance with a roster to be drawn up by mutual agreement between the employer and the employees and approved by the Industrial organisation in writing:

Provided that such roster shall provide for not more than five shifts of eight continuous hours per day, including crib breaks to be worked in any one week with two consecutive days off duty.

#### **Overtime**

5. (1) Except as provided in clause 3 (Hours of Work) and as hereinafter provided all time worked by employees in excess of 8 hours on any full day or four hours on any half-day or 40 hours in any one week or outside the daily spread of working hours or outside the daily and/or weekly rostered hours shall be deemed overtime and except as hereinafter provided shall be paid for at the rate of time and a-half for the first three hours and double time thereafter.

(2) All time worked on an employee's days or half-day off shall be paid for at the rate of time and a-half for the first three hours and double time thereafter with a minimum payment as for two hours worked:

Provided, however, that the two-hour minimum payment shall not apply to employees who continue working in their half-day off.

(3) All overtime worked on Sundays shall be paid for at the rate of double time:

(4) All time worked after 12 midnight and prior to 6.00 a.m. the following day shall be paid for at the rate of time and a-half for the first three hours and double time thereafter.

(5) Overtime on any day shall stand alone.

(6) All time worked by a shift worker in excess of forty hours per week or eight hours per day or outside of the rostered hours of work shall be deemed to be overtime and shall be paid for at the rate of double time.

(7) Notwithstanding the provisions of this clause, there may be an agreement in writing between the employee and the employer to take time off with pay in lieu of payment of overtime. Such time off shall be equivalent to the number of ordinary hours' pay that the employee would have received for such overtime. Accumulated time must be taken within twelve months from the time of accrual and at a time mutually agreed between the employee and the employer. Outstanding accrued overtime shall be paid at the appropriate rate in full at the time of termination, for any reason, by either party.

#### Week-End Penalty Rates

6. Payment at the rate of time and a-half for all time worked between midnight Friday and midnight Sunday, not being overtime within the meaning of clause 5 (Overtime) of this Award shall be made to all employees other than casuals.

#### Part-Time Employees

7. (1) Part-time employees shall be engaged for a minimum of 12 hours and a maximum of 40 hours in any one week and shall work on not more than five days in any one week. Part-time employees shall work a minimum of three hours on any one day and a maximum of ten hours on any one day. The hours of work shall be continuous subject to clause 9 (Meal Breaks).

(2) (a) A part-time employee shall be paid per hour at the rate of one-fortieth of the weekly rate prescribed for the class of work performed.

(b) Savings – Part-time employees who were in receipt of a 10% all-purpose loading as at the date of this variation are to continue to receive that loading for all ordinary hours worked.

(3) (a) Part-time employees who work in excess of eight hours per day (or in the case of employees to whom clause 3(c) applies, any work in excess of ten hours per day) shall be entitled to be paid overtime in accordance with clause 5 (Overtime) for such excess hours.

(b) In the case of part-time employees who receive the ten per cent loading prescribed for in subclause (2)(b) above, any time worked in excess of 40 hours per week shall be classed as overtime and paid in accordance with clause 5 (Overtime) hereof.

(c) In the case of all other part-time employees any time worked in excess of the ordinary daily or weekly hours prescribed by the roster, shall be classed as overtime and paid in accordance with clause 5 (Overtime).

(4) Part-time employees shall be entitled to *pro rata* entitlements to annual leave, public holidays (on which the employee is normally rostered to work), sick leave, bereavement leave and long service leave in accordance with the provisions contained in this Award.

(5) All provisions of this Award not expressly varied by this clause shall have application to part-time employees.

#### Meals

8. Meals may be taken at the option of the employee and where practicable notice shall be given by the employee on the previous day whether meals are required for the following day. The sum of \$2.00 may be deducted for any meal taken.

#### Meal Breaks

9. (1) Every employee shall be entitled to a meal break of not less than thirty minutes nor more than one hour for breakfast, lunch or dinner. No employee shall work for more than six hours without a meal break except where overtime of one hour's duration or less is being worked immediately following an employee's ordinary ceasing time.

(2) Where an employee is required to work through his or her normal break he or she shall be paid at the rate of double time for all work so performed and such double time shall continue to be paid until such time as a meal break of the usual duration can be taken or until the employee ceases work for the day.

(3) Any employee who is required to work overtime for more than two hours beyond the rostered ceasing time shall be provided with an adequate meal by the employer, or, in the event of the employer being unable to provide such meal, be paid an allowance of \$7.50 in lieu thereof.

