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No. 14

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
CA320/99	Toowong Private Hospital - Hospital Nurses and Other Staff – Certified Agreement 1998	1/9/99	CA38/97
CA268/00	Procrete Formwork Pty Ltd - Certified Agreement	19/6/00	CA234/97
CA272/00	Vicky Wallace T/A A Bloody Good Clean - Certified Agreement	19/6/00	
CA273/00	Tony Thornton Landscapes Pty Ltd - Certified Agreement	19/6/00	
CA274/00	Sanctuary Pacific Pty Ltd t/a Pacific Landscapes - Certified Agreement	19/6/00	
CA275/00	Poseidon Waterproofing Pty Ltd - Certified Agreement	19/6/00	
CA276/00	William John & Monique Allendorf T/A WMA Demolition – Certified Agreement	19/6/00	CA420/95
CA277/00	Shade Structures Pacific Pty Ltd - Certified Agreement	19/6/00	
CA278/00	Tweed Coast Cleaning Suppliers Pty Ltd - Certified Agreement	19/6/00	CA301/97
CA279/00	Brothers Rice Landscaping Pty Ltd - Certified Agreement	19/6/00	
CA280/00	Linton Pacific Pty Ltd - Certified Agreement	19/6/00	
CA281/00	M&B Rigging Pty Ltd - Certified Agreement	19/6/00	CA270/97
CA282/00	BRT Plant Hire Pty Ltd - Certified Agreement	19/6/00	CA569/97
CA283/00	Richardson Excavations Pty Ltd - Certified Agreement	19/6/00	CA568/97
CA284/00	Kawana Signs Sunshine Coast Pty Ltd - Certified Agreement	19/6/00	CA416/96
CA285/00	Moortop Pty Ltd t/a Independent Bobcat Services - Certified Agreement	19/6/00	
CA286/00	P & R Flood Pty Ltd - Certified Agreement	19/6/00	CA197/97
CA287/00	Gaplyn Pty Ltd t/a D&J Aluminium Fitters - Certified Agreement	19/6/00	CA426/95

No/s	Title	Date certified	Cancelling
CA288/00	Barritts Properties Pty Ltd t/a Barritts Carpet One and Tiles One - Certified Agreement	19/6/00	
CA324/00	Australia Meat Holdings - Beef City Maintenance Employees - Certified Agreement 2000	13/7/00	

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(1) – appeal against decision of industrial commission

MIM Holdings Limited AND Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (No. C36 of 2000)

s. 248 – application for prerogative orders

MIM Holdings Limited AND Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (No. C37 of 2000)

s. 341(1) – appeal against decision of industrial commission

The Australian Workers' Union of Employees, Queensland AND Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (No. C39 of 2000)

PRESIDENT HALL

19 July 2000

DECISION

On 23 May 2000 the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (hereafter AMWU) filed an application for injunctive relief under s. 277 of the *Industrial Relations Act 1999* to compel compliance with and restrain the contravention of s. 156 of the *Industrial Relations Act 1999*. The injunctions were sought against Mount Isa Mines Limited (hereafter MIM) and The Australian Workers' Union of Employees, Queensland (hereafter AWU). The terms of the injunctions which were sought were as follows:

- “1.1 An injunction pending the final Hearing and determination of this matter restraining Mount Isa Mines Limited (‘MIM’) 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 Applicant as a party.
- 1.2 An injunction pending the final Hearing and determination of this matter restraining The Australian Workers' Union of Employees, Queensland (‘the AWU’) 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 Applicant as a party.
- 1.3 An injunction restraining Mount Isa Mines Limited (‘MIM’) 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 Applicant as a party.
- 1.4 An injunction restraining The Australian Workers' Union of Employees, Queensland (‘the AWU’) 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 Applicant as a party.
- 1.5 An injunction compelling 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* to include in such proposed agreement a provision whereby the Applicant is a party to that agreement.
- 1.6 An injunction compelling the AWU 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* to include in such proposed agreement a provision whereby the Applicant is a party to that agreement.
- 1.7 Such further or consequential Orders as the Commission sees fit to ensure that Mount Isa Mines Limited and the AWU comply with the provisions of Chapter 6 of the *Industrial Relations Act 1999* in respect of the proposed Agreements for the Mining Area and the Metallurgical Plants Area.”.

When the matter was called each of MIM and AWU took certain threshold or preliminary points. It was contended –

- (1) that s. 156(1)(j) did not give AMWU a right to be a party to either of the proposed certified agreements and that s. 142 denied AMWU the right to be a party to either of the proposed certified agreements,

- (2) s. 156(1) set up criteria which, subject to the discretion at s. 156(2), were to be observed by the Commission in certifying agreements and did not create rights or duties capable of enforcement by injunctive orders,
- (3) AMWU did not have *locus standi* to bring the application for injunctive relief.

The Commission elected to hear and determine each of the threshold or preliminary points. Section 329(c) gave the Commissioner ample authority to take that course. There is no mandate for confining the exercise of the power at s. 329(c) to the case in which, whichever way it is decided, the preliminary issue will dispose of the whole of the matter. Section 329(c) is in sufficiently wide terms to enable a Commissioner to weigh up considerations of convenience and cost in a case where, if a point of law is decided in one way, it will be decisive of the matter, compare *Everett v. Ribbands* [1952] 2 QB 198 at 206 per Romer LJ. and *Carl Zeiss Stiftung v. Herbert Smith and Co.* [1969] 1 Ch 93. There was nothing before the Commission to indicate that the case was one in which the facts and the law were so mixed up that it was undesirable to deal with the threshold or preliminary point, compare *Carl Zeiss Stiftung v. Herbert Smith and Co.*, *ibid.*, at 98 per Lord Denning NR and *Benning v. Wong* (1969) 43 ALJR 467 at 482 per Windeyer J. It was not until the appeals which I shall shortly describe were argued, that it emerged that there might be an outstanding issue of fact as to the third threshold point.

On 29 June 2000 the Commission granted certain interim orders against AWU and MIM. There was an appeal to this Court and on 30 June 2000 the interim injunctive orders were set aside. On 6 July 2000, after hearing submissions upon whether certain current certified agreements made in 1996 and relating to the Mining and Metallurgical Plant Areas of Mount Isa Mines Limited affected the matter, the Commission held that the threshold points were no bar to the hearing of the application for injunctive relief. On 7 July 2000 MIM appealed against that decision. Later in the same day MIM made application pursuant to s. 248 of the *Industrial Relations Act 1999* for orders in the nature of prohibition, certiorari, mandamus. (I assume without deciding that the orders referred to are orders of the type which might be made pursuant to s. 41 of the *Judicial Review Act 1991.*) On 10 July 2000 the AWU also appealed the Commission's decision.

It seems to me that each of MIM and AWU were entitled to appeal against the decision pursuant to s. 341(1). By schedule 5 of the *Industrial Relations Act 1999* "decision" is defined, *inter alia*, to mean –

- “(a) a decision of the . . . commission . . . or
- (b) an award, declaration, determination, direction, judgment, order or ruling”.

Whilst defining the noun "decision" by reference to the noun "decision" is on its face not helpful, the indication is clear that a "decision" may be constituted by something other than an "award, declaration, determination, direction, judgment, order or ruling". In *Transport Workers' Union of Australia, Union of Employees (Queensland Branch) v. XL Parcel Express Pty Ltd* (1996) 69 IR 310 at 311 de Jersey, President observed "The ordinary notion of decision involves the concluding, or resolving of an issue, determination or settlement". Here, all three threshold or preliminary points were resolved finally and adversely to the appellants.

It has been urged upon me that because in dealing with the appeal against the interim injunctive orders I characterised AMWU's case as arguable, I should allow the proceedings in the Commission to reach finality before dealing with any appeal. Doubtless s. 329(c) vests power to take that course. However, the threshold or preliminary points have now been fully argued once before the Commissioner and partially argued in the Court on the appeal against the interim injunctive orders. Because of the procedural course which these appeals have taken, the appellants submissions were reduced to (relatively voluminous) written form and circulated prior to the date of hearing. Written submissions by the AMWU were circulated on the evening prior to the date of the hearing. The submission that the matter should be allowed to take its course in the Commission before any appeal was heard was put after the appellants had put the whole of their oral submissions. It seems to me that every consideration of cost and of convenience favours dealing with the appeals now, compare *Inglis v. Commonwealth Trading Bank of Australia* (1972) 20 FLR 30 at 35 (I accept of course that the matter is to be approached cautiously and, if it emerges that some unresolved issue of fact previously thought to be of no significance is crucial, the matter should be returned to the Commission.).

For completeness I should add that as the matter developed there was no need to deal with the application for orders in the nature of prohibition, certiorari, mandamus. If MIM is successful on the appeal, it will have no need of the prerogative orders. If MIM is unsuccessful on the appeal it will, inevitably, fail on the application for prerogative orders also.

- (a) Does s. 156(1)(j) give AMWU a right to be a party to any certified agreement relating to the Mining or Metallurgical Plants Areas of Mount Isa Mines Limited or does s. 142 deny AMWU the right to be a party to any such certified agreement?

