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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
CA58/00	Subway Indooroopilly - Certified Agreement	20/3/00	
CA137/00	Furlongs Pty Ltd - Certified Agreement	26/4/00	CA63/99

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

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

Australian Mines and Metals Association (Incorporated) Queensland Branch AND The Australian Workers' Union of Employees, Queensland (No. C15 of 2000); AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers AND The Australian Workers' Union of Employees, Queensland (No. C16 of 2000)

PRESIDENT HALL

DECISION

28 April 2000

In matter no. B879 of 1999 The Australian Workers' Union of Employees, Queensland (AWU), seeks the declaration of a General Ruling upon the matter of union encouragement. In matter no. B1049 of 1999, the Queensland Council of Unions (QCU) seeks a Statement of Policy about the same industrial matter. By a decision published 7 March 2000, 163 QGIG 277, the Full Bench of the Queensland Industrial Relations Commission which is hearing each of B879 of 1999 and B1049 of 1999 rejected submissions that each of the matters was beyond its jurisdiction. On 24 March 2000 Daniel Charles Williams, Solicitor, of Minter Ellison Lawyers, being authorised to represent a diverse group of organisations and employers (particularised below at the heading "Appearances") appealed against the decision of the Full Bench in each of matter no. B879 of 1999 and matter no. B1049 of 1999. Some four days later the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers filed an appeal of its own. It is both convenient and necessary to separate the appeal in matter no. B879 of 1999 and matter no. B1049 of 1999, notwithstanding that the matters have been joined.

By s. 287(8) of the *Industrial Relations Act 1999* –

“(8) If a ruling takes effect while an industrial instrument, other than a instrument or part of an instrument excluded under subsection (4), is in force –

- (a) the industrial instrument is taken to be amended to accord with the ruling, on and from the specified date; and
- (b) the amendment has effect as an industrial instrument, on and from the specified date.”.

By the Dictionary at Schedule 5 “industrial instrument” means an award, certified agreement, QWA, industrial agreement, EFA or order under chapter 5, parts 5 and 6. The reference to subs. 4 is necessary because subs. 4 vests the Commission with power to grant exemption from the operation of a General Ruling. (There is authority to the effect that in the absence of subs. (4) a power to exempt might have been found within subs. (1). However, the presence of an express power makes it difficult to find that a comparable power is implicit within or incidental to the power at subs. (1).)

Subsection (4) is in the following terms –

“(4) A ruling may exclude from the operation of any of its provisions –

- (a) a class of employers or employees; or
- (b) employers or employees in a particular locality; or
- (c) an industrial instrument or part of an instrument.”.

Not surprisingly, given the remarkable effect of a General Ruling, the power to make a General Ruling is exercisable by QIRC only when constituted as a Full Bench and only in limited circumstances. Subsection (1) provides –

“287. (1) The full bench may make general rulings about –

- (a) for employees bound by an industrial instrument – an industrial matter, to avoid a multiplication of inquiries into the same matter; or
- (b) a review of a general employment condition under chapter 2;⁷⁸ or
- (c) a Queensland minimum wage, whether or not it is the subject of an industrial instrument.”.

Only subs. (1) para (a) is relevant here. Subsection (1)(a) does not authorise the Commission to hear an application for a General Ruling and make the General Ruling if satisfied that it is desirable to do so. The power to make a General Ruling is available only for the purpose of avoiding a multiplication of enquiries into the same matter. (And it is to be noticed that the Commission is not required to make a General Ruling where making a General Ruling would avoid a multiplication of enquiries into the same matter. There is no reason to doubt that “may” indicates that the power may be exercised or not exercised, at discretion, compare s. 32 CA of *Acts Interpretation Act 1954*.)

However, there is absolutely no reason why a party otherwise competent to seek variation of an industrial instrument* may not institute proceedings seeking the making of a General Ruling. I respectfully adopt the observation of the Full Bench in *ACTU and Others v. QCCI and Others* (1997) 155 QGIG 1175 at 1176 dealing with the General Ruling provision of the *Workplace Relations Act 1997*:

“The point at issue is whether in determining to form the intention referred to at s. 132(2)(a), the Commission may listen to an industrial organisation of employees which has expressed the view that the making of a General ruling is desirable. We consider s. 335(2) to grant the Commission ample authority to listen to such an industrial organisation. The width of the power was emphasised by Mackenzie P. in *The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Others v. Retailers' Association of Queensland Limited, Union of Employees and Another* 145 QGIG 664 at 665 whereat His Honour observed ‘The liberty [the Commission] has in going about the process of informing itself for the purpose of exercising its jurisdictions or powers and the performance of its duties is extremely wide.’. See also *Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees and Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch, Union of Employees and Queensland Colliery Employees Union of Employees* 153 QGIG 537 at 538 per de Jersey P.”.

Indeed, in the absence of such a party it is difficult to imagine how the material supporting a conclusion that, in the absence of a General Ruling, there will be multiple enquiries into the same industrial matter might, be placed before the Commission in any appropriate way. And such materials must be placed before the Commission. The purpose of power at s. 287(1)(a) is available only to avoid a multiplication of enquiries into the same matter. (*The Commission may of course decline to make a General Ruling on the application of a party with no legitimate interest in the wide range of industrial instruments which will be affected by such a ruling.)

With respect to the appellants, it seems to me that all that the Full Bench has done in matter no. B879 of 1999 is embark upon the enquiries (a) whether multiple enquiries upon the same matter may be avoided by a General Ruling, and (b) if the answer to (a) is in the affirmative, whether a General Ruling should be made in all the circumstances of the case. I quite accept that s. 126(f)(g) applies to the Commission constituted as a Full Bench. If in the course of wrestling with the question whether to make a General Ruling in matter no. B879 of 1999 the Commission forms the view that in avoiding a multiplication of enquiries it will disable itself from discharging the duty cast upon it by s. 126(f)(g), the question whether the Commission should refrain from making a General Ruling will squarely arise. It may well be that the Commission will conclude that an instrument by instrument approach, or even an enterprise by enterprise approach, is more appropriate than the declaration of a General Ruling. It may be that the Commission will conclude that a General Ruling may appropriately be made provided certain industrial instruments and/or industries and/or enterprises are corralled off by an interim exclusion under s. 287(4) until the circumstances of the industrial instrument and/or industry and/or enterprise may be more fully examined. All of that is a matter for the Commission.

Some criticism has been made of the drafting of the application by which The Australian Workers' Union of Employees, Queensland (AWU) instituted matter no. B879 of 1999. Doubtless the application has to be construed as pleading rather than as a log of claims. However having regard to ss. 320(2) and 329(c), (d) and (e) it is open to the Commission to interpret the application in a robust way and, if necessary, require amendment or provision of further and better particulars to make clear what is sought. The real problem with the application, I suspect, is that the outcome sought is not an obligation to encourage employees to join an industrial association and maintain membership of that industrial association, but a clause which goes further and nominates the industrial association or associations to which the obligation relates in the case of every industrial instrument. The mechanics of drafting a General Ruling capable of producing such an outcome in the case of every industrial instrument are daunting. Perhaps it was for that reason that at 278 the Full Bench observed “--- practical impediments may have made their adaptation difficult were either (application) to be granted.”. Further, if

determining which industrial association or industrial associations are to be named in the case of each industrial instrument requires multiple inquiries about particular industrial instruments within matter no. B879 of 1999, one might wonder what is to be gained by dealing with the matter by way of a General Ruling. But those are all matters for the Full Bench when it has more fully educated itself about the issues with which it is being asked to deal.

It is then contended that the application giving rise to matter no. B879 of 1999 is incompetent because the relief which it seeks is relief which the Commission cannot grant. For each of two reasons it is put that grant of the relief sought would contravene s. 126(a).

First, it is put by Mr Williams that “discriminatory provisions” at s. 126(a), which is not defined, takes its meaning from the definition of ‘discrimination’ in the dictionary at Schedule 5. The dictionary relevantly, defines discrimination to mean discrimination that would contravene the *Anti-Discrimination Act 1991*. It is then submitted, for reasons which it is not presently useful to outline, that the relief sought by the AWU would contravene the *Anti-Discrimination Act 1991*. Section 110 is said to permit no more than the inclusion in an industrial instrument of a clause allowing conduct otherwise allowable under the law. I have great difficulty with the submission. To begin with, if s. 110 has the limited effect contended for, whether the relevant head of power is s. 2 of the *Constitution Act 1867* or s. 2(1) of the *Australia Act 1986* (C’wth) and *Australia Act 1986* (UK), s. 110 would not be a law at all, compare the notion of “a law” developed by Kitto J. in *Fairfax v. Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7. On that view, s. 110 should in consequence of s. 9 of the *Acts Interpretation Act 1954*, be read as permitting the inclusion in industrial instruments of a clause allowing conduct not otherwise authorised by law. In any event, reading the Act as a whole and in a natural way, it would appear that the legislative scheme is that if a clause proposed for inclusion of an industrial instrument falls within s. 110 inclusion will not contravene s. 126(a).