#### Wages

10. (1) The minimum rates of wages payable to the following classes of employees in the Southern Division (Eastern District) shall be:–

Classification	Excess Payment Per Week \$	Total Wage Rate Per Week (as from 1.9.99) \$
1. Kitchenhand	6.00	391.40
2. Bar Attendant		401.30
Drink Waiter/Waitress		401.30
Food Waiter/Waitress		401.30
Receptionist		401.30
Cashier		401.30
Singlehand Cook	2.10	403.10
Other Cook		401.30
3.		408.60
4. Head Waiter		421.00
5. Qualified Cook		431.20
6. Second Cook		442.60
7. Chef or Chief Cook		458.40
Persons not otherwise provided for		391.40
Introductory Level		364.60

The rates of pay in this Award include the arbitrated adjustment payable under the 1 September 1999 Declaration of General Ruling and earlier Safety Net Adjustments. [Disputed cases are to be referred to the President.] This arbitrated wage adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in

the Award. Such payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award amendments to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Cases or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated wage adjustments.

Divisional and District Allowances – Adult employees in the Mackay Division shall be paid 90c per week and adult employees in the Eastern District of the Northern Division shall be paid \$1.05 per week in addition to the rates above prescribed.

Junior Rates – The minimum rates of wages payable to junior employees as defined shall be calculated as follows:–

	Of the Minimum Adult Rate for the Respective Division and/or District
	%
Under 17 years of age.....	55
17 and under 18 years of age.....	65
18 and under 19 years of age.....	75
19 and under 20 years of age.....	85

And thereafter at the appropriate rate prescribed for adults in the class of work being performed.

Junior rates shall be calculated in multiples of 10 cents with any result of 5 cents or more being taken to the next highest 10 cent multiple.

Any employee aged 18 or 19 years who is engaged to dispense and/or mix and/or sell alcoholic beverages shall be paid at a minimum rate of \$318.50 per week in the case of full-time employees and in the case of casual and part-time employees at the appropriate hourly rate on the weekly rate provided above.

(2) *Casual employees* – The hourly rate for such employees to be ascertained by dividing the appropriate weekly rate prescribed for permanent employees of the same class by forty and adding thereto the following loadings:–

- (a) 50 per cent for work performed Monday to Saturday.
- (b) 100 per cent for work performed on Sundays and for work performed after 12 midnight, and prior to 6.00 a.m. the following day.
- (c) 150 per cent for work performed on Statutory Holidays.

(3) *Supervisory Allowances* – Employees other than chefs or chief cooks, second cooks, and head waiters who are appointed to supervise the work of other employees shall be paid the following additional allowances:–

	As From 1.9.99 Per Week \$
<i>In charge of –</i>	
1 to 8 employees.....	8.40
9 to 16 employees.....	10.70
17 or more employees.....	12.80

(4) *Late Work Rates* – Employees, other than casuals, required to work any ordinary hours between 8.00 p.m. and midnight Monday to Friday shall be paid \$2.50 per occasion as from 12 October 1992 and \$2.72 as from 12 January 1993.

(5) Shift workers shall be paid an allowance of \$9.70 per afternoon or/night shift worked:

Provided that for the purposes of this subclause, an afternoon shift shall be deemed to mean any shift commencing later than noon and ceasing at, or before midnight, and a night shift shall be deemed to mean any shift commencing at, or later than midnight and ceasing at, or before, noon.

(6) No employee presently employed under the terms of this Award shall suffer any reduction in his or her ordinary time rate as a result of amendments contained in this clause.”.

Dated this fourth day of May, 2000.

By the Commission,  
[L.S.] E. EWALD,  
Industrial Registrar.

Operative Date: 26 June 2000  
Amendment – Application, Hours of Work.  
Released: 1 July 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 125 – application to amend award

**Queensland Rail AND Australian Rail, Tram and Bus Industry Union of Employees,  
Queensland Branch and Others (No. B996 of 1999)**

**QUEENSLAND RAIL AWARD – STATE**

COMMISSIONER BECHLY

AMENDMENT

29 May 2000

THIS matter coming on for hearing before the Commission at Brisbane on 26 August, 29 October, 15 November and 22 December 1999, this Commission doth order, by consent, that the said Award be amended as follows from the twenty-third day of September, 1996:–

By deleting clause 3.1(1) of Schedule 3 and inserting the following in lieu thereof:-

- “(1) *Ordinary working hours* – The ordinary working hours shall be those allowed for under clause 4.1(2) (Implementation of 38 hour week) of the Award and, except for infrastructure employees engaged under conditions relevant to s. 3.4 and employees working in the Rollingstock Maintenance area, where ordinary hours are worked on a Saturday payment shall be made at the rate of 150% for the first three hours and 200% for the remainder.

Infrastructure employees engaged under conditions relevant to s.3.4 and employees working in the Rollingstock Maintenance area will be paid in accordance with clause 4.7 for ordinary hours worked on a Saturday.”.

Dated this twenty-ninth day of May 2000.

By the Commission,  
[L.S.] P. SCOTT-HOLLAND,  
Acting Industrial Registrar.

Operative Date: 23 September 1996  
Amendment – Ordinary working hours  
Released: 29 June 2000