It is convenient to commence with s. 141 which establishes what a certified agreement under chapter 6 part 1 of the *Industrial Relations Act 1999* maybe made about. Section 141(1) is in the following terms:–

“A certified agreement may be made about the relationship between an employer and a group of employees (whether all employees, or a category of employees) of the employer.” (emphasis added)

It is unnecessary to dwell upon the definition of "group of employees" at s. 141(3) save to note that the group may comprise a group of proposed new employees in a new business. [By s. 141(2) the certified agreement covers all employees in the group, even if they were employed after the agreement was made (whether in a proposed new business or not)]. Section 142, which significantly has the heading "Who may make certified agreements" (part of the section by *Acts Interpretation Act 1954*, s. 35C(D), is in the following terms:–

“A certified agreement may be made between –

- (a) on the one hand, the employer; and
- (b) on the other hand –
- (i) 1 or more employee organisations who represent, or are entitled to represent, any employees who are, or are eligible to be, members of the organisation; or
- (ii) the employees at the time the agreement is made.”.

Prima facie one would have thought that the "employees" referred to at s. 142(b)(1) were "the group of employees" about whose relationship with their employer the agreement was being made. It is submitted by the respondent that in its plain and natural meaning s. 142 "gives standing to the union who 'represents or is entitled to represent, any employees who are, or are eligible to be, members of the union, i.e. it is not limited by its terms to employees

who are to be bound by the certified agreement. It uses the wide language of “any employees”. If that were the intent of the legislature it is difficult to understand why s. 142(b)(1) does not simply say “one or more employee organisations”. (Before passing to s. 156(j) I should note that because the “employees” at s. 142(b)(1) may be future employees in a new business there is some difficulty in reading “represent” as meaning “represent as an agent”).

Notwithstanding its length, it is useful to set out the whole of s. 156(1). The subsection, which I note is headed “Certifying an agreement”, is in the following terms:-

“The commission must certify the agreement if, and must not certify the agreement unless, it is satisfied –

- (a) the things required by sections 143, 144 and 145 were done, and in particular, the terms of the agreement were explained in a way that was appropriate, having regard to the persons’ particular circumstances and needs; and
- (b) the employer did not coerce, or attempt to coerce, an employee –
 - (i) not to make a request mentioned in section 144(2)(c); or
 - (ii) to withdraw the request; and
- (c) the agreement is in writing and signed by or for all the parties; and
- (d) the agreement includes procedures for preventing and settling disputes; and
- (e) the agreement specifies a nominal expiry date that is –
 - (i) for a project agreement – the date no later than the date on which the project ends; and
 - (ii) for another agreement – a date no later than 3 years after the date on which the agreement will come into operation; and
- (f) the agreement contains, or is accompanied by, information prescribed under a regulation; and
- (g) a valid majority of the relevant employees employed at the time approved the agreement; and
- (h) the agreement passes the no-disadvantage test; and
- (i) for a project agreement – each employee organisation that has given notice of wanting to be party to the agreement under section 143(4), and that has not withdrawn as a party under section 145(3), is a party to the agreement; and
- (j) for an agreement to be made with an employee organisation, other than an agreement for a new business –
 - (i) each employee organisation that is bound by the award or industrial agreement that binds the employer, or would bind the employer apart from an award under the Commonwealth Act, is a party to the agreement; or
 - (ii) if no award or industrial agreement binds, or would bind, the employer – each employee organisation that is entitled to represent the industrial interests of the relevant employees is a party to the agreement; and
- (k) for an agreement for a new business –
 - (i) the agreement was made before the employment of any of the persons in the new business at the new workplace whose employment will be subject to the agreement; and
 - (ii) the agreement has been made with 1 or more employee organisations that are entitled to represent the industrial interests of the persons.”.

It is not immediately obvious to me why the legislature would define at a section headed “Who may make certified agreements” which organisations of employees may make certified agreements, and then override the definition with a quite different formulation contained within a section headed “Certifying an agreement”. Nor other am I immediately able to grasp what policy would be advanced by permitting every employee organisation which is bound by the award or industrial agreement that binds the employer to be a party to a certified agreement which concerns employees of the employer whom all save one of the employee organisations have no right to represent. It is not adequate to argue that if that is the literal meaning of s. 156(1)(j) effect must be given to the provision. By s. 14(A) of the *Acts Interpretation Act 1954* an interpretation best achieving an Acts purpose, whether or not the purpose is expressly stated in the Act, is to be preferred to any other interpretation.

Section 156(1)(j) has an ample role to play, and a role which is perfectly coherent with the other provisions of chapter 6 – part 1 of the *Industrial Relations Act 1999*, if s. 142 is given the interpretation which I have placed upon it above.

Section 142 is silent upon the matter of which of several industrial organisations capable of representing the group of employees whose relationship with their employer is to be regulated by a proposed certified agreement, is to be a party to the agreement. If s. 142 stood alone the question “which of the organisations capable of representing a group of employees is to be a party to the proposed certified agreement?” would be answered by the unfettered choice of the employer. It is the purpose of s. 156(1)(j) to substitute a legislative answer, save in the case of an agreement for a new business, in which case unfettered employer choice is to provide the answer to the question. The legislative answer provided differs according to whether the relationship between the group of employees is free of award or industrial agreement or subject to an award or industrial agreement. In the former case, subject to the exercise of the discretion at s. 156(2), the Commission is to refuse to certify the agreement unless each employee organisation that is entitled to represent the industrial interests of the relevant employees is a party to the agreement. In the case where the relationship is regulated by an award or industrial agreement, subject once again to the discretion at s. 156(2), the Commission is to refuse to certify the agreement unless each employee organisation which is bound by the award or industrial agreement is a party to the proposed certified agreement. For example, if each of two employee organisations is entitled to represent the industrial interests of the group of employees and, as is not uncommonly the case, one of the employee organisations holds the award regulating the employment of a category of employees contained in the group in the north of Queensland and the other employee organisation holds the award regulating the employment of the category of employees contained in the group in southern Queensland, a proposed certified agreement made between a south Queensland employer about south Queensland employment with the employee organisation holding the award in north Queensland may not be certified by the Commission.

Rejection of the submission that s. 156(1)(j) requires that all employee organisations party to an award or industrial agreement binding the employer proposing to enter into a certified agreement must be parties to the agreement, and acceptance of the proposition that only employee organisations who represent or are entitled to represent the group of employees to whom the proposed certified agreement relates, creates great difficulty for AMWU. On 12 September 1995 a Full Bench of the Commission made an order under s. 45 of the *Industrial Relations Act 1990* giving AMWU the right to represent certain categories of employee of MIM to the exclusion of all other employee organisations and giving AWU the right to represent other categories of employee of MIM to the exclusion of all other unions. The order is reported at 150 QGIG 406-407. It is unnecessary to reproduce it here. It is sufficient to say that allocation of the right to represent is in part based on the organisational structure of MIM. There is in evidence an affidavit of Simon David Beach, the Employee Services Manager of MIM at Mount Isa. It is unchallenged. It describes the current organisation of work at Mount Isa. It is the effect of the order of 12 September 1995 that if work is organised as described in the affidavit of Mr Beach the AWU has the right to the exclusion of all other unions including AMWU to represent the industrial interests of employees in the Mining and Metallurgical Plants Areas of MIM. Indeed, the contrary is not contended.

As previously indicated the order of 12 September 1995 was made under s. 45 of the *Industrial Relations Act 1990*. That Act was, of course, repealed by the *Workplace Relations Act 1997*. However, s. 293 of the *Workplace Relations Act 1997* was a provision corresponding to s. 45 of the *Industrial Relations Act 1990*. In consequence, by s. 492(3) of the *Workplace Relations Act 1997* the order of 12 September 1995 continued in force as if it had been "made, given, done, granted or approved by the . . . commission . . ." under s. 293. The *Workplace Relations Act 1997* has of course been repealed by the *Industrial Relations Act 1999*. Section 279 is a provision corresponding to s. 293 of the *Workplace Relations Act 1997* and, if it be relevant, s. 45 of the *Industrial Relations Act 1990*. In consequence, by s. 710 of the *Industrial Relations Act 1999*, the order of 12 September 1995 as if it had been "made, given, done, granted or approved by the . . . commission . . ." under s. 279. Indeed, the contrary has not been contended.

What has been contended, both in the alternative to the argument that s. 156(1)(j) determines the industrial organisations to be a party to a proposed certified agreement and as an aspect of that argument, is that the order of 12 September 1995 is irrelevant. The submission is that in seeking to become parties to the proposed certified agreement AMWU is not acting as agent for employees in the Mining or Metallurgical Plants Areas of MIM but on its own behalf. By its written submission, AMWU summarised its argument as follows:-

"The AMWU, in proceeding in this application before the Commission, is not seeking to represent the interests of any employees over which it is precluded by the section 45 order from representing. The AMWU, as a body corporate separate from its membership, can clearly bring this application without in any way seeking to exercise representation rights with respect to any individual employees. It is a party principal. It is a body corporate, can sue and be sued and is subject to regulation in respect of its accounts, elections and rules. It can be fined and have orders directed against it. It would itself be liable for breaches of the Award, etc. It has a character and existence in its own right which takes it beyond being a mere agent or figurehead for the employees it represents: see *Australian Workers Union v. Pastoralists' Federal Council* (1917) 23 CLR 22 at 26; *Burwood Cinema Ltd v. Australian Theatrical and Amusement Employees' Association* (1925) 35 CLR 528 at pp. 544-555; *Amalgamated Engineering Union v. The Metal Trades Employers' Association* (1935) 53 CLR 658 at 662."