The second contention, propounded by Mr Murdoch, SC is that the application is incompetent because it seeks to encourage financial membership of an industrial association rather than membership of an industrial association. So indeed it does. But s. 110(1) permits inclusion in an industrial instrument of an encouragement provision which “may encourage a person to join or maintain membership of an industrial association.”. The AWU may well succeed in making out an argument that in the case of some (perhaps many) industrial associations membership cannot be maintained without the maintenance of financial membership. (The more immediate point, of course, is whether the AWU can satisfy a Full Bench that it should make a General Ruling to avoid a multiplicity of enquiries, when the consequence of adopting that approach is that multiple enquiries about membership rules will be conducted within the trial leading to the making of the General Ruling.)

Insofar as the appeals relate to the application for a General Ruling in matter no. B879 of 1999, I consider the appeals to be without substance.

The QCU’s application seeking a Statement of Policy is said to be incompetent also. The submission is that the application, in its amended form, fails to stipulate who is to be burdened with the duties prescribed by the clause, viz fails to nominate by whom it is that the acts of encouragement are to be carried out. (In its unamended form the application sought to impose the duty on the employer.) It is said that a Statement of Policy made in terms of the amended application would not be a Statement of Policy at all, because it would not be capable of being inserted in an award on application by a party to an award.

Although the matter has not been argued I consider that I may safely adopt the approach that the presence of an express (and limited) power to make a Statement of Policy precludes construction of more general powers as granting authority over the same subject matter. However, given the history of Commission principles and guidelines, and I respectfully adopt the observations of the Full Bench in *Queensland Council of Unions v. Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others AND The Australian Workers’ Union of Employees, Queensland v. Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* 162 QGIG 359 at 359-360, I reject the proposition that all the Commission may do is develop a draft clause which, upon application, may be inserted in a particular award. Certainly, the Commission has power to do that and has done so, see e.g. Declaration of Policy, Occupational Superannuation, 132 QGIG 1105. But the Commission may also develop a Statement of Policy to guide a Commissioner sitting about how certain industrial matters are to be dealt with. A Commissioner sitting alone who gave effect to such a Statement of Policy by inserting in a particular Award a clause drafted by the Commission in language appropriate to the existing wording of the Award, would, in my view, within the meaning of s. 288(2), give effect to the Statement of Policy by inserting it in the Award.

I dismiss the appeals insofar as they relate to the QCU application.

I reserve the questions of costs.

Dated this twenty-eighth day of April, 2000.

D.R. HALL, President.

Appearances:—

Mr J. Murdoch SC instructed by Minter Ellison, Lawyers for Australian Mines and Metals Association (Incorporated) Queensland Branch.

Mr D. Williams of Minter Ellison, Lawyers, for Grainco Australia Ltd; Australian Mines and Metals Association and its members; Consolidated Rutile Limited; Cape Flattery Silica Mines Pty Ltd; Dalrymple Bay Coal Terminal Pty Ltd; Century Drilling Limited; Eurest Australia; Roche Bros Pty Ltd; MIM Holdings; Placer Pacific Osbourne Mine; BHP Minerals; Byrncut Mining Pty Ltd; Comalco Aluminium Ltd; Ausdri; Peabody Mining Services Pty Ltd; and RGC Thalanga.

Mr A.K. Herbert instructed by Sciacca’s Lawyers, for The Australian Workers’ Union of Employees, Queensland.

Mr D.R. Dawes for the Queensland Council of Unions.

Mr G. Power for Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.

Mr R. Livingstone of Livingstones Australia for the Queensland Cemeteries and Crematoria Association; Queensland Funeral Directors Association; John Paul College; Aviation Group Handling; Boral Construction Materials; Boral Quarries; Queensland Friendly Societies Pharmacies Association Industrial Organisation of Employers; Queensland Nursery Association Industrial Union of Employers; Slacks Creek Auto Barn; TAB Queensland; Queensland Private Childcare Centres Employers Association of Queensland Industrial Organisation of Employers.

Released: 27 April 2000

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement***Scott Ricketts AND Hay-Ric Pty Ltd t/a Sunfarm (Case No. B1737 of 1999)**

COMMISSIONER BLADES

2 May 2000

Unfair dismissal – Dismissed while on annual leave – Not told directly – Official notification by way of Separation Certificate – Not paid long service leave entitlement – Not paid in lieu of notice – Harsh, unjust or unreasonable – Compensation – Long term employment – Separate proceeding for recovery of long service leave – Employment not requiring special qualifications – Four months (less one week already paid) awarded – Social Security benefits paid – Applicant not to benefit – Employer not to benefit at expense of the revenue – Employer to pay full amount of compensation – Benefits to be refunded to Department – Payment of compensation to be made to the Registrar.

DECISION

Scott Ricketts alleges he was dismissed from his employment with Sunfarm in early December 1999. He says that the first he heard of his dismissal was when his friend and co-worker Earl Stanley Young contacted him by telephone and advised him that on 6 December, 1999 Mr Graham Hayes, Owner and Ms Elaine McAlpine, Manager had informed all staff that “I am buying out Jack Ricketts and he and Scott are no longer employed here”. “Jack” was the applicant’s father and Scott Ricketts was on annual leave at the time this occurred. It is alleged that up until that time, there was a business arrangement between Jack Ricketts and Graham Hayes although, for reasons which will become clear, Mr Hayes denies any partnership or involvement in the company Hay-Ric Pty Ltd.

The issues in this case were made more complicated by the existence of various corporate structures, which were interlinked and confused by family trusts.

It is appropriate to make some comments on credibility issues.

Jack Ricketts is the father of the applicant Scott and was a 50% shareholder in Hay-Ric Pty Ltd. Unbeknown to him, he alleges, about 1 November 1999, Ms Elaine McAlpine, Administration Manager, was appointed as a Director. He had agreed to the removal of his name as a Director at that time but was unaware she had been appointed in his place. Mr Ricketts expressed a certain degree of ignorance when asked about the various company structures although it is possible that Mrs Ricketts may well have been the brains behind these arrangements. He said that he was the delivery driver and she did the paper work. It was submitted that he became very evasive when tested about his knowledge of these matters but that was not my impression. Many people in his position leave the paper work to someone else and his explanation is not that unlikely.

Mr Scott Ricketts was cross-examined about his earnings after termination and denied that since the “partnership” folded, his father was operating a business of his own. Two questions later, when it was put to him that his father was operating a business named “Dancourt”, he agreed, claiming he did not understand the question. His denial did not assist his credibility.

Without doubt, Mr Graham Hayes was a significant player in this business arrangement. Some witnesses referred to him as the owner, some as the partner. He denied being a partner. However, the Office Manager (Ms McAlpine) said that he had “an ownership responsibility”. She also said that she reported to him. In a letter (Exhibit 10) dated 9 December 1999 on Hay-Ric Pty Ltd letterhead and which announced the departure of Jack Ricketts, it was signed “Graham, Elaine and staff”. Evidence was produced from the Australian Securities Commission that Mr Graham Hayes had been a Director of some eleven companies, which had been in conflict with the Commission. The culmination of the conflict was that on 18 November 1997 a Notice of Prohibition under s. 600 of the *Corporations Law* was issued. That notice prohibited Mr Hayes:

“.. From the date of service of this notice for a period of 5 years from being a director or promoter of, or being in any way (whether directly or indirectly) concerned in or taking part in the management of a corporation without leave of the Court.”.

The reasons advanced for that decision indicated that Mr Hayes had displayed a lack of fitness to direct, promote or manage a corporation. His conduct had demonstrated a disregard for and a lack of appreciation of his statutory obligations, duties and responsibilities as a company director. I hasten to add that Mr Hayes is not a director of Hay-Ric Pty Ltd, nor of the company Sunfarm Pty Ltd and those reasons bear no real relevance to this case. However, very clearly he was concerned, probably directly, but certainly indirectly, in or taking part in the management of both corporations. In my view his involvement in an apparent breach of the Prohibition Order does not lend itself to a favourable assessment of his credibility.

Ms Elaine McAlpine gave evidence, which indicated she was prepared to make inaccurate statements even under threat of sanction by the law. She issued an Employment Separation Certificate, dated 9 December 1999, to Scott Ricketts wherein she stated that the employment was terminated. She now recants and states that Ricketts really resigned and was not terminated at all and that the certificate was issued at Ricketts’ request for Social Security purposes. (It did not go unnoticed that it was never put to Scott Ricketts in evidence that he had approached her and asked for this certificate). The Certificate contains an exhortation that “There are penalties for deliberately giving false or misleading information”. Either the Certificate is false or her evidence is false.

