



# The Queensland Government Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$297

ISSN 0155-9362

Vol. 164

FRIDAY, 16 JUNE, 2000

No. 7

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
CA130/00	Total Contract Services Pty Ltd - Certified Agreement	26/4/00	CA351/96
CA131/00	Klaus Ceramic Tiling Pty Ltd - Certified Agreement	26/4/00	CA134/97
CA135/00	Mal Horsfall t/a Maland Commercial - Certified Agreement	26/4/00	
CA138/00	Wadsworth Constructions Pty Ltd t/a Specialty Contractors – Certified Agreement	26/4/00	CA107/97
CA139/00	Aussie Joinery Company Pty Ltd - Certified Agreement	26/4/00	CA213/99
CA140/00	DJ & BA Jeffs Pty Ltd - Certified Agreement	26/4/00	CA154/97
CA141/00	Vealstruct Pty Ltd - Certified Agreement	26/4/00	CA165/97
CA142/00	Lucchese Holdings Pty Ltd t/a B & W Aluminium - Certified Agreement	26/4/00	
CA143/00	Coastline Walls & Ceilings Pty Ltd - Certified Agreement	26/4/00	CA146/97
CA144/00	Interior Fitouts Pty. Ltd. - Certified Agreement	26/4/00	CA304/95
CA145/00	LD & KM Rigby Pty Ltd t/a Shop Adjusters - Certified Agreement	26/4/00	
CA147/00	Tasklake Pty Ltd - Certified Agreement	26/4/00	CA302/95
CA148/00	Custom Design Shopfitting Pty Ltd - Certified Agreement	26/4/00	CA210/96
CA149/00	Accent BW Pty Ltd t/a Accent Design - Certified Agreement	26/4/00	CA131/97
CA150/00	Ideal Interior Linings Pty Ltd - Certified Agreement	26/4/00	
CA151/00	Bell Design & Group Pty Ltd t/a Bell Design & Shopfitting- Certified Agreement	26/4/00	CA346/99
CA152/00	Karscliff Pty Ltd t/a Ultimate Project Technology - Certified Agreement	26/4/00	
CA153/00	United Marble Products (Qld) Pty Ltd - Certified Agreement	26/4/00	CA308/99