The simple answer is that the touchstone at s. 142 is whether the employees' organisation represents or is eligible to represent the group of employees to whose relationship with their employer the proposed certified agreement relates, not whether the employee organisation is seeking to represent the interests of the group. There is, however, a second answer. The argument, with respect, confuses legal personality with legal capacity.

It has always been the case that upon registration an employee organisation is incorporated, *Industrial Arbitration Act 1916*, s. 37(1), the *Industrial Conciliation and Arbitration Act, 1932*, s. 41, *Industrial Conciliation and Arbitration Act 1961*, s. 69(1), *Industrial Relations Act 1990*, s. 334 *Industrial Organisations Act 1997*, s. 18 and *Industrial Relations Act 1999*, s. 423. Upon incorporation an employee organisation acquires full corporate personality, compare *Williams v. Hursey* (1959) 103 CLR 30 at 52 per Fullagar J. with whom Dixon C.J., Kitto and Menzies JJ. agreed. The capacity of an employee organisation is an entirely different matter. It is incontestable that the Commonwealth legislation providing for the registration and incorporation of employee organisations are *in pari materia*. The capacity of corporations brought into existence by registration and incorporation under the Commonwealth legislation was summarised in the *Queen v. Williams and Others; Ex parte the Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402 at 408 at follows:-

"The eligibility provisions in the rules of a registered organisation of employees serve the function of defining the general area or areas of industry or industrial pursuit from which members can legitimately be drawn and with which the organisation can legitimately be concerned (see *Reg. v. Dunlop Rubber Australia Ltd.; Ex parte Federated Miscellaneous Workers' Union of Australia* (1957) 97 CLR 71 at 87; *Reg v. Clarkson; Ex parte Victorian Employers Federation* (1973) 131 CLR 100 at 111 and 113; *Co-operative Bulk Handling Ltd. v. Waterside Workers' Federation of Australia* (1980) 49 FLR 355 at 357-8). Since such eligibility provisions constitute a reference point for courts, commissions, employers, employees and other organisations in determining or ascertaining an organisation's proper coverage and field of operation, they must be construed objectively (see *Reg. v. Aird; Ex parte Australian Workers' Union* (1973) 129 CLR 654 at 659; *Reg. v. Cohen; Ex parte Motor Accidents Insurance Board* (1979) 141 CLR 577 at 580 and 587."). (emphasis added)

In *The Australian Workers' Union of Employees, Queensland and The Electrical Trades Union of Employees of Australia, Queensland Branch and Others* (1995) 150 QGIG 1123 at 1124, I held the Commonwealth authorities to be applicable to the Queensland provisions about the registration and incorporation of employee organisations. Nothing which has been put in these proceedings has caused me to doubt that that approach was correct. It is true that there are myriad provisions providing for proceedings to be instituted by an "organisation". That is not surprising. An employee organisation registered and incorporated under the Act is entitled to sue and be sued in its own name. Doubtless the legislature might have endowed an employee organisation registered and incorporated under the Act with all the legal capacity and powers of a natural person. The Incorporations Law, s. 124, for example, confers that capacity on companies under that Act. But after all this time and with the encrustation of case law, one might have expected express words. It is useful also to reproduce s. 45 of the *Industrial Relations Act 1990*. The section was as follows:-

"**45(1) [Orders of Full Bench]** A Full Bench may, on the application of an industrial organisation, an employer or the Minister, make the following orders -

- (a) an order that an industrial organisation of employees is to have the right, to the exclusion of another industrial organisation or other industrial organisations, to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation;
- (b) an order than an industrial organisation of employees that does not have the right to represent under this Act the industrial interests of a particular class or group of employees is to have that right;
- (c) an order that an industrial organisation of employees is not to have the right to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation."

Although the formatting is different, in the definition of "right to represent" is read into the subsequent provisions, s. 293 of the *Workplace Relations Act 1997* and s. 279 of the *Industrial Relations Act 1999* are the same. The provisions are not concerned with the right to represent employees or to represent members but with the right to represent the industrial interests of a particular class or group of employees. What is granted or taken away by an order under those sections is the capacity to represent employee interests referred to in the *Queen v. Williams and Others; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 153 CLR 402 at 408. And deprived, as AMWU is, of the capacity to represent the industrial interests of employees in the Mining and Metallurgical Plants Areas of MIM, AMWU may not be a party principal to the proposed agreements.

(b) Is injunctive relief under s. 277 available to secure compliance with s. 156(1)(j)?

The question must be answered in the negative. Section 156 neither creates rights nor imposes obligations. The effect of non-compliance with s. 156(1)(j) is that the Commission, subject to the proper exercise of the discretion at s. 156(2), must not certify the proposed certified agreement. Section 156(1)(j) creates an obligation only in the sense that an employer anxious to achieve certification of an agreement about the relationship between a group of his employees and himself owes a duty to himself to ensure that the proposed certified agreement meets the checklist at s. 156(1) and does not attract the sanction of non-certification.

AMWU points to s. 331(a) which, *inter alia*, authorises the Court to make such a decision as it considers just without being restricted to any specific relief claimed by the parties, and seeks to support grant of an injunction by reference to the contravention of sections other than s. 156(1)(j). I agree that neither the Commission nor the Court is restricted by the pleadings. If there be a right the Commission and the Court, subject to giving all parties adequate notice and the opportunity to be heard, is to search for a remedy. But here there is no right.

AMWU seeks also to rely on sections other than s. 277 to support the grant of injunctive relief. The insuperable barrier is that the impediment in the Act may not be over borne by the exercise of a power vested by the Act.

I reject the submission that the AMWU is aided by the existing certified agreements made in 1996 with MIM about employees in the Mining and Metallurgical Plant Areas. It may be granted that the agreements, whilst recognising that only the AWU has representational rights in the area covered by the agreements, treat AMWU as a party. This is not a case in which it is necessary to analyse whether certification is conclusive of the validity of all that is certified. This is a case in which AMWU seeks to enforce the clauses in the agreements by the issue of orders in the nature of mandatory injunctions (specific performance?). Such orders if made would be worse than a futility. Such orders would require the expenditure of time and money in the preparation of proposed certified agreements which could not lawfully be certified. I can think of no proper exercise of discretion which would lead to the making of such orders.

(c) Has the AMWU *locus standi* to make the application for injunctive relief?

It is the contention of AWU that the application for injunctive relief which has given rise to the proceedings in the Commission and is the subject of the appeals is itself an application which the order of 12 September 1995 precludes the AMWU from bringing. My strong suspicion is that the argument is correct. As a matter of first impression, one would think that the employees to whose industrial interests the action of becoming a party to the proposed certified agreements was relevant are the employees at MIM in the Mining and Metallurgical Plants Areas. If that be so, the orders of 12 September 1995 are a bar to the proceedings. However, this is an appeal from a decision dealing with a threshold or preliminary point. The evidence is incomplete. It may be that had the proceedings been completed evidence would have been led that by becoming a party to the proposed certified agreements AMWU would protect or advance the interests of categories of employees who are not employees of MIM in the Mining or Metallurgical Plants Areas. It seems to me preferable to deal with the matter on the basis that, in consequence of the order, and s. 142, the application for injunctive relief cannot succeed rather than to deal with it on the basis that, in consequence of the order, the proceedings could not be brought.

In all the circumstances I allow the appeal. I set aside the decision of the Commission of 6 July 2000. In lieu thereof I order that the application of AMWU which founds case B704 of 2000 be dismissed.

I reserve the question of costs.

Dated this nineteenth day of July, 2000.

D.R. HALL, President.

Appearances:-

Mr J. Murdoch SC and Ms C. Arnold (instructed by Minter Ellison) for Mount Isa Mines Holdings Limited.

Mr A. Herbert (instructed by Sciacca's Lawyers) for The Australian Workers' Union of Employees, Queensland.

Mr J. Shaw QC and Mr M. Brady (instructed by Reidy and Tonkin) for Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland.

Released: 19 July 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Property Sales Association of Queensland, Union of Employees AND L.J. Hooker Bli Bli (No. W10 of 2000)

COMMISSIONER BLOOMFIELD

13 July 2000

Unpaid wages – "Commission only" real estate salesperson – Claim for payment in lieu of notice – Claim for unpaid commission – Witness evidence – Dispute as to who listed and/or sold various properties – Arbitrated Matter – Commission found there was a mutual decision that Applicant would cease employment – Applicant not entitled to any payment in lieu of notice – Unpaid commission determined and ordered to be paid to Applicant.

DECISION

Acting pursuant to s. 278(3)(c) of the *Industrial Relations Act 1999* Mr William Barry Gannon, Secretary of the Property Sales Association of Queensland, Union of Employees (PSAQ), lodged an application seeking an Order that Ms Gai Seaton, Principal of L.J. Hooker Bli Bli Real Estate Agency, pay to Mr Kevin Alfred Bullard the sum of \$4,477.08 being wages/commissions owed to Mr Bullard in accordance with the provisions of the Property Sales Award Queensland – State.

By correspondence sent to the Respondent the amount ultimately claimed was \$4,043.94, comprised of unpaid commissions of \$2,094.00 and two weeks' wages in lieu of notice amounting to \$1,949.94.

Mr Bullard commenced employment with John Heaney Associates Pty Ltd, trading as L.J. Hooker Bli Bli, on 1 July 1999. The business was transferred to Ridesun Pty Ltd on or around 30 June 1999. Ms Gai Seaton is a shareholder in Ridesun Pty Ltd and is a joint Principal of L.J. Hooker Bli Bli.