After having come to the view that the respondents, in particular, were not desirous of being overly helpful in this case, there was another curious stratagem that occurred and which was never really explained. At the commencement of the hearing, there was no appearance of Hay-Ric Pty Ltd. Mr Patti announced his appearance on behalf of Sunfarm Pty Ltd which company was not the respondent to the application. It was suggested by the Commission that perhaps Mr Patti could withdraw and the proceedings continue *ex parte* against the respondent who had not appeared. The applicant however eventually elected to apply to have both companies joined as respondents and this was done, in the alternative. The Commission made an order under s. 329(g) of the *Industrial Relations Act 1999* (the Act) that the action against Hay-Ric Pty Ltd proceed in its absence and the hearing continued.

Upon his final submissions being made, Mr Patti immediately submitted that the only order that could be made was against Hay-Ric Pty Ltd as that respondent was the employer. Sunfarm Pty Ltd was not the employer. The question is then why did Mr Patti seek to appear on behalf of Sunfarm Pty Ltd. Did he seek to defend the application against Hay-Ric Pty Ltd under the guise of defending on behalf of Sunfarm Pty Ltd? If the only order that could have been made was against Hay-Ric Pty Ltd what possible business was it of Sunfarm Pty Ltd? Did it have something to do with the financial viability of the companies? Do the Directors have some connection with each other? Was there some confusion between the legal entity Sunfarm Pty Ltd and the business name of Sunfarm which does not have a separate legal existence? Was the appearance a misguided exercise of judgment? I may have asked the wrong questions but I certainly did not receive any answers. However, there was alleged to have been a sale by Hay-Ric Pty Ltd to

Sunfarm Pty Ltd via a shelf company called Rovermere Pty Ltd, which eventually changed its name to Sunfarm Pty Ltd. I am left more than just a little uneasy at the ploy.

It is appropriate to indicate the make-up, as appears from the company searches, of the two companies. The Directors of Hay-Ric Pty Ltd, as from 1.11.99, were Elaine Joyce McAlpine and Clive Kenneth Gannon. One shareholder was Fondant Salisbury Pty Limited whose Director was Carol Shirley Hayes and who held the two shares on issue. The other shareholder was Ribham Pty Ltd whose Director was Jack Ricketts and whose shares were held by Jack Ricketts and Gay Irene Ricketts. The information provided in relation to Sunfarm Pty Ltd is not as revealing although it appears to have a connection with the Hayes family.

The applicant's version is that he was first employed by Gaphill Pty Ltd trading as J & G Distributors on 1 February 1987. Gaphill Pty Ltd was owned by Jack Ricketts, father, and Mrs G. Ricketts, mother. On 18 August 1998, Graham Hayes paid Ricketts \$35,000 and came into partnership in a business called Hay-Ric Pty Ltd. Hay-Ric Pty Ltd continued to employ the applicant and there was no break in continuity of employment. On 6 December, 1999, Jack Ricketts was locked out of the premises after an altercation with Hayes and it was at this time that Hayes made the announcement to staff that both Ricketts would no longer be working for the organisation. The applicant was on annual leave at the time.

The respondent alleges that when the business was first purchased and Scott was employed, he was employed on three months probation. That was denied. This evidence had relevance because, it was said, the three months probation broke the continuity of the employment. However the probabilities are against any probation, whether probation had the effect suggested or not. Jack Ricketts and Mr Hayes were entering into a new venture. Scott Ricketts had been employed for many years in the business. Why would he be placed on three months probation? In my view the allegation does not make sense, is against the probabilities and is rejected.

The respondent also alleges that there was a conversation on 6 December 1999 between Jack Ricketts and Graham Hayes about Hayes buying out Ricketts. It is alleged that after that arrangement was made, Ricketts told Hayes that "Scott would not work there without him (Jack Ricketts) and would not be back". Jack Ricketts denies that conversation occurred. It is the respondent's case that Ricketts was never terminated but simply walked away from the employment.

On the whole of the evidence, on the balance of probabilities, I prefer the evidence of the applicant and his father. I also consider the Employment Separation Certificate to be an admission against interest and therefore more likely to be true and it corroborates the evidence of the applicant. The Certificate also indicates that Mr Ricketts was paid one weeks pay in lieu of notice. Notice is not paid to someone who resigns or walks away. I did not consider that Jack Ricketts would have made any decision about his son's employment at the time of his disagreement with Hayes. Scott Ricketts is 30 years of age with a wife and two young children. He did not appear to me to be overborne and so subject to influence that his father could be taken to speak for him on such an important matter.

There is no evidence that anyone heard Hayes or anyone else actually dismiss the applicant. Mr Patti made some moment of the fact that the applicant gave evidence that no one told him he had been dismissed. However, for there to have been a dismissal, the words "dismiss" or "terminate" do not need to be used. The Employment Separation Certificate provides evidence that the applicant was terminated for "unsuitability for this type of work". Mr Young, an independent witness and an employee heard Mr Hayes address the staff saying "I am buying out Jack Ricketts and he and Scott are no longer employed here". Mr Young was taken aback by this statement as he knew Scott had been employed for 13 years and was at that time on annual leave. I am satisfied that the dismissal occurred at the time that Mr Hayes made that public announcement and that Mr Hayes possessed the authority to effect the termination.

The manner of the applicant's dismissal was clearly harsh, unjust and unreasonable. He was never told to his face that he was dismissed. The first he heard was by way of the telephone call from Mr Young. The applicant formally became aware of it when he received his Employment Separation Certificate.

By virtue of the operation of s. 69 of the Act, the applicant had continuity of employment from the commencement on 1 February 1987 to the dismissal on 6 December 1999. His employment was simply continued on when Hay-Ric Pty Ltd took over. In terms of s. 69 of the Act, I am satisfied there was a transfer of a calling from Gaphill Pty Ltd to Hay-Ric Pty Ltd on 18 August, 1998. He was therefore entitled to long service leave and a payment in lieu of notice as required by the Act. He had been continuously employed by the respondent company and the company from whom the business was purchased for almost 13 years. The failure to pay his entitlements upon his termination also operates to render this dismissal harsh unjust and unreasonable.

The reason given for the dismissal was "unsuitability for this type of work", hard to believe for a person with nearly 13 years experience. Ms McAlpine advanced in evidence that applicant had allergies, an allegation which was not put to Scott Ricketts. There were allegations made of unsatisfactory work performance, particularly relating to a monetary shortfall about July 1999. I am satisfied that the applicant's explanation for the shortfall was accepted at the time. Other performance issues were denied and I accept those denials.

There was a suggestion by Mr Hayes that Scott Ricketts was employed as a casual. This was hardly likely in my view and casual employment is inconsistent with the details recorded on the Separation Certificate. At termination, he was paid annual leave, something also not consistent with casual employment. Ms McAlpine did not support the contention but agreed he was employed on a full-time basis.

On the whole of the evidence I am satisfied on the balance of probabilities that the dismissal was harsh, unjust or unreasonable.

The applicant sought reinstatement but it would seem to me that reinstatement or re-employment is impracticable. The applicant has been denied about 11 weeks long service leave and there is an application before another Tribunal for the recovery of that amount. It is appropriate that that Tribunal continues to deal with that application. It would seem that jurisdiction may not exist in this Commission to make an order for the recovery of that sum. Annual leave and long service leave **entitlements** fall within the definition of "unpaid wages" and section 278 (the Commission) and section 399 (the Industrial Magistrate) of the Act provide for the jurisdiction for the recovery of unpaid wages. This is to contrast compensation orders which have incorporated allowances for amounts for long service leave which has fallen just short of the entitlement - e.g. *Watson v. L & J Seed Grading* 160 QGIG 303-306 (9 years 8 months) and *Dempsey v. Colwell Wright Solicitors* 154 QGIG 460 (9 plus years). Section 83(4) of the Act makes provision for an order for the payment of the compensation the employer was required to pay under the provisions of section 85 in regard to payment in lieu of notice. There is no similar provision in Chapter 3, which authorises an award of compensation in lieu of **accrued** long service leave.

Under s. 79 of the Act, the Commission may order an amount of compensation decided by the Commission, which is generally restricted to six months wages. The object of an award of compensation is to restore the employee, as far as practicable, to the financial position in which the employee would have been in if not for the dismissal. In assessing the amount, it is appropriate to consider the length of time that will probably elapse before the dismissed employee is likely to obtain equivalent or other suitable employment and the true length of time that the employment might have endured. An

assessment should be made and the lesser figure adopted as the basis for assessment of compensation. It should then be considered whether there has been appropriate mitigation by the applicant and what other non-refundable remuneration has been received. Discounting for "contingencies" should also occur – see *Cater v. Electra Cables (Aust) Pty Ltd* 1997 155 QGIG 328-331.