No/s	Title	Date certified	Cancelling
CA154/00	K & U Formwork Pty Ltd - Certified Agreement	26/4/00	CA92/97
CA155/00	Foamtec Services Pty Ltd - Certified Agreement	26/4/00	
CA156/00	Seca Cranes Pty Ltd - Certified Agreement	26/4/00	CA183/97
CA157/00	BFB Scaffolding Pty Ltd - Certified Agreement	26/4/00	
CA158/00	Reflections Painting Services - Certified Agreement	26/4/00	CA371/99
CA159/00	Shepherd Contracting Pty Ltd - Certified Agreement	26/4/00	CA117/97
CA160/00	Steelfixing Australia Pty Ltd - Certified Agreement	26/4/00	CA163/97
CA161/00	Lindores Rigging Pty Ltd - Certified Agreement	26/4/00	CA199/97
CA162/00	Atlantic Contractors Pty Ltd - Certified Agreement	26/4/00	
CA163/00	Talbrace Pty Ltd - Certified Agreement	26/4/00	CA119/97
CA164/00	QR Concrete Pty Ltd - Certified Agreement	26/4/00	CA73/97
CA165/00	Lenco Pty Ltd - Certified Agreement	26/4/00	CA240/97
CA166/00	Cascade Australia (Qld) Pty Ltd T/A Allstate Robina Contracting Certified Agreement	26/4/00	CA219/95 -
CA167/00	Northside Demolitions Pty Ltd - Certified Agreement	26/4/00	CA153/97
CA197/00	Alan & Kerry Maynard t/a A & K Onsite Joinery – Certified Agreement	22/5/00	CA94/99
CA198/00	Bogart Enterprises Pty Ltd t/a Shopfits Etc – Certified Agreement	22/5/00	
CA199/00	Heinrich Constructions Pty Ltd – Certified Agreement	22/5/00	
CA200/00	Advance Bricklaying Pty Ltd – Certified Agreement	22/5/00	CA139/97
CA201/00	PJ & CE O'Leary t/a O'Leary Formwork – Certified Agreement	22/5/00	CA268/97
CA202/00	Priest & Co Bricklayers Pty Ltd – Certified Agreement	22/5/00	CA227/97
CA203/00	Southgate Formwork Pty Ltd – Certified Agreement	22/5/00	CA212/97
CA204/00	Demco Constructions Pty Ltd – Certified Agreement	22/5/00	
CA205/00	Ventura Quality Painters Pty Ltd – Certified Agreement	22/5/00	CA105/96
CA206/00	Formrite (Qld) Pty Ltd – Certified Agreement	22/5/00	CA540/99
CA133/00	Fast Food Industry Award - State (Excluding South East Queensland) - Mackay Kebab House - Certified Agreement 2000	25/5/00	CA329/97
CA170/00	Bundaberg Bag Company - Certified Agreement	25/5/00	CA5/93
CA185/00	Centacare - Bribe Community Options Project and Waminda Respite Centre - Certified Agreement 2000	25/5/00	
CA207/00	Seisia Island Council Enterprises - Certified Agreement 2000	25/5/00	
CA215/00	Bartter Enterprises - Ipswich Processing and Clerical- Certified Agreement 2000	25/5/00	
CA225/00	Joyce Foam Products Australia Limited - AWU- Certified Agreement 2000	25/5/00	CA628/99
CA587/99	Centacare - South West Brisbane Community Options/Connections- Certified Agreement 1999	26/5/00	
CA98/00	Receiving, Assessment, Placement and Therapy Program - Certified Agreement 2000	26/5/00	
CA228/00	Jase (Queensland) Pty Ltd - Certified Agreement	31/5/00	CA182/99
CA229/00	Bastemeyer Group Pty Ltd t/a Bastmeyers - Certified Agreement	31/5/00	CA481/97
CA230/00	AR Glover t/a Glover Constructions - Certified Agreement	31/5/00	
CA231/00	Superior Walls & Ceilings Pty Ltd - Certified Agreement	31/5/00	CA392/99
CA232/00	La Mex Pty Ltd - Certified Agreement	31/5/00	CA23/96
CA237/00	NRNT Pty Ltd T/A AAA Quality Concrete Pumping - Certified Agreement	31/5/00	

No/s	Title	Date certified	Cancelling
CA238/00	Beenleigh Steel Fabrications Pty Ltd - Certified Agreement	31/5/00	CA259/97
CA239/00	Jewelblade Pty Ltd T/A FTM Reinforcing - Certified Agreement	31/5/00	
CA240/00	Surround Scaffold Pty Ltd - Certified Agreement	31/5/00	
CA241/00	Window Wipers - Certified Agreement	31/5/00	
CA242/00	Rodney & Terry Dillon T/A Dillon's Scaffolding - Certified Agreement	31/5/00	
CA243/00	A True Style Tiling Pty Ltd - Certified Agreement	31/5/00	
CA244/00	Clonmel Pty Ltd T/A Remo Concrete - Certified Agreement	31/5/00	CA76/97
CA221/00	Boral Timber (Allen Taylor And Company Limited Eidsvold Mill) - Certified Agreement 2000	5/6/00	CA774/97
CA222/00	Boral Timber (Allen Taylor And Company Limited Cooroy Board Plant) - Certified Agreement 2000	5/6/00	CA772/97
CA223/00	Boral Timber (Allen Taylor And Company Limited Nandroya Mill) - Certified Agreement 2000	5/6/00	CA771/97
CA224/00	Boral Timber (Allen Taylor And Company Limited Theodore Mill) - Certified Agreement 2000	5/6/00	CA773/97

**Correction**

CA472/99	Tile-it Pty Ltd - Certified Agreement	29/9/99	CA401/95
----------	---------------------------------------	---------	----------