During his employment with the initial employer Mr Bullard was employed under an Individual Employee Flexibility Agreement in accordance with "Part C" of the Property Sales Award Queensland – State. The Individual Employee Flexibility Agreement was renewed by agreement between Mr Bullard and his new employer at about the time of the sale of the agency to Ridesun Pty Ltd. The renewed Flexibility Agreement ran for a further twelve months from 23 June 1999 "subject to the same conditions as the original agreement". In accordance with the procedures laid down in the Award the renewal was approved by the Secretary of the Property Sales Association of Queensland on 1 July 1999.

Mr Bullard argued that his services were terminated by Ms Gai Seaton on 10 August 1999. He said that Ms Seaton asked him to step out of the office into the carpark. She asked him about his future plans. He said that he knew what Ms Seaton was getting at and he responded that he had made an appointment to discuss a job with another real estate agency and if he was successful he would give her two weeks notice. He alleged that she told him that that "wasn't good enough" and that he "could go inside and pack his personal belongings and fuck off now".

He said that he asked permission to be allowed to finish off a particularly difficult contract and Ms Seaton gave him permission to take that file. He then went inside and packed his personal belongings informing the property manager, Ms Quilty, as he left that he had been sacked.

He indicated that he had never been paid any money in lieu of notice and said that he was entitled to two weeks notice, or payment in lieu of notice, because of his length of service with the original and subsequent employers.

Ms Quilty gave evidence that she had seen an animated discussion outside the real estate office between Ms Seaton and Mr Bullard and that Mr Bullard had informed her that he had been sacked shortly after he came back into the office. She said that she had not overheard any of the conversation between Mr Bullard and Ms Seaton. She also indicated that she could not recall whether Ms Seaton had ever explained to her the basis upon which Mr Bullard left the agency.

Ms Gai Seaton gave evidence that she had asked Mr Bullard to meet with her outside the office so that she could discuss his future intentions. She said that there was some conflict between Mr Bullard and her daughter Sandra, and there seemed to be a "general indication" coming from Mr Bullard that he was not happy working for the business. She said that Mr Bullard told her that he had held a meeting with the Principal of another real estate agency and that he was going to start work there. When she asked him when he would be going he replied "I will work the two weeks out if you like" and she replied that that "was up to him". His response was that there was not much use doing that and he might as well leave now. He went back into the office, packed his belongings and left.

She also confirmed that he had asked her could he take a particular sales file with him when he left because the property was owned by a friend of his. She agreed to allow him to take that file.

Ms Seaton also led evidence from Mr P. Keates and from Ms G. Ealam, each from PRES Real Estate, which suggested that Mr Bullard had actually commenced employment with their agency on 4 August 1999 – some 6 days before he finished his employment with L.J. Hooker Bli Bli.

However, having regard to my findings about whether Mr Bullard was dismissed, it is not necessary for me to decide whether Mr Bullard had been employed by the other agency, and actually commenced his employment there, before the discussion with Ms Seaton on 10 August 1999.

My review of the evidence of Mr Bullard, Ms Quilty and Ms Seaton – taking into account their respective demeanours – leads me to conclude that Mr Bullard's services were not terminated in the way he suggested. Rather, there was a mutual decision that he would cease employment.

Had Mr Bullard been terminated in the manner that he suggested it would have been somewhat unusual for Ms Seaton to have as readily agreed to allow Mr Bullard to take the sales file as has been suggested. Ms Seaton's decision to allow him to take the file is more in keeping with the fact that there had been a mutual agreement reached that he would cease employment rather than a termination in the crude manner suggested.

Consequently, I find that Mr Bullard is not entitled to any payment in lieu of notice.

That leaves the claim for unpaid commissions.

The Employee Flexibility Agreement between Mr Bullard and John Heaney and Associates Pty Ltd provided that Mr Bullard was to be employed on a commission only basis and that he would receive 22.5 per cent of the gross office commission if he listed a property and/or 22.5 per cent of the gross office commission if he sold a property.

The terms of that Agreement were renewed when Ms Gai Seaton purchased the business on or around 30 June 1999 through the company Ridesun Pty Ltd.

Notwithstanding the renewal of the Employee Flexibility Agreement Ms Gai Seaton implemented a policy shortly after taking over the business that commissions on all sales would be shared equally (25 per cent each) between the two sales staff, i.e. Mr Bullard and her daughter Sandra. In that regard Mr Bullard was paid commission for some sales that he did not make.

Mr Bullard's claim for unpaid commission of \$2,094.00 was made up as follows:–

Property	Total Commission \$	Commission Paid \$	Commission Owing \$
Yandina Road	4,575.00	1,041.81	1,041.81
Samantha Avenue	3,950.00	898.62	898.63
Atkinson Road	1,450.00	329.88	329.87
Kokoda Street	2,600.00	591.50	591.50
			<u>2,861.81</u>
LESS: paid on unclaimed contract being a second Property in Kokoda Street			767.81
			<u>2,094.00</u>
Total commission claimed as owing			<u>2,094.00</u>

Evidence about who may have listed and who may have sold the respective properties was given by the former principal of L.J. Hooker at Bli Bli, Ms Maureen Heaney, as well as by Mr Bullard, Ms Sandra Seaton and Ms Gai Seaton.

After considering that evidence I have concluded that Mr Bullard listed the Yandina Road and Samantha Avenue properties and that he sold the Yandina Road, Samantha Avenue and Atkinson Road properties.

In making such decision I have noted that Ms Seaton did not dispute that Mr Bullard had listed the Yandina Road property once she heard the evidence of Ms Heaney. I have also noted the evidence of Ms Heaney that Mr Bullard listed the Samantha Avenue property, notwithstanding the lack of documentary evidence to support that position. I have further noted that all of the documentary evidence supports Mr Bullard's contention that he sold the Atkinson Road property and that nothing supports his contention that he sold the disputed Kokoda Street property.

Consequently, in accordance with the terms of the renewed Individual Employee Flexibility Agreement between Mr Bullard and Gai and Sandra Seaton, as Principals of L.J. Hooker Bli Bli, Mr Bullard was entitled to be paid the following commissions:—

Property	List Commission \$	Sell Commission \$	Total Commission \$
Yandina Road	1,029.37	1,029.38	2,058.75
Samantha Avenue	888.75	888.75	1,777.50
Atkinson Road	nil	326.25	326.25
Kokoda Street	nil	nil	nil
Total commissions earned			4,162.50
LESS: commissions actually paid			3,623.62
Total commission still owing and unpaid			538.88

It is the Commission's Order that Ridesun Pty Ltd ACN 073 283 100 trading as L.J. Hooker Bli Bli pay unpaid commissions amounting to \$538.88 to Mr Kevin Alfred Bullard within twenty-two days of the date of release of this decision.

A.L. BLOOMFIELD, Commissioner.

Appearances:—
 Mr B. Gannon, of the Property Sales Association of Queensland, Union of Employees, with Mr A. Ross for Mr K. Bullard.
 Mrs G. Seaton and Mr J. Seaton for Ridesun Pty Ltd trading as L.J. Hooker Bli Bli.

Released: 13 July 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Brian Rodney Staples AND Allen Allen & Hemsley (No. B47 of 2000)

COMMISSIONER BLADES

13 July 2000

Reinstatement application – Preliminary issue – Deed of release – Applicant suffering psychological illness – Depression and stress – Consumption of Valium – Requesting substitution of a resignation for a dismissal – Employed by large legal firm – Whether legally enforceable contract – Whether consideration – Consideration found to be adequate and sufficient – Economic duress – Duress not established – Unconscionable conduct – Applicant not in a position of special disadvantage – Medical condition not such as to seriously affect ability to decide – Estoppel – Estoppel established – Applicant bound by deed – Application dismissed.

DECISION

On 21 December 1999 Mr Staples' employment with Allen Allen and Hemsley was terminated. The following day, at his request, he signed a Deed of Release document which allowed him to substitute a resignation and which provided for a full release to the employer. He now challenges that document and seeks to have his case heard as an unfair dismissal claim under the provisions of the *Industrial Relations Act 1999*.

This matter was heard as a preliminary issue and written submissions were permitted. Those submissions have been extensive and of considerable assistance to the Commission.

Applicant himself challenges the deed of release on the basis that he was "so out of it on Valium that I would have agreed to anything at this stage". He alleges that he was not in true control of his actions. It would appear that the statement about being "so out of it on Valium" is not being relied upon by his legal advisers to claim that there was an incapacity to contract. That would probably explain the failure to call any medical evidence to establish that the applicant was unable to understand the nature of the transaction.

The applicant's submissions were put on the basis that if there was a legally formed contract of compromise, it was obtained as a result of economic duress and/or that pressure on the applicant to sign amounted to unconscionable conduct. It was also submitted that there was no legally formed contract because there was no consideration passing from the respondent.

The respondent argues that the deed of release forms a legally enforceable contract and further, that the execution of the deed raises an estoppel which prevents Mr Staples from now alleging the contrary.