In this case there was no reason why the employment should not have continued long term.

It was suggested that the applicant had been receiving some income from his father's business since his dismissal. This was denied by both Jack and Scott Ricketts. The evidence relied upon was hearsay statements attributed to suppliers. Those statements because of their hearsay character, could not be tested, I have doubts about the credibility of the two witnesses (McAlpine and Hayes) making the allegations and the allegations were not put in detail to either Jack or Scott Ricketts when they were cross-examined. Whilst Scott Ricketts was not honest about his father's involvement in a business, it must also be taken into consideration that Jack Ricketts had recently ceased operating with Hay-Ric Pty Ltd and any business he did conduct was new. I should imagine it would take some time before any new business arrangement was up and running and profitable enough to employ staff. There is simply no acceptable evidence to make a finding that Scott Ricketts was employed for reward in his father's business after dismissal.

As at the first day of this hearing on 7 March, 2000, the applicant was still unemployed. There was no evidence given as to the position beyond that date although a claim was made from the bar table that the unemployed status still continues. There was no evidence that the applicant's employment was in a professional capacity or requiring some special qualifications. In view of the long-term nature of the employment, I would have considered four months to have been ample in which to obtain another position of a similar nature and remuneration.

Taking into account the amount (one week) already paid by the employer (s. 79(3) of the Act), I consider that an appropriate amount of compensation to award is 15 weeks wages, which I calculate to be \$10,125 (\$675.00 per week). This award does not include any amount for accumulated long service leave, which is the subject of another action. The applicant received some payments from Social Security and it is appropriate that he should not profit from his dismissal. However, it is also appropriate that the employer should not profit from the applicant's receipt of Social Security benefits to the detriment of the public purse. I do not therefore consider it appropriate to reduce the actual award against the employer but an order will be made that any unemployment benefits received to the date of release of this decision be refunded to the Social Security Department.

The question remains as against whom should the order be made. Sunfarm Pty Ltd's insistence on entering an appearance was not adequately explained. The Company appears to have commenced business as a shelf company under the name of Rovermere Pty Ltd, which then changed its name to Sunfarm Pty Ltd some time after the application for unfair dismissal was filed. Mr Hayes says that Rovermere Pty Ltd was owned by the Hayes Family Trust comprising his wife and two children. There was a sale at some stage between Hay-Ric Pty Ltd and Sunfarm Pty Ltd, which was the result of the argument between Mr Ricketts and Mr Hayes. There may or may not have been a written contract of sale. Mr Ricketts thought he signed some papers at a Solicitor's office but is not sure what. He has not been paid any money. Mr Hayes conceded that the sale was not finalised although he also said it occurred on 21 January 2000. He gave evidence that there was no provision made in that contract for the payout of employee benefits. This situation is quite peculiar. However, whilst the Commission is suspicious of some as yet unidentified subterfuge, Sunfarm Pty Ltd does not, on any limb of s. 6 of the Act, fall within the definition of "employer". Hay-Ric Pty Ltd was clearly the employer at the time of the dismissal and the only order that can be made must be made against that entity. Why then Sunfarm Pty Ltd entered upon these proceedings to defend the action is quite beyond my comprehension and has simply served to add to the length of the hearing.

I order that Hay-Ric Pty Ltd pay to the applicant the sum of \$10,125. To facilitate the appropriate refund of payments to the Department of Social Security, I order that sum be paid into the office of the Registrar, Queensland Industrial Relations Commission. (Had the applicant's representative had a Trust Account, I would have spared the Registrar). I further order that the applicant obtain a certificate from Social Security indicating the amount paid to him as benefits from the date of his dismissal for sixteen weeks thereafter. I direct that the Registrar pay to the Department of Social Security out of the compensation, the sum stated in that Certificate and the receipt of that Department shall be a sufficient discharge to the Registrar for that payment. The balance should then be paid to the applicant or his Advocate.

The Commission orders accordingly.

B.J. BLADES, Commissioner.

Released: 2 May 2000

Appearances:-

Mr A. Carroll, of Adrian Carroll & Associates, with him Mr D. McNeil, for the Applicant.
Mr J. Patti, of Employer Services Pty Ltd, on behalf of Sunfarm Pty Ltd.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1997 – s. 218 – application for reinstatement

Raymond Paul Nugent AND Natural Fibre Pty Ltd (No. B868 of 1999)

VICE PRESIDENT LINNANE

2 May 2000

Preliminary issue of whether Applicant was a probationary employee – term "trial period" synonymous with probation period as found in the *Workplace Relations Regulations 1997* – application struck out – costs awarded against Applicant due to unreasonable continuance with unfair dismissal application

DECISION

This is a Dismissal Application by Raymond Paul Nugent (the Applicant) seeking reinstatement to his former position of Marketing Manager with Natural Fibre Pty Ltd ACN 055 452 910 (the Respondent). The Application was filed on 29 June, 1999. The Applicant was dismissed from employment on 8 June, 1999. The provisions of Chapter 5 of the *Workplace Relations Act 1997* (the Act) are therefore relevant to the dismissal of the Applicant: see s. 720 of the *Industrial Relations 1999*.

The Respondent seeks to have the Dismissal Application struck out on the basis that s. 216(5) of the Act and s. 34(2) of the *Workplace Relations Regulation 1997* operate to exclude the Applicant from access to the unfair dismissal regime. The Respondent further seeks an order under s. 225 of the Act that the Applicant pay the costs incurred by the Respondent in the Dismissal Application and this Application.

Regulation 34(2) of the *Workplace Relations Regulations 1997* relevantly provides as follows:-

“(2) Chapter 5, Parts 2 and 3 of the Act do not apply to –

- (a) an employee serving a probation period, if the period determined before the employment commenced –
 - (i) is 3 months or less; or
 - (ii) is more than 3 months but is a reasonable period, having regard to the nature and circumstances of the employment; or
 - ...”.

It is s. 218 of the Act (found in Part 2) which gives a dismissed employee the right to make a dismissal application.

At the hearing of the preliminary Application Mr Williams, for the Respondent, sought simply to rely upon the Application and the Statement of Raymond Paul Nugent signed 20 April, 2000 (Exhibit 1).

In paragraph 2 of the material facts relied upon to support his Application, the Applicant states that “I was offered the position of Marketing Manager on a 3-month trial basis at a salary of \$40,000 per annum plus a company vehicle and all vehicle expenses”. In paragraph 3, the Applicant states that he commenced work on 23 April, 1999. Relevant sections of paragraphs 11 and 12 of the material facts indicate that the Applicant was informed on 8 June, 1999 by Ron Sanders, the Respondent General Manager, that things were not working out and that “we should part company”. The dismissal then took effect on 8 June, 1999 i.e. within the 3 month trial period. In paragraph 13 the Applicant again states that “it was agreed that I would be given a 3-month trial in which to prove myself and at the end of that period a decision would be made on whether I am to stay or go”.

The fact that the Applicant was on a 3 month trial period is again confirmed in the Statement of the Applicant where at paragraph 10 the Applicant states that “Mr Sanders indicated to me that I would be put on a three month trial period. It was indicated that it was general procedure to place new employees on such a trial”. The fact that the Applicant was on a 3 month trial period is referred to in various other paragraphs of that Statement. In particular at paragraph 18 the following is said:-

“During the interview process, it was made clear that I was to be engaged as a permanent employee on a three (3) month trial and that the review would only be concluded at the end of the three (3) month period. This was made clear because I stressed that I needed at least three months to understand the company’s product, marketing procedure and its potential and to endeavour to raise its sales leads. This was accepted by Ron Sanders. Mr Sanders nodded acceptance of my statement that I would need at least three (3) months for this purpose. This was a senior position and the clear impression was conveyed to me was that I had three (3) months to prove my credentials and my performance.”.

The Applicant’s case is that a “trial period” is not a “probationary period”. He asserts that it was never explained that he would be on a three month probationary period.

The term “probation period” is defined in regulation 34(5) to mean “a period of probation when first employed and includes a qualifying period of employment”.