E. EWALD  
Industrial Registrar

#####

## INDUSTRIAL COURT OF QUEENSLAND

*WorkCover Queensland Act 1996* – s. 509 – appeal against decision of industrial magistrate

**Cesar Montoya AND WorkCover Queensland (No. C73 of 1999)**

PRESIDENT HALL

8 June 2000

## DECISION

At all material times the appellant has suffered from a degenerative spinal condition. Prior to 24 July 1998 the condition was asymptomatic. On that date, whilst using a small shovel, the appellant aggravated the condition. Henceforth, his back was painful. He ceased work and made a claim under the *WorkCover Queensland Act 1996*. The claim was allowed under s. 34(1) as enlarged by s. 34(3)(b). Payments ceased on and after 7 September 1998. They ceased because WorkCover Queensland formed the view that the injury resulting from the incident of 24 July 1998 had run its course.

The appellant sought redress in the Industrial Magistrate's Court. He was unsuccessful. This is one of those cases in which it is convenient to reproduce the passages in the Industrial Magistrate's decision which are now complained of –

“Whilst the medical evidence suggests the onset of these symptoms without the trauma of 24 July 1998 may not have occurred for years, the thrust of the evidence of Dr Scott-Young and Dr Parkington is that the affect of the injury at work on 24 July 1998, ceased as at 7 September 1998. Whilst Dr Boyce does not subscribe to that view, he did not, in my appreciation of his evidence, neither in the written report or orally, state, ‘whether the employment was the major significant factor’.

Dr Boyce does, in his report of 12 August 1999, state that the applicant has a 15 per cent impairment of which he describes one third of the changes to work related problems. In this context, I understand Dr Boyce not to be attributing employment as the major significant factor in the applicant's condition as at 12 August 1999.

My view of the medical evidence is that it preponderates against the proposition that the applicant's condition after 7 September 1998 was the affect or result of the event of 24 July 1998.”.

The final paragraph is plainly wrong. The correct inquiry is not whether it could be said that the major significant cause of the appellant's overall condition on 7 September 1998 was the incident of 24 July 1998. The issue was whether the incident of 24 July 1998 was the major significant factor causing the aggravation, ie the symptoms, on 7 September 1998.

On any fair perusal of the transcript His Worship has also misapprehended the medical evidence. Doctors Scott-Young and Parkington did not give evidence that the effect of the injury of 24 July 1998 had ceased by 7 September 1998. Their evidence was that but for the underlying degenerative condition the injury might have been expected to heal within 6 weeks. They also gave evidence that it was unlikely that the appellant's degenerative condition would have become symptomatic for some years. It is not to the point that Dr Boyce does not swear to the fact that the incident of 24 July 1998 was “the major significant factor”. Perhaps Dr Boyce has been criticised for swearing to the fact on previous occasions. The critical issue is whether one can infer from Dr Boyce's evidence that the incident of 24 July 1998 was still the major significant cause of the pain. Of particular relevance to that issue is the evidence of Dr Boyce that the symptoms, but for the incident, might not have developed for a very considerable number of years.

I do not seek to say that once a claim in respect of the aggravation of a degenerative back condition has been allowed, payments may not be ceased under s. 195 until WorkCover Queensland has evidence that the underlying degenerative condition has advanced so far as to be productive of the symptoms. The onus of proof must not be reversed. However, in the circumstances of this case, there was no evidence that it was likely that the underlying degenerative condition would have become symptomatic inside some years. There was evidence of a traumatic event capable of producing the symptoms by way of aggravation of the underlying condition which event proximate in time to the date of reassessment of the appellant's condition. It seems to me that the Industrial Magistrate should have found on the balance of probabilities that cessation of payments was premature and should have allowed the appellant's claim.

The appeal is allowed.

The appellant is to have his costs of and incidental to the appeal. In the event that the parties are unable to agree on the quantum of costs, they have liberty to apply.

Dated this eighth day of June, 2000.