Mr Staples commenced employment with Feez Ruthning on 25 August 1989 as a word processing operator. That firm merged in 1996, with Allen Allen and Hemsley. There had been a number of incidents during the employment and on 13 October 1997, Mr Staples received a written warning about his performance and conduct. In a report dated 22 March 2000 his psychiatrist Dr Hurley indicated that Mr Staples was suffering from a Major Depressive Episode of moderate severity, superimposed on a long-standing Dysthymic Disorder. His General Practitioner at the time of the dismissal, Dr Penny, had prescribed 100 milligrams of Zoloft per day. Dr Luhrs who saw him on 21 December, 1999 recalled that he attended upon her in an agitated state and that he was depressed about his situation at work. She prescribed Valium and Panadeine Forte. Mr Staples gave evidence that before he went to the meeting on 21 December 1999 when his employment was terminated, he consumed about 3 or 4 Valium and 4 Panadeine Forte after that visit to Dr Luhrs.

I thought there was little in dispute between the parties but where disputed facts are material, I express a preference for the evidence of Ms Rod and Mrs Forrester who I thought were both sincere and professional. There were however inconsistencies in the evidence but not of much moment.

The applicant's own statements reveal that a dispute arose in November 1999 between the applicant and his direct supervisor Ms Kathy Rod over bonuses and personal computers which culminated in a meeting on Friday 12 November. Nothing was resolved and the applicant brooded about those issues over the weekend. On Monday 15 November he sent an E-mail to a number of persons (some of them having no legitimate interest in the contents of the E-mail). On Tuesday 16 November Kathy Rod contacted him and sought a meeting at 3.00 p.m. to discuss the E-mail. His evidence was that he was so worried about the impending meeting that he attended his Doctor who placed him on stress leave. Consequently, that meeting was postponed. He obtained certificates which certified him unfit for work because of stress up to 10 December 1999. Further certificates were not obtained because a claim for WorkCover had been refused so he took annual leave. There was a number of telephone contacts between the parties during that leave. While there is some conflict of little importance, the applicant states that on 17 December he was contacted by Kathy Rod about the issues he raised in the E-mail of 15 November and he was advised that the Human Resources Department wanted to wait until he returned to work on 4 January 2000. Mr Staples did not want the issue hanging over his head over Christmas so on Monday 20 December he phoned Sue Forrester the Human Resources Manager about having the meeting before Christmas so as to get it out of the way. At about 10.00 am on 21 December Sue Forrester telephoned and asked if he could come in immediately. He arrived at 12.00 noon after earlier arranging to see Dr Luhrs and taking the medicine referred to. He was taken through the allegations against him and asked for his responses which he gave. His employment was then terminated.

It was at this point that he became worried about securing another position with no reference and a Statement of Service which reflected that his previous position had been terminated. He brought up this question and was advised by Kathy Rod that "well, you can always resign". He did not respond but returned home about 3.00pm and feeling tired, sickened and totally intimidated by the process, phoned Kathy Rod and asked her what would happen if he resigned and whether a resignation would affect him financially. His query was conveyed to Mrs Forrester. About an hour later he was contacted by her and she advised him that he could resign but that the only way he would be let resign was if he signed a Deed of Release. He was told that he could keep the pay in lieu of notice he had received. He agreed to sign the document. He was asked to come in around 10.00 am on 22 December for that purpose.

He did so, was taken into a conference room and given the opportunity to sign the document if he was happy with its contents. He said that although the document was left in front of him for a few minutes, he did not really take in any of its contents. There was evidence that when he was asked whether he was happy with it, he said "Yeah, it looks pretty normal". Whilst he does not deny that occurred, he does not accept it occurred but I am satisfied that he read it and made that statement. He said that at the time he was on Valium to try and cope with the stress of the situation. He signed the document. He also handed over a signed resignation he had earlier completed.

While Mr Staples said he felt tired, sickened and intimidated by the meeting at which his employment was terminated, I reject his evidence that he was quite emotional, had tears in his eyes and his voice was breaking. I thought this allegation to have been rather late in coming and I prefer the contrary evidence of Mrs Forrester.

He claims that when he went into the meeting on 21 December he did not expect his employment to be terminated but that he would only receive a warning. There are however other indications to the contrary.

After a meeting on 8 October 1997 which culminated in a written warning, Mr Staples sent out to a number of persons in the Organisation an E-mail containing the statement "the consequences of my sending same will more than likely be the final nail in my coffin so to speak". The E-mail indicates that all was not well and that Mr Staples knew as far back as October 1997 that he had some difficulties with his continuing employment. On 15 November 1999, the E-mail he sent to staff and partners alike together with people who had no interest in the business of the E-mail contained some inappropriate comments. On the copy he sent to a Camilla Fleming (another employee and friend) he added "Keep this under your belt. Give me a ring". On the copy he sent to Savina Scheiwe (the Switchboard Operator) he added "This is for your eyes only. I am in for it today?". I am satisfied that Mr Staples knew that he was in some bother because of the sending of the E-mail.

This finding is further supported by other evidence. On 16 November before he went home after handing in a WorkCover certificate for stress leave, he was advised that his access to the computer system had been suspended. He acknowledged that he thought this a pretty drastic measure to take if they were only going to give him a warning.

Furthermore, on 17 November he rang another employee of the respondent and upon discussing the lock out from the computer system stated "They can't sack me, they don't have a leg to stand on". The statement indicates an awareness of his predicament.

On the whole of the evidence, I do not accept Mr Staples' claim that he was unaware of the seriousness of the meeting he attended on 21 December. The suspension from the computer system, his previous statements to others, his prior history and his attendance upon Dr Luhrs immediately before the meeting in an agitated state, indicated that he knew the meeting of 21 December had some more significance than just a warning. His evidence to the contrary is rejected.

I am satisfied that his decision to accept the offer of a resignation in exchange for the deed of release was made in circumstances where he had a considerable opportunity to reflect upon the wisdom of that procedure. It was done at his request and for good reason.

Consideration:

Before there can be a legally binding contract, there must be consideration which "may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered or undertaken by the other" – per Lush J in *Currie -v- Misa* (1875) LR 10 Exch 153 at 162.

That consideration, which need not be adequate, must be sufficient in law. It must have a value. It must not be unlawful.

The applicant alleges that the consideration that passed from the respondent was the alteration of the statement of service alleging he had been terminated to one alleging he had resigned. The submission proceeds that there was no obligation on the respondent to provide any reasons for the cessation of employment and the insertion of those reasons in the document was a voluntary act. It would have been sufficient to simply state the period of employment. It was submitted there was no consideration for the arrangement because there was no benefit or detriment to the respondent to alter the statement.

I am not so sure what was meant in the evidence by a "statement of service". A "certificate of employment" under s. 700 of the Act should conform with s. 42 of the *Workplace Relations Regulation 1997*. It must include certain particulars but does not require that the method of termination be exposed. However, it is certainly not unlawful to include the method of termination. What was subsequently provided to Mr Staples was a "Statement Regarding Employment History". That may not be the same as a "Statement of Service". The Employment Separation Certificate, usually provided to all or most employees for Centrelink purposes requires the method of termination to be disclosed.

Needless to say, the employer was to provide Mr Staples with a Statement of Service indicating that his services had been terminated. In exchange for the employer substituting that document with one stating that he had resigned, Mr Staples released the employer from all actions, claims and demands.

There was a benefit to both. The benefit to Mr Staples was the substitution of a resignation for a termination. The benefit to the respondent was the release from all claims.

Learned Counsel for the respondent cited the unreported decision of the NSW Court of Appeal in *Electroboard Administration -v- O'Brien* CA 40185 of 1998. In that case, the employer requested the employee to sign a restraint of trade agreement. The request was made during the course of the employee's employment. The employee initially refused to sign the agreement, but eventually did so. The trial judge held that no consideration had been provided for the employee's promise contained in the agreement. It was unanimously held that the trial judge had fallen into error. Meagher JA (with whom Mason P and Priestly JA agreed) said:-

"In my view, the appellants are correct in submitting that his Honour fell into error. On his Honour's own finding the appellants said to Mrs O'Brien 'we shall dismiss you if you don't sign' or alternatively 'we shall not dismiss you if you do sign.'. I cannot see how such an agreement lacks consideration: this is a benefit to the employer in obtaining the signature, and a benefit to the employee in diverting the prospect of imminent dismissal."

I think it irrelevant that the employer may not have been required by law to state a reason for the termination in that document. That was the document applicant was getting.

It was also submitted by learned Counsel for the applicant that the only value that the applicant believed he would get would be that the altered service statement would provide him with better job prospects. It was said that there would be no benefit because whether the certificate said the applicant resigned or whether it gave no reason at all for termination, a prospective employer would have queried the position of an employee ceasing employment with no reference after 10 years service.

In my finding, a prospective employer, faced with a statement that asserted a resignation after 10 years and not supported by references may query that lack of references but it is not necessarily the case. A statement that indicated no reason at all is more likely to be queried.

I am satisfied that the certificate indicating a resignation was of significant benefit over one that indicated a dismissal and some benefit over one that said nothing at all. Mr Staples' conduct subsequent to the signing of the deed indicated the value he placed upon the resignation. On 24 December he left a voicemail with Kathy Rod that some people in the firm still thought he had been dismissed rather than that he had resigned and he sought rectification of that position. I am also satisfied that his position in the job market was made substantially stronger by the resignation, so much so that he told an employment agency some weeks later that he had resigned. At the time he signed the deed, his job prospects were foremost in his mind.

Moreover, the applicant, as part of the dismissal was paid one months salary in lieu of notice. Upon the acceptance of a resignation, that sum was not payable at all. The respondent indicated that the money would not be withdrawn and applicant would still be able to keep it if the deed was signed. The payment of that money was of some concern to the applicant. In itself, that constituted a detriment to the respondent, a benefit to the applicant and good consideration.