Chief Industrial Commissioner Hall (as he then was) in *Darling v. Ultrarad Pty. Ltd. trading as Queensland X-Ray Services* (1997) 155 QGIG 1342 dealt with the essential quality of a period of probation in the following terms:-

“The essential quality of a period of probation is that it ‘is a time of testing or trial and a probationer, where conduct, character or qualifications fail to meet the test, need not be confirmed,’ O’Rourke v. Miller (1984) 9 IR 439 at 442 per Gibbs C.J. I accept that His Honour was directing his mind to a police constable and to a period of probation preceding appointment to a statutory office. But Dowsett J. in Beck v. Darling Downs Institute of Advanced Education, 20-4-90, unreported, No. 3865 of 1988 seems to have taken much the same view of a period of probation of contractual origin. The Macquarie Concise Dictionary, the Shorter Oxford Dictionary, the Concise Oxford Dictionary and Jowitts Dictionary of English Law, 2nd ed, 1997 take what is in essence the same view of the noun probation. There is nothing in the context to displace that prima facie meaning. Exclusion of probationers in that sense from access to the remedies at Chapter 5, parts 2 and 3 is perfectly understandable.”.

See also the decision of Chief Industrial Commissioner Hall in *Lennon v. Kelly & Fletcher ental Group* (1998) 159 QGIG 79. Commissioner Blades in *Hamilton v. The Cut Above Beauty Salon* (1998) 158 QGIG 37 said:-

“A trial period ‘to gain comfort with the owners and them with me’ was a period on probation. Mr Steiner, one of the owners, stated that he did not use the word ‘probation’. But the word, according to the Concise Oxford Dictionary, means ‘testing of conduct or character of person’. I am satisfied that the applicant was employed for a three month probationary period which had not yet expired when her employment was terminated.”.

There is no question in my mind that the three month period raised with the Applicant prior to his commencing employment with the Respondent had the purpose of permitting testing or evaluation of the Applicant’s conduct, capacity and performance.

In my view the use of the term “trial” is synonymous with “probation” when used in an employment law context. As such I find that the Applicant was an excluded employee for the purposes of accessing the provisions of Part 2 of the *Workplace Relations Act 1997* and I order that the Dismissal Application be struck out.

On the question of costs the Respondent relies upon the following material contained in the Affidavit of Hedy Meggiorin (Exhibit 2):-

- (i) a facsimile transmission of 22 June, 1999 to Solicitors for the Applicant which confirmed that the Applicant was employed subject to a three month probationary period and that therefore he was an “exempt employee” for the purposes of any unfair dismissal proceedings;
- (ii) a facsimile transmission of 19 July, 1999 to Solicitors for the Applicant which put the Applicant on notice that the Respondents would seek costs against the Applicant should he proceed with his Dismissal Application;
- (iii) a facsimile transmission of 17 August, 1999 to Solicitors for the Applicant confirming that the Respondent would seek costs against the Applicant if he proceeded with his application;
- (iv) a facsimile transmission of 6 March, 2000 again advising Solicitors for the Applicant of the need to attend a Callover before the Dismissal Application could be listed and reconfirming their position on costs of the Dismissal Application and any preliminary application to determine whether or not the Applicant was an “excluded employee”;
- (v) a facsimile transmission of 7 April, 2000 advising that this preliminary hearing had been scheduled at the Callover and reconfirming the Respondent’s position that it would pursue the Applicant for costs generally in relation to the matter.

There is also correspondence dated 22 July, 1999 forwarded to the Applicant from the office of the Industrial Registrar which advised the Applicant as follows:-

"I refer to our telephone conversation on 21 July 1999 regarding the above application.

I now confirm that you indicated that your employment was for a 3 month period only and that you were not seeking reinstatement to your former position, but payment for the work you would have performed if the 3 month trial period had been completed.

Under these circumstances the commission does not have jurisdiction to proceed with your application for reinstatement to your former position with Natural Fibre Pty. Ltd...".

Mr Puryer responded to the Industrial Registrar on behalf of the Applicant in a letter dated 13 August, 1999. In the course of that response it was stated at paragraph 8 that "I have outlined to the registry staff that there may be some basis to Mr Nugent's claim. It would be hoped in these circumstances that Mr Nugent would be afforded an opportunity to state his position, and possibly resolve the matter before a commissioner and the respondent at a Conciliation Conference."

If the Applicant was advised to continue beyond the conciliation conference stage then I am somewhat concerned. Mr Puryer submitted that the Applicant was fifty years of age, was still unemployed, had little prospects of obtaining employment in the near future and had minimal assets. Whilst I have sympathy for the Applicant in those circumstances the Respondent has had to bear certain legal costs through no fault of their own eg. the cost of attendance by its Solicitors at the compulsory conference, the writing of various pieces of correspondence to Solicitors for the Applicant, attendance at the Callover, preparation of Affidavits of Jack Wilson, Ronald Sanders and Hedy Meggorin and the appearance at the preliminary hearing.

Section 225 of the Act gives the Commission power to order costs. Section 225 is as follows:-

"(1)[Order to pay costs] The commission may order a party to an application under section 218 to pay costs incurred by another party if satisfied the party-

- (a) made the application frivolously, vexatiously or without reasonable cause; or
- (b) caused costs to be incurred by the other party because of an unreasonable act or omission connected with the conduct of the application.

(2) [Application for order] An application for an order for costs must be made within 21 days after -

- (a) the commission decides the application; or
- (b) the application is discontinued or lapses.

(3) ["costs"] In this section-

'costs' include legal and professional costs and disbursements and witness expenses, whether or not the commission has certified under section 350."

The issue then is whether the Applicant has caused costs to be incurred by the Respondent because of an unreasonable act or omission connected with the conduct of the application. The Respondent has at all times since 22 June, 1999 made full disclosure of their case, claiming that, as a probationary employee, the Applicant was excluded from the benefit of the legislation. It seems to me that from receipt of that letter, it was unreasonable for the Applicant to continue with his Dismissal Application. To have continued with the matter following receipt of the letter from the Office of the Industrial Registrar adds to the unreasonableness particularly when Mr Puryer was only of the view at that time "that there may be some basis to Mr Nugent's claim".

I have been provided with a detailed list of the legal costs incurred by the Respondent in defending this matter. With some degree of reservation I have decided not to award costs on an indemnity basis. I am however prepared to exercise the discretion given in s. 225 of the Act to make an order that the Applicant pay the Respondent some award of costs. I have taken the Applicant's particular financial circumstances into account in selecting an amount of \$1,000 in costs. I am aware that the amount of \$1,000 would go nowhere near compensating the Respondent for the costs it has incurred as a result of the unreasonable acts or omissions by the Applicant since receiving the correspondence dated 22nd June, 1999.

I order the Applicant to pay the Respondent an amount of \$1,000 for costs incurred by the Respondent in defending the Dismissal Application by 30 June, 2000.

Order Accordingly.

D.M. LINNANE, Vice President.

Released: 3 May 2000

Appearances:-

Mr T. Puryer of Puryer and Co. Solicitors and Tax Agents, with him Mr R. Nugent.

Mr D. Williams of Minter Ellison Lawyers for the Respondent, with him Ms H. Meggorin.

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Merchant Service Guild of Australia, Queensland Branch, Union of Employees (No. Q33 of 1999)

REGISTRAR EWALD

20 April 2000

Conduct of Election - Prescribed Information - Positions Unfilled - Direct Voting System - Electoral Commission to Conduct Election.

DECISION

On 14 October 1999 the Merchant Service Guild of Australia, Queensland Branch, Union of Employees lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 53(1) of the *Industrial Organisations Regulation 1997* in relation to its request for the conduct of an election by the Electoral Commission of Queensland for the following Offices.

OFFICE	Number of Positions
President	1
Senior Vice President	1
Vice President	1
Secretary/Treasurer	1
Committee Members	6
Trustees	2

On 13 December 1999, a Decision was issued for the arrangement of the conduct of elections for the above positions by the Electoral Commission. Notices for the calling of nominations were posted on 4 January 2000 with the closing date for nominations being at midday on 4 February 2000.

At the close of nominations, the Electoral Commission advised that only 1 (one) valid nomination had been received for a position of Committee Member. The Electoral Commission declared that Member elected leaving vacancies in 11 other positions.

There was a certain degree of uncertainty by persons as to whether they were members of this particular organisation or not. This uncertainty may have had some affect on the level of nominations. Membership matters now have been addressed.

This being the case it is appropriate that I arrange for the Electoral Commission of Queensland to recall nominations for those positions for which nominations were not received.

Therefore, under section 482 of the *Industrial Relations Act 1999*, I am making arrangements for the conduct of the election of the above named positions of office by the Electoral Commission of Queensland with the exception of 1 position of Committee Member.

Dated this twentieth day of April, 2000.

E. EWALD
Industrial Registrar.

Released: 20 April 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 474 – approval for amendment to eligibility rule –
s. 427 – approval to change list of callings

Queensland Independent Education Union of Employees (No. U34 of 1999 and U35 of 1999)

VICE PRESIDENT LINNANE

17 April 2000

Applications to amend eligibility rule and alter callings – applications granted

DECISION

These are two applications by the Queensland Independent Education Union of Employees (QIEU). There is an application to alter its list of callings (U34 of 1999) and an application to amend its eligibility rule (U35 of 1999). The applications were made pursuant to the *Industrial Relations Act 1999*.

Objections were filed in U34 of 1999 by The Australian Workers' Union of Employees, Queensland and The Queensland Public Sector Union of Employees on 20 December, 1999; The Electrical Trades Union of Employees of Australia, Queensland Branch on 24 December, 1999 and the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees on 7 January, 2000. The same organisations filed objections on the same dates in U35 of 1999, with the exception of the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees from whom no objection was received.

Negotiations between the Applicant and the Objectors have resolved those objections. Exhibit 1 in the proceedings is a Deed of Agreement between the Applicant and the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees, dated 24 March, 2000, pursuant to which that objector withdrew its objection. Exhibit 2 is an agreement in similar form entered into on the same date between the Applicant and the Queensland Public Sector Union of Employees, pursuant to which the latter withdrew their objection. Exhibit 5 marks correspondence between the Applicant and The Electrical Trades Union of Employees of Australia, Queensland Branch containing an undertaking by the Applicant in relation to its eligibility. Exhibit 6 identifies correspondence passing between the Applicant and The Australian Workers' Union of Employees, Queensland outlining the basis upon which that objector would withdraw their objection. It should be noted that Exhibits 4 and 5 contain correspondence passing between the Applicant and the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees, withdrawing an objection to the Application which does not appear to have been filed in the Registry.

As there is no outstanding objection and no material before me on which I could conclude that those who will become eligible to join the Queensland Independent Education Union of Employees, as a result of the alteration, might conveniently belong to an existing registered organisation, I am satisfied that the requirements of s. 474(1) have been met.

Further I have no evidence before me that would cause me to refuse to approve the amendment to the eligibility rule under s. 474(3) of the Act.

On the material before me the amendment complies with the provisions of the *Industrial Relations Act 1999*, the *Industrial Organisations Regulation 1997*, and the *Industrial Court Rules 1990*. In those circumstances, I approve the amendment to the eligibility rule of the Applicant which is found in Schedule 1 to the Application in U35 of 1999, with the addition of the following words at the end of each of subclauses 3(a)(vii)A, 3(a)(vii)B and 3(a)(vii)C, "and excluding persons employed outside the Southern Division, Eastern District and who are eligible for membership of The Australian Workers' Union of Employees, Queensland."

The proposed change to the Applicant's list of callings flows from the amendment to its eligibility rule. As there is no outstanding objection to the proposed amendment I order the change to the Applicant's list of callings which is reflected in Schedule 1 to the Application in U34 of 1999, with the addition of the following words at the end of each of the callings listed in paragraphs (7) and (8), "and excluding persons employed outside the Southern Division, Eastern District and who are eligible for membership of The Australian Workers' Union of Employees, Queensland."

Order Accordingly.

D.M. LINNANE, Vice President.

Released: 4 May 2000

Appearances:-

Mr T.P. Burke and later Mr J. Spriggs, for the Queensland Independent Education Union of Employees.

Mr R.J. Neil and later Mr A. Doodney, for The Electrical Trades Union of Employees of Australia, Queensland Branch.

Mr M.A. Brady and later Ms K. Parkin, for the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees.

Mr J. Merrell for The Queensland Public Sector Union of Employees.

Mr D. D'Arcy for The Australian Workers' Union of Employees, Queensland.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Paul Kampouroglou AND QEII Sports Club Limited (No. B1348 of 1999)

VICE PRESIDENT LINNANE

2 May 2000

Application to strike out – issue whether applicant employed pursuant to Federal Award – application dismissed

DECISION

This is an application by QEII Sports Club Ltd ACN 058 108 062 (the Respondent to a Dismissal Application brought by Paul Kampouroglou) to have the Dismissal Application struck out on the basis that Mr Kampouroglou (Applicant) was employed pursuant to an award of the Australian Industrial Relations Commission. Consequently it was contended that the Australian Industrial Relations Commission was the appropriate jurisdiction for the Applicant to pursue his Dismissal application.

Mr Kampouroglou was employed as the Operations Manager of the Respondent. As at the date of termination of his employment, Mr Kampouroglou was in receipt of a gross salary of \$45,000.00 per annum. Whilst I was not provided with Mr Kampouroglou's letter of appointment I was provided with correspondence from the Respondent detailing certain conditions of his employment dated 1 December, 1998. In that correspondence Mr Kampouroglou was informed that as Operations Manager he would continue to have primary responsibility for the Respondent's Catering Department.

The Liquor and Accommodation Industry – Licensed Clubs – Managers and Secretaries – Award 1998 (the Award) is an award of the Australian Industrial Relations Commission. Clause 4 of the Award relevantly provides as follows:-

"This Award binds:

- 4.1 The Club Managers' Association, Australia and its members; and
- 4.2 The Registered and Licensed Clubs' Association of Queensland, the Licensed Clubs Association of Victoria and its members in respect of persons who are employees as defined in clause 5.6 whether members of the Club Managers Association, Australia or not; and
- 4.3 The clubs named in Schedule A of this award, being clubs licensed under the provisions of the individual State legislation governing liquor and gaming control as it applies within the State of operation, in respect of persons who are employees as defined in clause 5.6 whether members of the Club Managers' Association, Australia or not.

4.4 Exemptions

This award does not apply to:

- 4.4.1 Clubs' Honorary Secretaries.
- 4.4.2 Clubs with a gross annual revenue of less than \$500, 000. Gross annual revenue means gross receipts from bar dining-room areas and other miscellaneous income and net income from poker machines (after payment of turn over tax) less any liquor licence fee paid...".

QEII Sports Club Limited is listed as a Respondent to the Award: see Schedule A. Clause 4.3 provides that such clubs as are named in Schedule A are bound by the Award in respect of persons who are employees as defined in clause 5.7 (sic) whether members of the Club Managers' Association, Australia or not. There appears to be an error in the printing of the Award for it is clause 5.6 of the Award that is relevant. Clause 5.6 provides that the term "employee" means any "Secretary/Manager, Secretary, Manager, Assistant Secretary/Manager, Assistant Manager or Trainee Manager". Clearly the Award was meant to cover persons employed in a managerial capacity by clubs listed in Schedule A.

Ms Arnold, counsel for the Applicant, contends that clause 4.3 of the Award binds the Respondent but it does not bind the Applicant or any employee as defined in clause 5.6 of the Award. The submission then is that the provisions of Division 3 of Part VIA of the *Workplace Relations Act 1996* (C'wth) have no application as an award of the Australian Industrial Relations Commission does not bind the Applicant.

Section 170CB of the *Workplace Relations Act 1996* relevantly provides as follows:-

“170CB (1) Subdivision B applies, in so far as it relates to an application to the Commission for relief in relation to the termination of employment of an employee on the ground that that termination was harsh, unjust or unreasonable, if the employee concerned was, before the termination:-
...
(c) a Federal award employee who was employed by a constitutional corporation; or
...”.

Section 170CD of the *Workplace Relations Act 1996* defines “Federal award employee” to mean “an employee any of whose terms and conditions of employment are governed by an award, a certified agreement or an AWA”. The term “award” is defined in s. 4 of the *Workplace Relations Act 1996* to mean “an award or order that has been reduced to writing under subsection 143(1) but does not include an order made by the Commission in a proceeding under Subdivision B of Division 3 of Part VIA.”.

Clearly the Applicant was a Federal award employee as the Award governed certain conditions of his employment. It is clear from a reading of the material facts relied upon in the Dismissal Application that the Applicant asserts that his dismissal was unfair in that it was harsh, unjust or unreasonable.

It was conceded that the Applicant was employed by a constitutional corporation.

It seems to me that whether or not the Award binds the Applicant is irrelevant to a determination as to whether the Applicant’s dismissal from employment is a matter for the Australian Industrial Relations Commission pursuant to Division 3 of Part VIA of the *Workplace Relations Act 1996*. The Australian Industrial Relations Commission’s power to deal with any such application depends upon whether any of the terms and conditions of the employment were governed by an award of the Australian Industrial Relations Commission.

An alternative submission was made by Ms Arnold that the Award had no application to the Applicant’s employment with the Respondent. The basis of the submission was that in Clause 13 of the Award each of the managerial classifications (Level A Manager – Level G Manager) require that the “prescribed standard of training” be completed by the employee. It was submitted that as the Applicant had not completed the “prescribed standard of training” he was not an employee as defined in Clause 5.6 of the Award.

I also reject this submission. There was no evidence before me as to whether or not the Applicant had completed the “prescribed standard of training”. Even if there was such evidence the matter would simply go to a question of whether the employer was in breach of the Award. The Applicant would still be an employee of a constitutional corporation some of whose terms and conditions of employment were governed by an award of the Australian Industrial Relations Commission.