I am satisfied that there was valuable and sufficient consideration passing between the parties and the agreement constituted a legally enforceable compromise.

Duress:

The applicant then submits that if there is a legally enforceable contract, it should not be enforced on the grounds it was obtained as a result of economic duress.

Both learned Counsel have cited *Crescendo Management -v- Westpac* (1988) 19 NSWLR 40 at 45-46 where McHugh JA said:-

"The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate" . . .

. . . The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress."

Lord Scarman's speech in *Universe Tankships of Monrovia -v- International Transport Workers Federation* (1983) 1 AC 366 was also relied upon by the applicant, that to constitute economic duress:-

"There must be pressure the practical effect of which is the compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him."

In my view, the applicant is unable to succeed on that argument. Mr Staples made no resistance to signing the document and delivered no protest. Whilst the respondent may have flagged that a resignation was a possibility, there was no pressure of any description brought to bear for that course of conduct. The applicant sought information about a resignation and it was at his request that the resignation was substituted. He always had a choice. He could have sued on the dismissal, lost and achieved nothing because there are no certainties in litigation. Clearly it was to his benefit to substitute the dismissal with the resignation. It was not intimidation or pressure by the respondent that secured the substitution in exchange for the release. It was his desire to enhance his position in the labour market. The respondent was entitled to issue a document which contained dismissal as a reason for the termination. This practice may even be the rule rather than the exception. If the document that was issued had anything to do with Centrelink, the respondent was required to disclose the reason for termination.

Unconscionable conduct:

It was also submitted that the respondent was guilty of unconscionable conduct in that it took unfair advantage of the position of strength it occupied, or of the applicant's susceptibility, to gain an unfair advantage. Again, both parties relied upon the same authorities regarding principle. *Commercial Bank of Australia Ltd -v- Amadio* (1982-83) 151 CLR 447 involved two elderly migrants who were unfamiliar with written English and who executed a mortgage. The mortgage instrument contained a guarantee which was not disclosed to them. The instrument was set aside. Mason J said:-

"Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable

conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage, e.g. a catching bargain with an expectant heir or an unfair contract made by taking advantage of a person who is seriously affected by intoxicating drink."

His Honour referred to *Blomley -v- Ryan* (1956) 99 CLR 362 and to Fullagar J's list of some examples of the circumstances that could be relied on. They include poverty or the need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. There must be a serious disadvantage *vis-a-vis* the other party. Mason J sent on to say about "special disadvantage":-

"I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party."

There may have been a difference in bargaining power but this was not sufficient to invoke the rule. Merely because he was not legally qualified and the respondent was a large legal firm did not place him in a position of serious inequality. The applicant was more than a word processing operator. He had worked for many years in the Precedents Department of a large legal firm and had experience as a legal secretary. His statement that "It looks pretty normal" is also consistent with a knowledge of legal precedents and their purpose and I would expect him to have had that knowledge. While the respondent was aware at the time that the applicant suffered a chronic depressive illness, I am satisfied there was nothing to suggest that he was suffering from some special disadvantage and nothing was made apparent to the respondents that he was suffering special disadvantage at the time. The medical evidence does not suggest such a state. Valium presumably had a calming effect upon his stress. There is no evidence that it somehow altered his mind, for example or that he was in a state of ill health that affected his judgment. There was no evidence as to the effect, if any, of the cocktail of drugs on his mind. On his own evidence he appeared to be making conscious and reasoned decisions in his financial interest. He gave no visible indication at either meeting he was suffering any material state of ill health. The applicant had not formally taken legal advice but he certainly had the opportunity to do so and had received legal advice of sorts about possible termination from an in-house lawyer. He knew what the purpose of the meeting of 21 December was and its possible consequences and he had plenty of time to secure advice before the deed was signed on 22 December. He had plenty of time to obtain advice before he requested the meeting that was held on 21 December.

I am of the opinion that the onus of proof is upon the applicant to show that when he executed the deed of release, his ability to make a judgment as to his own best interests was seriously affected and that the other party was aware or ought to have been aware of that. The onus of proof is upon the person wishing to avoid the provisions of the contract – *McLaughlin -v- Daily Telegraph Newspaper Co Ltd (No 2)* (1904) 1 C.L.R. 243.

I am unable to find, considering all of the applicant's circumstances and his relationship with this large legal firm, that he was in a position of special disadvantage or that the respondent knew of it or took advantage of it. I am unable to find, on the evidence, that his medical condition was such that it seriously affected his ability to make judgments in his own best interests. The decision he made, objectively, was not unsound.

Other similar cases:

Tunbridge -v- Linde Material Handling Pty Limited (1997) 72 IR 115 was cited by learned Counsel. In that case it was held that a deed of release was not signed under duress because the circumstances of duress were of the employee's own making. Learned Counsel opposing cited *Le Good -v- Stork Electrical Pty Ltd* (1999) 45 Federal Cases 4-047 and the appeal reported at (1999) 46 Federal Cases 4-116. There it was held that a deed of release which has been knowingly and properly executed should not permit a party to claim relief under s. 170CE of the Federal Act. However, it was also held that that principle should be tempered by the main question to be asked concerning whether the employee's signature was obtained by duress and her agreement therefore vitiated. The Full Bench further held that it was reasonably open to the Commissioner to find there had been duress in circumstances where the special disadvantage was that the applicant had her employment terminated on the eve of her entering hospital for major surgery. Contrary to the submission, that is a vastly different circumstance to those existing in this case.

Each case must be decided on its own facts. The cases cited have not proved particularly helpful other than as illustrations of the application of the principles.

Estoppel:

The doctrine of estoppel is also relied upon by the respondent. *Cheshire and Fifoot's Law of Contract 7th Australian Edition* at paragraph 2.2 reads:

"The elements of estoppel exist when a promise, representation or conduct of one party leads another to assume that the first party will follow a certain course of action or that certain facts are established or that a certain legal relationship exists and the other acts on that assumption in some material way – relies on the promise, representation or conduct – so that it would be unconscionable for the first party to go back on the promise or representation or to undermine the assumption generated by his or her conduct."

As far back as *Pickard -v- Sears* (1837) 6 Ad & E 469 it was said:-

"... where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time ..."

In *Grundt -v- Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 Dixon J said:

"The principle on which estoppel in pais (i.e. estoppel by conduct) is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt or accept for the purpose of their legal relations."

Cross points out that the party relying upon the estoppel must have altered his position to his detriment.

I think it is clear that by the agreement, the applicant has represented to the respondent that he accepted the resignation as a "complete satisfaction and discharge of all actions, claims and demands of any nature arising out of or in respect of his employment or termination of his employment with the Employer". In response to that, the employer altered its previous position by withdrawing the termination. The employer then acted to its detriment by advertising the vacancy and proceeding to fill it on the basis that the termination and consequently the vacancy, were not being contested. I think there is merit in the submission that an estoppel has arisen. Other cases were cited by learned Counsel but I think it unnecessary to traverse this topic any further.

I am of the view that the applicant is bound by the deed of release which has extinguished any claim he might have had upon the respondent.

I dismiss the application.

The Commission orders accordingly.

B.J. BLADES, Commissioner.

Appearances:-

Mr B. Whitten, of Counsel, instructed by Mr M. Randall of Nicol Robinson Halletts, for the applicant.

Released: 17 July 2000

Mr D. Kelly, of Counsel, instructed by Mr J. Wells of Allen Allen & Hemsley.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Treve Lewis AND Warner World Australia Pty Ltd and Kirby Banner Pty Ltd Trading as Warner Bros Movie World Enterprises (No. B66 of 2000)

COMMISSIONER BALDWIN

17 July 2000

Application for reinstatement – Instant dismissal on the grounds of serious misconduct – Two issues – Time off in lieu and informing daughter to falsify date of birth on company records – Alleged breach of position of trust – Payroll Officer – High standard of accountability required – Employed for best part of 11 years – Finding dismissal appropriate action – Issues not acts of serious misconduct – Resignation offer withdrawn without adequate warning amounting to an unreasonable act by employer – Order – *Pro rata* long service leave benefit and compensation of eight (8) weeks pay awarded.

DECISION

This is an application by Treve Lewis for her reinstatement in the employ of Warner World Australia Pty Ltd and Kirby Banner Pty Ltd trading as Warner Bros Movie World Enterprises.

The applicant commenced employment with Sea World as a Payroll Clerk and in May 1991 became Payroll Supervisor for Warner Bros Movie World theme park. (Sea World, Wet 'n' Wild and Movie World are a group of parks owned by Warner World Australia Pty Ltd and Kirby Banner Pty Ltd). At the time of her termination, the applicant held the position of Payroll Administrator, managing all payroll functions for the Movie World, Wet 'n' Wild theme parks and the Administration payroll of the Movie World Studios.

The applicant's dismissal came about when members of her staff informed the respondent that she had engaged in misconduct. They alleged two issues of misconduct. The first was that she had been claiming and taking leave days to which she was not, in their opinion, entitled. The second was that she had some years previously told two of her staff that she had changed her daughter's date of birth on the company's records, to allow her to receive a higher rate of pay.