I therefore dismiss the Unfair Dismissal application pursuant to s. 331 of the *Industrial Relations Act 1999* on the basis that further proceedings by the Commission are not necessary or desirable in the public interest.

Order accordingly.

D.M.LINNANE, Vice President.

Appearances:-

Miss C. Arnold, instructed by Ms. K. Torlach of Clayton Utz for the Applicant.

Mr G. Black of G and R Black Industrial Consultants for the Respondent.

Released: 4 May 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Rosey Hagel AND Mercy Aged Care Services/Sisters of Mercy Australia Brisbane Congregation Registered as the Trustees of the Order of the Sisters of Mercy in Queensland (No. B1604 of 1999)

COMMISSIONER FISHER

4 May 2000

Application for Reinstatement – Registered Nurse – Unaccounted PRN medication – “Audit” – Suspension on Full Pay – Various representation – No reasonable explanation provided – Application refused.

DECISION

This is an application by Rosey Hagel for relief from her dismissal from the position of Registered Nurse with Mercy Aged Care Services. Ms Hagel was appointed as a permanent part-time Registered Nurse, Level 1 Year 7 at the Mercy Aged Care Services facility – Emmaus at Nudgee on 9 April 1999. She was dismissed on 9 November 1999 for the reason of not properly accounting for certain quantities of medication.

Ms Hagel was principally employed to undertake night duty (9.30pm to 7.30am) and evening duty (2.30pm to 9.45pm). She was responsible for 35 high care residents who are extremely dependant on nursing staff. The majority of these residents are frail and elderly. A large proportion have a degree of dementia or are bed fast. The nursing roster provides for one Registered Nurse to be on duty in the high care area at any time. On night duty the RN is supported by an Assistant in Nursing or an Enrolled Nurse. During night duty this RN is in charge and is the senior staff member on site. This Registered Nurse has overall responsibility for patient care.

The issue of unaccounted medication arose in this way. In or around August 1999 a RN, Bernice O’Brien, told other RN’s, Gillian Higgins, and Margaret Casey, that medication, known as PRN medication was missing. PRN medication is medication ordered by a medical officer to be given to a resident “when necessary”. The RN is responsible for determining when such medication is necessary. The PRN medication is packed separately to

regular medication. The matters came to Ms O'Brien's attention because medication was being removed from the packs out of the order. This was discovered when checking stock to determine the pharmacy order.

Both Ms Higgins and Ms Casey are RN's with considerable experience. Ms Higgins has worked at Emmaus for 27 years while Ms Casey has been employed there for 26 years. Being concerned a few RN's including Ms Higgins and Ms Casey undertook some checks. Their method was to count the PRN medication by writing the number on the back of the pack and then recounting it later. On several occasions the number on the back of the pack did not coincide with the medication in the pack. The RN's involved then decided the Director of Care, Deirdre Moran, should be informed.

In early September 1999 Ms Casey told Ms Moran of the RN's concern over the missing PRN medication. Ms Moran checked a number of medication charts (which are used by RN to record medication given or refused) and confirmed that a quantity of medication was unaccounted for. Because Ms Moran was attending a seminar she asked Ms Casey to monitor the situation in her absence. Ms Casey did this and recorded that PRN medication continued to go missing. She further identified that the medication was going missing on night shifts.

From 7 September 1999 Ms Moran started to undertake random checks of the PRN medication, assisted on occasion by Ms Casey and Ms Higgins. These random checks continued until 20 September 1999. Over this period medication was unaccounted for on 33 occasions. The random checks also indicated that the medication was going missing only on night or evening duty shifts.

The results of the random checks led Ms Moran to determine that a more systematic count of the PRN medication needed to be undertaken for the night and evening shifts. It was limited to five residents. This count, which was referred to in evidence as an audit, was a sincere attempt on the part of Ms Moran to try to fathom what was happening to the PRN medication. She drafted a form which identified the resident, the type of PRN medication and the number of that medication in stock. The form had columns for the date, the number of medications signed for during the shift, the number of medication remaining and the number not accounted for. The RN undertaking the count was required to sign the form. To ensure confidentiality as far as possible the count was limited to Ms Moran, Ms Higgins and Ms Casey. On one occasion another permanent RN undertook the count.

The "audit" was conducted over the period 25 September to 11 October 1999. Ms Moran primarily undertook the medication counts of each resident prior to the commencement of the night or evening shifts. When she was unavailable, a RN was asked to do it. Handwritten records of these counts were kept. The explanation for the different level of formality of the record keeping relates to the involvement of staff other than Ms Moran. The medication of the five residents was counted and formally recorded at the commencement of each morning's day shift which was also the cessation of the night shift.

Ms Moran also asked the RNs involved to check at the morning hand over whether any residents had received medication out of the ordinary. This request was made to provide a double checking mechanism. Ms Moran was not advised that medication had been given but not recorded.

At the end of the two week "audit period" the result was that medication was unaccounted for on 34 occasions. It was also established that the shift upon which the PRN medication was going missing coincided with the shifts undertaken by Rosey Hagel. During the "audit period" of 25 September to 11 October 1999 Ms Hagel performed ten night shifts and one evening shift.

After establishing that PRN medication was going missing on the shift undertaken by Ms Hagel, Ms Moran met with the Executive Director, Peter Jardine, to discuss the matter. They decided to suspend Ms Hagel on full pay pending an investigation.

Ms Moran wrote to Ms Hagel on 12 December 1999 advising of the medication discrepancies, that the discrepancies appeared linked to her rostered shifts and that further investigation of the matters was warranted. The letter also advised Ms Hagel of her suspension because of the potentially serious implications for residents. She was invited to attend a meeting with the Executive Director and Ms Moran on 15 October 1999. She was informed of her right to have a support person or representative attend the meeting.

On receiving the letter Ms Hagel telephoned Ms Moran and began explaining what happened to certain medication. Ms Moran halted her explanations and advised these matters were to be discussed at the scheduled meeting.

In her evidence Ms Hagel claimed Ms Moran denied her the right to a support person or representative. This was rejected by Ms Moran who said she asked whether she intended to be represented and if so, who the representative was to be. Other conflicts also arose in the evidence. On the contested points I accept the evidence of Ms Moran and Mr Jardine in preference to that of Ms Hagel. I found both Ms Moran and Mr Jardine to be truthful witnesses who gave direct accounts of the events. On many issues their evidence could be supported by contemporaneous notes. In contrast I found Ms Hagel on many occasions to be evasive and unable to provide clear accounts of events. While some of this could be attributed to her nervousness, apprehension and inexperience in representing herself in the proceedings, her responses to a number of issues lacked credibility.

Ms Hagel attended the meeting with Ms Moran and Mr Jardine on 15 October 1999 unrepresented. I am satisfied on the evidence of Ms Moran, Mr Jardine and even Ms Hagel herself that she was aware of the purpose of the meeting and that she was being asked to account for the missing medication.

At the meeting Ms Moran explained how the discrepancies had been determined and the outcome of the medication count. The audit was provided to Ms Hagel, the discrepancies identified and various explanations were provided by her. To assist her Ms Hagel requested the resident medication charts and progress notes. Ms Moran left the meeting to collect these. All material sought except the medication chart for Resident 5 which was in use was provided. On receiving these documents Ms Hagel was unable to provide more detailed explanations.

The only explanations provided at that meeting were that she may not have recorded all medications given. In terms of Resident 1, her medication was disposed of one at a time because of discolouration. The medication for Resident 2 had been disposed of one by one because the resident had died. There did not appear to be an explanation for Resident 3. Ms Hagel identified Resident 4 as being one where medication given may not have been recorded. Resident 5 was said to spit out the medication. Ms Hagel said she would crush and destroy the medication but not record it.

In her evidence to the Commission Ms Hagel denied many of the above responses. For example, with respect to Resident 1 and 2 Ms Hagel said she disposed of all medication on the one day, viz 10 October 1999. However, this does not accord with the medication count nor does it reflect nursing practice of returning aged or unwanted medication to the pharmacy. Ms Hagel also alleged Ms Moran made the statement regarding Resident 4.

At the conclusion of the meeting Mr Jardine advised Ms Hagel she would remain suspended on full pay pending further consideration of the matter and that a decision would try to be made early the following week. Ms Hagel wrote to Mr Jardine on 18 October 1999 regarding a further meeting. Mr Jardine telephoned Ms Hagel on receipt of the letter. He advised her it was inappropriate to discuss the matter over the phone and suggested that she obtain representation because of the seriousness of the matter.