The applicant received the letter confirming her termination on 24 December 1999. It read as follows:-

“After our initial meeting on Monday, 20 December, 1999, we undertook further investigation into the allegations discussed with you on that day. The investigation of payroll and other records have highlighted the following issues:

- Taking days in lieu for which you were not entitled, i.e.
 - Monday, 15/7/96
 - Tuesday, 16/7/96
 - Thursday, 26/12/96 (claimed twice)
 - Friday, 2/4/99
- Informing your daughter, Nicole to falsify her date of birth resulting in a higher rate of pay, having knowledge of this fact and therefore defrauding Warner Bros. Movie World and breaching Commonwealth law.

These acts are a breach of your position of trust and therefore we have no alternative but to terminate your employment effective today, Wednesday, 23 December 1999. These acts constitute mis-conduct and therefore are subject to instant dismissal. However, in recognition of your service to the Group, we are prepared to pay you five weeks salary in lieu of notice.”

The applicant was the only witness called in support of her application. The respondent called four (4) witnesses. They were Mr Lines, its Human Resources Manager, Ms Olson its Human Resources Co-ordinator and the two payroll staff who had reported the misconduct to the company's management, Ms Simpson and Ms Summerfield.

From the applicant's perspective she had worked for the respondent for the best part of eleven (11) years. During this time she had held a supervisory role and had never been criticised, counselled or warned regarding her conduct or performance. In light of this, she submitted that the treatment handed out to her was harsh, unjust and unreasonable.

The applicant called into question the thoroughness of the respondent's investigations into the allegations by drawing the Commission's attention to the fact that at the outset of the hearing the respondent had amended the allegations in its termination letter. It accepted that it had been in error with respect to two of the four leave days it had relied upon in its letter. The applicant argued that during the 20 December 1999 meeting, she had attempted to explain to them that they had been in error, but that without the details, this had been impossible. Further, the applicant submitted that despite the suspension and the delayed decision to terminate, there had not at any time been a thorough investigation of the matters relied upon by the respondent to terminate her employment.

The applicant argued that the respondent had no formal written policy on the issue of time off in lieu. When leave of this nature had been taken, there had been a requirement that a general leave application form be submitted. It was assumed that salaried personnel would maintain their own records of leave owed and taken. The applicant argued that the environment was a high pressure one in which a new payroll system had been implemented adding to the general level of activity. Given the busy environment, the applicant gave evidence, that if she had taken leave incorrectly, then it had been a mistake. Further, in respect of this matter, the applicant submitted that allegations of this kind could not be responded to without having access to particular documents, including diaries. Despite this, the first time she had received written details of the allegations was when the information appeared in an attachment to her termination letter.

The parties agreed that when the respondent raised the issue of her daughter's falsified date of birth, she said, "There is a loophole in the system.". However, the applicant contended that there was nothing untoward in the statement.

The offer of resignation, she argued, was an attempt at a constructive dismissal. The applicant argued that the offer of resignation had been an attempt to "buy a resignation". For instance, if the employer had been satisfied that it had good cause to terminate her employment on the grounds of serious misconduct, given the allegations of fraudulent behaviour, there had been no legal obligation for it to include payments in lieu of notice and *pro-rata* long service leave.

According to the applicant, there had been an element of pre-determination in the respondent's approach suggestive of the fact that it had decided to terminate her prior to the commencement of the meeting on 20 December 1999. More importantly, there was "an abject lack of evidence in any way, shape or form to suggest that Miss Lewis acted in a deliberate manner in an attempt to defraud her employer.". From the applicant's perspective, the respondent failed to provide procedural fairness to her. In evidence she said:-

"I want my job back. I want my name cleared. I want to be compensated for any loss."

The respondent contended that the applicant had not produced any evidence to show that the dismissal had been harsh, unjust or unreasonable. From its perspective the applicant held a supervisory role and as such was in a position of trust. The respondent submitted that it carried out an investigation and that the allegations had been proved with the exception of the allegations relating to the 15th and 16th which it had withdrawn. It highlighted Leave Application Forms wherein the applicant had claimed time off in lieu, for one and the same day, two and three times.

The respondent also submitted that the requirements for s. 77 had been met in that the applicant had been given a reason for her dismissal relating to her conduct, capacity or performance. In the respondent's view the seriousness of the allegations made it an inappropriate matter for a warning.

In terms of the procedural fairness issue, the respondent submitted that it had:-

- Put the allegations to the applicant;
- Given her an opportunity to respond;
- Had not been satisfied with her response;
- Raised the issue of a resignation rather than a termination. The applicant had indicated she would resign for 2 years pay and when Mr Lines told her this was not possible, she altered the request to one year;
- Placed her on suspension to further investigate;
- At a meeting on 23 December 1999, told her it was still not satisfied with her responses and discussed the opportunity it might provide for her to resign on certain terms and conditions. Mr Lines offered her ten (10) weeks pay saying that in his view the offer was five (5) weeks over the statutory requirements;
- Mr Lines had phoned the applicant the following day to ask her whether she wished to accept the offer of ten (10) weeks pay, and finally;
- Mr Lines sent the termination letter believing the applicant had rejected the offer.

Conclusions:

Significantly, the applicant denied the allegations. The denials were not always straightforward. Also, during the termination process the allegations were in some respects changed but not so much as to change the character of the alleged misconduct. For instance, initially the employer provided particulars of four (4) lieu days taken, to which it declared she was not entitled, but withdrew two of the four at the commencement of the proceeding. Also, initially the employer accused the applicant of directly writing the incorrect date of birth on her daughter's behalf. Later, the termination letter accused her of "informing her daughter to falsify her date of birth."

In deciding the issue of whether or not this was a lawful or unlawful dismissal, I am cognisant that two important considerations underpin my determination. Firstly, the onus of proof was on the applicant to show that she had been unlawfully dismissed. Secondly, and perhaps more importantly, in this case, the applicable standard of proof is on the balance of probabilities. The implications of these two considerations effectively mean that I am not determining the matter of the applicant's guilt in respect of the allegations. The standard that applies in the criminal jurisdiction, namely, beyond a reasonable doubt, is a much higher standard than the balance of probabilities. I have therefore applied the balance of probabilities test to the circumstances of the case and asked myself the question of whether or not the action taken by the respondent was reasonable in all the circumstances. I have also considered whether or not in taking the step to dismiss the applicant she was accorded the requirements mentioned in the act at s. 77 as well as other issues relating to the offer the respondent made for the applicant to resign.

At the outset I will say that I found the evidence of the two payroll staff not only credible but compelling. It did strike me that this matter took on the characteristics of what is colloquially called "office politics" and after hearing the evidence and considering the matter I reached the conclusion that reinstatement would in any event be inappropriate.

What did strike me was not so much the seriousness of the allegations *per se* but the likely ramifications of such allegations on the applicant's reputation once made. I do not accept that the matters in question are so serious that they should be allowed to tarnish the reputation of a Senior Payroll Administrator with eleven (11) successful years standing. I have therefore considered whether or not in the circumstances the allegations, if proved on the balance of probabilities, justified dismissal.

I have considered the question of whether, if the 1993 incident had not occurred would the respondent have been justified in dismissing the applicant for taking days in lieu to which she had not been entitled?

It was, in my view, unsatisfactory for someone in such a position to be keeping what to me appeared to be shoddy records of her own lieu days. This is especially the case since in evidence the applicant recognised an obligation to account for her time off, appropriately. Regardless of the respondent's written policy and requirements, or lack thereof, in evidence, and when she had been called to account for herself, she was unable to do so. At best it does seem that the applicant was prone to err on the side of generosity to herself in reimbursing her hours. At worst she created opportunities for herself to take time off to which she was not entitled. Both of these options need to be viewed in the context of her seniority and her eleven (11) years of service.

In my view without the incident involving the daughter's falsified date of birth, the time in lieu issue did not justify instant dismissal. It would have been more appropriately a matter for a warning along with a change to the recording system. It is significant that the respondent has since instigated a tighter recording system that requires accountability.

I have then considered the 1993 incident.

Given the applicant's opinions and attitudes about there being a loophole in the system, I have asked myself could any person in her position as a Payroll Officer/Administrator not have been aware of the incorrect date of birth put forward in respect of her own daughter?

Mr French: "Can you remember what you were accused of, Miss Lewis?"

Applicant: "Of filling out her forms and putting in a false date."

Mr French: "And what was your response to the gentlemen upon hearing that allegation?"

Applicant: "My response was that shouldn't they be discussing this with Nicole."

My view is that as the complaint had arisen because of allegations made by the applicant's staff about admissions she had made to them, it was entirely appropriate that she account for herself in relation to the matter.

As a matter of principle, an employer has the right to expect employees in a position of trust, especially when they are unsupervised, and in a payroll position, to act impeccably in relation to their job. In my view, because of the nature of the position, a higher standard of accountability is required from a payroll employee in a position of trust, than that which would apply to a junior employee.

In the present case, I am of the view it is worth mentioning that the issue of pay rates, for juniors, who are doing the same work as seniors, is seen in different ways by different people. It is not an issue on which there is a clear community view. From an employer's point of view, to allow an incorrect date of birth to be processed may be seen as an act of dishonesty. However, to particular employees the same act may seem to be acting justly and righting a wrong. Clearly, it is not the role of an employee to make such rules.

The evidence of the other two (2) employees with respect to the applicant's attitude to this issue of pay rates for juniors and the birth certificate loophole, is clearly corroborative of this view. On the balance of probabilities, I find that the applicant would clearly have been aware of the situation regarding her daughter's incorrect date of birth and at best chose to do nothing about it. Being the Senior Payroll Administrator, it was improper for her to do this. Hence, my view is that the act is an act of impropriety and not one of moral turpitude like stealing or other types of fraud.

Bearing in mind the following factors:-

- The applicant's near eleven (11) years of service;
- The responsibility of the position she held;
- Her recognised work output and competence and finally;
- The seven (7) year lapse of time since the impropriety occurred.

It was both reasonable and desirable for the employer to give the applicant an opportunity to tender her resignation.

On the evidence, I find that the respondent did not stipulate a deadline for the acceptance of its resignation offer.

At the 23 December meeting the respondent presented the applicant with the proposed Resignation letter.

Mr French: "And did you respond to that immediately?"

Applicant: "No. I requested if I could have time to seek advice on this. I also mentioned the time of the year, which was going to create a problem getting advice."

The applicant said she had been unable to get an appointment with any of the names supplied to her by Industrial Relations so close to Christmas. She said that at 3.57 pm on 24 December 1999 Tony Lines phoned.

Mr French: "Do you remember what that call was about?"

Applicant: "Yes he was ringing up to ask me what decision I'd made."

Mr French: "And what did you tell him?"

Applicant: "I was unable to make a decision."

Mr French: "And what did Mr Lines say to you?"

Applicant: "That he had no alternative, that I'm terminated."

Mr French: "And you say at par 23 you received a letter later on that afternoon delivered personally by Mr Lines?"

Applicant: "Yes."

With the incident unfolding in the closing days prior to Christmas, my view is that the respondent acted too hastily in effecting the termination without ever giving the applicant an opportunity to come to terms with the predicament in which she found herself. Under cross-examination the applicant did accept that she had understood what it was that her employer was accusing her of at the time of the interview. I find that the applicant understood this such that the employer could accept her responses. However, it seemed to me that the applicant's opinions about the matters were such that she could not have been expected to come to terms with the ramifications of her situation. In my view it is likely that the applicant needed the benefit of professional advice. In any case she had indicated to her employer that she would like time to obtain legal advice and the employer had not for example responded "regardless, the offer will be left open until a specified date and time." In saying this, I do not accept Mr Lines' evidence that the applicant had clearly rejected the offer of resignation during their phone conversation of 24 December 1999, although I accept that he believed this to be the case.

I did not accept the employer's evidence regarding the timing of the discussions in relation to the offer of resignation. Rather, I accepted the applicant's version of these events.

The applicant's response to the concept of resignation had been positive at the first meeting although her expectations of a suitable termination payment were entirely unrealistic.

Mr French: "You said to Mr Graziani that you would voluntarily resign only if offered an appropriate severance/redundancy package; is that correct?"

Applicant: "Yes."

In my view what occurred at the end of the termination process was that the applicant was terminated before she could have reasonably been expected to obtain advice. Therefore I find her termination occurred prematurely while the offer was still under consideration. I find this was unreasonable in the circumstances.

In summary, the investigations could have been more thorough but I find that the outcome would still have been the same. The applicant did hold a position of trust and once the respondent reached the view that the trust had been breached it was highly likely that she would lose her position. On the evidence I was satisfied that the process followed by the respondent was in general sufficient for a dismissal in the circumstances, and that it would not have been appropriate for the employer to continue the employment during the notice period. However, I find her actions were not of the nature of misconduct or serious misconduct justifying instant dismissal and the loss of her statutory entitlements to *pro-rata* long service leave benefit.

While the respondent was under no obligation to make the applicant an offer allowing her to resign, once it had been made it was obliged to act reasonably in relation to the offer. I find it did not. I therefore find that the manner of the dismissal including the termination payment harsh, unjust and unreasonable in the circumstances and therefore in breach of s.77 (d) of the *Industrial Relations Act of 1999*.

In relation to the termination payment referred to in the applicant's termination letter, I am aware that the employer has determined not to pay the applicant her long service leave because they believe her actions constituted misconduct such as that referred to in s. 83(2)(c). I have not made a finding that her actions constituted the type of serious misconduct envisaged in the Act at s. 83(2)(c). Such misconduct would have been sufficient to preclude her from receiving her statutory entitlements and is referred to at s. 43(3)(b)(iii). The applicant has said that she secured alternative employment with Village Road Show Productions approximately one month after her dismissal from the respondent. She said in evidence that she was aware that Movie World was owned fifty percent each by Village Road Show and Warner Brothers Movie World.

As a result of my finding that her actions did not constitute serious misconduct, the respondent should forthwith pay the applicant the monies that were due and owing to her for long service leave entitlement to avoid the necessity for the applicant to recover these monies in other proceedings. In addition I order the respondent to pay an amount equal to eight (8) weeks pay by way of compensation within twenty-one (21) days of the date of release of this decision. Both parties to bear their own costs.

The Commission orders accordingly.

D.B. BALDWIN, Commissioner.

Appearances:-

Released: 18 July 2000

Mr L. French of Redwing Consulting for the applicant.
Mr R. Livingstone of Livingstones (Australia) for the respondent.

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QUEENSLAND INDUSTRIAL REGISTRAR

Industrial Relations Act 1999 s. 482 – arrangement for conduct of elections

James Cook University Staff Association (Union of Employees) (No. Q24 of 2000)

REGISTRAR EWALD

17 July 2000

Conduct of Election – Prescribed Information – Timing of Election – Reasons for Election – Method of Election –Electoral Commission to Conduct Election.

DECISION

On 12 July 2000 the James Cook University Staff Association (Union of Employees) (JCUSA) lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 53 of the *Industrial Organisations Regulation 1997* in relation to its request for the conduct of an election by the Electoral Commission for the following Offices:

OFFICE	Number of Positions
President	1
Vice President	1
Secretary	1
Treasurer	1
Member of Executive Committee	6

Timing of Election

No clear date for opening of nominations is prescribed by the Rules to assist in determining the prescribed date for the filing of prescribed information and, after reading all rules, a date is not definable by me.

Notwithstanding, I am prepared to exercise my discretion and extend the prescribed time for filing of such information to 12 July 2000.

Reasons for Elections

All of the above positions fall vacant because of the expiration of terms of office and I am satisfied that an election be held for such offices.

Method of Election

All elections are, by the rules, to be conducted by a direct voting system by way of a secret postal ballot.

Conduct of Elections

I have considered the request, the Act and Rules, and I am satisfied that an election is required to be held under the rules for the above Offices.

Therefore, under section 482 of the *Industrial Relations Act 1999*, I am making arrangements for the conduct of the election by the Electoral Commission of Queensland.

Dated this seventeenth day of July, 2000.

E. EWALD,
Industrial Registrar.

Released: 17 July 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Property Sales Association of Queensland, Union of Employees
AND L.J. Hooker Bli Bli (No. W10 of 2000)**

COMMISSIONER BLOOMFIELD

13 July 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 7 July 2000, this Commission, after having decided that Kevin Alfred Bullard was underpaid commissions by L.J. Hooker Bli Bli, in accordance with the provisions of an Individual Employee Flexibility Agreement, doth order as follows:–

1. That Ridesun Pty Ltd ACN 073 283 100 trading as L.J. Hooker Bli Bli pay to Kevin Alfred Bullard the amount of five hundred and thirty-eight dollars and eighty-eight cents (\$538.88) in respect of unpaid commissions.
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 thirteenth day of July, 2000.

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

Operative Date: 13 July 2000
Order – Unpaid commissions
Released: 17 July 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

TRADING (ALLOWABLE HOURS) ACT 1990

Industrial Relations Act 1999 – s. 280 – application to reopen proceedings

**Property Council of Australia Limited AND Hardware Association of Queensland,
Union of Employers and Others (No. B419 of 2000)**

PRESIDENT HALL
VICE PRESIDENT LINNANE
COMMISSIONER EDWARDS

12 July 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 12 July 2000, this Commission doth Order that the TRADING HOURS – NON-EXEMPT SHOPS TRADING BY RETAIL – STATE ORDER be amended as follows as from the first day of July, 2000:–

1. By inserting the following as clause 3.6 of the Order:–

“3.6 Hardware Stores

Notwithstanding anything hereinbefore provided the opening and closing times for Builder Materials Supply Stores and Hardware Stores as defined, throughout the whole of the State of Queensland on Sundays and Public Holidays shall be:–

	Opening Time	Closing Time
(a) Sundays	8.30 a.m.	4.00 p.m.
(b) Public Holidays: (other than Anzac Day, Good Friday and Christmas Day)	8.30 a.m.	5.30 p.m.”.

2. By adding the following new definition as subclause (23) of **SCHEDULE 1** of the Order:–

“(23) ‘A Hardware Store’ shall mean a non-exempt store consisting of a business which predominantly supplies:–

- (a) construction materials, tools, fittings and other appropriate products to licensed builders, associated tradespeople, licensed contractors and sub-contractors engaged within the building industry; and/or
- (b) similar products appropriate for home improvement purposes to the general public.”.

3. By renumbering existing clauses 3.6 and 3.7 as clauses 3.7 and 3.8 respectively.

4. By deleting the second sentence of clause 3.5 of the Order, and substituting the following in lieu thereof:-

“Except as provided in clause 3.6 hereof, such stores shall follow the trading hours times applicable to all other non-exempt shops in the various areas designated.”.

Dated this twelfth day of July, 2000.

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

Operative Date: 1 July 2000
Order: Trading Hours
Released: 14 July 2000