Ms Hagel subsequently contacted an Organiser of the Queensland Nurses' Union of Employees (QNU) who arranged to meet with Ms Moran and Mr Jardine on 19 October 1999. On that day Ms Moran explained the situation and showed the audit to the Organiser. A meeting at which Ms Hagel would attend was arranged for the following day.

For reasons not explained to the Commission, Ms Hagel decided not to be represented by the QNU. The meeting for 20 October 1999 was cancelled. Ms Hagel elected instead to be represented by a Solicitor. After a number of false starts a meeting between Ms Hagel, her Solicitor, Mr Jardine and Ms Moran was held on 27 October 1999. Again conflict exists between Ms Hagel and Mr Jardine and Ms Moran as to what occurred at that meeting. I accept the evidence of Mr Jardine and Ms Moran that the purpose of the meeting was to hear further explanations from Ms Hagel. This is a reasonable conclusion given that until this point, Ms Hagel had been able to provide only scant explanations for the missing medication.

The meeting resulted in Ms Hagel being given yet a further opportunity to respond. Ms Hagel's Solicitor requested that the allegations be put in writing and a response would be provided within 24 hours.

Later that day Mr Jardine wrote to Ms Hagel enclosing the results of the medication audit, Ms Hagel's roster, the resident medication charts and a resident identification chart. Clarification of certain matters was sought by Ms Hagel's Solicitor by correspondence of 28 October, 1999. Further information was provided by Mr Jardine on 2 November. When a response had not been received by 9 November 1999 Mr Jardine decided to dismiss Ms Hagel from her employment for the reason of not properly accounting for certain quantities of medication.

A letter requesting further particulars was faxed from Mr Jardine from Ms Hagel's Solicitor on 8 November 1999. I have considered whether Mr Jardine acted too quickly in dismissing Ms Hagel in light of the correspondence which was passing between him and Ms Hagel's Solicitor and the fact further particulars were being sought. As I said earlier, I am satisfied that on 15 October 1999 Ms Hagel was fully aware that she was being asked to account for missing medication. She gave certain explanations. Except for one patient chart which was in use at the time, Ms Hagel was provided with access to all relevant material at that time to assist her in framing her response. After that meeting she was provided with copies of the documents. She was also allowed representation at all times. Further, the Solicitor had indicated on 27 October that a response would be provided within 24 hours of receiving the allegations in writing. This was not done nor was it close to being achieved.

By 9 November 1999 Ms Hagel had been suspended on full pay for close to four weeks. Despite being given several opportunities and all material she had not been able to provide any more detailed or reasonable explanations than she had on 15 October 1999. In hindsight it may have been preferable for Mr Jardine to await the responses provided by the Solicitor, however, I am not satisfied these would have been any more satisfactory as Ms Hagel at the hearing some six months later was still unable to provide any semblance of a reasonable explanation. Accordingly while in retrospect natural justice may have been better served by allowing the formal written response process to take its course I am not persuaded Mr Jardine acted so unfairly on 9 November 1999 to warrant the Commission's intervention.

Ms Hagel took issue with several aspects of the medication audit and the documentation supplied to her. Ms Hagel criticised the audit for not being professionally conducted, that is, not being undertaken simultaneously by two RN's as required for audits of Schedule 8 or dangerous drugs. The PRN medication in question are not Schedule 8 drugs. The audit designed by Ms Moran was reasonable in the circumstances. The count recorded the necessary information and it was signed off by the RN undertaking the count.

During the course of the hearing a couple of errors in the count were identified and that one count was conducted at the start of the morning shift rather than the end of the evening shift. These were conceded by Ms Moran. These errors could have been detected by Ms Hagel while she was still employed given her access to the material but were not. Despite the errors the count still shows a significant quantity of medication (31) was unaccounted for on Ms Hagel's shifts. An error in transcription of one of the medications in the material forwarded to Ms Hagel on 27 October 1999 and repeated in the documents of 2 November 1999 was also acknowledged by Ms Moran and Mr Jardine. Although this caused confusion to Ms Hagel she should have been able to identify that an error had been made as she was aware of the PRN medication given to the particular resident and the medication chart had also been provided. In addition at the two meetings which Ms Hagel attended the correct medication was discussed in connection with this resident. While the error was unhelpful, I am not satisfied Ms Hagel was disadvantaged in the process.

Ms Moran is to be commended, not criticised, for keeping the audit as confidential as possible and to limiting the involvement of RN's in the process to essentially two long serving permanent employees. Had the audit not been so restricted then criticism would have been levelled at Emmaus for not attempting to protect the interests of a Registered Nurse.

Ms Hagel was critical of the number of audit documents. Exhibit 8 (changed only to protect the confidentiality of the Residents names) was disputed by Ms Hagel as being the original audit document and the one shown to her on 15 October 1999. There is simply no evidence to support Ms Hagel's contention but the testimony of the RN's involved and Ms Moran substantiates its authenticity. Ms Hagel complained she received five different audit documents. The evidence revealed Ms Hagel was shown and given the original (exhibit 8) and later documents were summaries of that document.

Ms Hagel also seemed unable to understand that the counts were undertaken at the commencement of the day shift which coincided with her finishing her night shift. She said that on several occasions she was not rostered for duty when the counts were done. For example, she claimed to be off duty on 27 and 30 September and 7 and 11 October 1999 yet she completed a night shift which commenced the previous day and ceased on each of those days specified.

Earlier in this decision I referred to the explanations given by Ms Hagel at the meeting of 15 October 1999 and at the hearing. In her evidence Ms Moran detailed the reasons Ms Hagel's explanations could not be sustained. (paragraphs 35 and 39 of exhibit 7). I do not intend to recite these reasons here. I should note that with respect to Resident 5, upon whom a great deal of time was spent in evidence, Ms Moran's evidence was supported by Ms Higgins, Ms Casey and Ms Williams, a RN called by Ms Hagel. The evidence here is that this Resident does not have any history of refusing the PRN medication in question. Should any refusal of this medication occur, the event ought to be recorded in the progress notes because it would be extraordinary.

Likewise the other explanations are generally implausible and some, such as simply disposing of aged or unwanted medication, would appear to be contrary to standard nursing practice, according to the evidence of the RNs who appeared in this hearing and the evidence of Ms Hagel herself.

Ms Hagel also attempted to explain that medication might have gone missing because other people had access to the medication stores. However, in relation to the medication store on Level 3 where the medication for certain Residents involved in the count was kept, it was Ms Hagel's own evidence that on her shift she had possession of the key and did not give it to other staff during that shift. In such circumstances it is difficult to accept, without further evidence, that other staff could be involved in the medication missing for these Residents.

The medication store on Level 4 where the medication for the remaining residents was kept, is more accessible to other staff but is not accessible to the public. Given the manner in which the medication from this store went missing it is unlikely that other staff were involved.

However it is not for me to determine whether any professional misconduct or professional incompetence was involved. That is for a separate body to determine.

I should also make it plain the employer did not during Ms Hagel's employment nor during the hearing level any allegations about the reasons medication might have gone missing. The employer was simply seeking that Ms Hagel provide a reasonable explanation for the unaccounted medication. That Ms Hagel was unable to do so despite being given a reasonable opportunity and provided with relevant material was the reason for her dismissal.

As an unrepresented litigant Ms Hagel was afforded considerable assistance by the Commission in an endeavour to ensure all relevant material was presented and to ensure that she fully understood the nature of these proceedings and their consequences for her career. To this end, the Commission granted an adjournment sought by the QNU who belatedly appeared, in order that Ms Hagel be fully informed of these matters. Regrettably for Ms Hagel personally, and potentially professionally, Ms Hagel was unable to persuade me that the decision of her employer to dismiss was harsh, unjust or unreasonable.

During the course of the meeting with her Solicitor and also during the hearing, Ms Hagel made claims of discriminatory treatment. In cross-examination it became apparent that the claims were not made on the grounds of race or ethnicity or any other ground provided for in the *Anti-Discrimination Act 1991*. The claim was made on the basis Ms Hagel felt she was being singled out.

The Commission is satisfied that the count was appropriate in the circumstances and its outcome generally reliable. Moreover, the cross referencing of the other staff who worked on the shifts in question to determine whether there was any correlation between the missing medication and staff showed that Ms Hagel was the most likely person responsible.

I dismiss Ms Hagel's claims of discrimination generally and any claim of dismissal for an invalid reason under s. 73(2)(k) of the *Industrial Relations Act 1999*.

The application is refused.

Order accordingly.

G.K. FISHER, Commissioner.

Released: 4 May 2000

Appearances:-

Ms R. Hagel appearing on her own behalf and with her Ms R. Steiner.

Mr S. Ross of the Queensland Nurses' Union of Employees for Ms. R. Hagel.

Mr A. Aspromourgos of Livingstones (Australia) and with him Ms D. Moran on behalf of the respondent.