D.R. HALL, President.

Released: 8 June 2000

*Appearances:-*

Mr D. Reid instructed by Murphy Schmidt, Solicitors for the appellant.

Mr G. Jones instructed by WorkCover Queensland for the respondent.

#####

#### INDUSTRIAL COURT OF QUEENSLAND

*WorkCover Queensland Act 1996* – s. 509 – appeal against decision of industrial magistrate

#### **Donald James Spence AND WorkCover Queensland (No. C11 of 2000)**

PRESIDENT HALL

8 June 2000

#### DECISION

Both before the Industrial Magistrate and on the appeal to this Court the matter has been conducted on the basis that the appellant suffers from a psychiatric condition with features of both anxiety and depression. What was an issue before the Industrial Magistrate and on the appeal was whether the appellant had suffered an injury within the meaning of the *WorkCover Queensland Act 1996*. At all material times to bring his ailment within the concept of "injury" at s. 34 of the *WorkCover Queensland Act 1996* it was necessary for the appellant, *inter alia*, to show that the employment was the major significant factor causing the injury. To do that the appellant relied on the evidence of certain medical witnesses and in particular on the evidence of Dr Peter Mulholland, a Brisbane based psychiatrist. Great significance is attached to the following passage in the report of Dr Mulholland:-

"From my lengthy discussions with him it appears as though the most important issues were to do with his being continually on call. What is important in this aspect is not so much the number of calls that actually occur but simply the fact that the individual is chronically on call and is likely to be called out at any time. This, in itself, can have a powerful stressful effect on the individual. He says that he was on call non stop for 7 years and if this is the case then that, of itself, would act as a significant psychosocial stressor which, when associated with other work issues, could easily result in psychological decompensation." (emphasis added)

His Worship did not act on that evidence. Each of Peter Robert Bailey, the appellant's supervisor when he was at work, and Jeffrey Edward Grosskreutz, a friend, gave evidence. It was Mr Grosskreutz's evidence that the appellant had spoken to him about marital difficulties which he was experiencing and had sought a part-time position because his (the appellant's) wife did not want him to go to work. The appellant had not complained of stress at work or of the difficulties caused by constantly being on call. Mr Bailey said that the appellant had not complained about being constantly on call and had not given any indication that he was finding his work or his work environment stressful. His Worship expressly found that each of those witnesses were credible and reliable, and it was their evidence which caused His Worship to reject the evidence of Dr Mulholland. His Worship was of the view, and I agree with him, that it was inherently improbable that a person advancing the claims advanced by the appellant would not have mentioned to a friend from whom he was seeking part-time work that his work and/or the circumstance of being constantly on call was causing him stress, or given any indication that he was stressed. In those circumstances, the Industrial Magistrate was perfectly entitled to refuse to accept the appellant's version as reliable. In any event, the Industrial Magistrate had the advantage of hearing and observing the appellant. Given that the Industrial Magistrate had earlier (rightly) found that Dr Mulholland's opinion was based on matters related to him by the appellant, it was inevitable that His Worship would reject the claim.

Mr Farrell of counsel who appears for the respondent contends, with some force, that the decision may be defended on the alternative basis that Dr Mulholland had admitted in cross-examination that he had assumed that the work stress had caused the disintegration of the appellant's marriage and the alcohol problems, and that in consequence the stress relating from the marriage breakup and the alcohol problems could be attributed to the employment. The respondent is, of course, entitled to defend the decision on any reasonable basis, but given the view which I have taken of the Industrial Magistrate's decision, I do not find it necessary to pursue this matter further.

The appeal is dismissed. The appellant is to pay the costs of the respondent of and incidental to the appeal, taxed as costs are taxed in the Supreme Court of Queensland.

Dated this eighth day of June, 2000.

D.R. HALL, President.

Released: 8 June 2000

*Appearances:-*

Mr D. J. Kelly instructed by Barwicks Wisemoulds, Solicitors for the appellant.

Mr J. D. Farrell instructed by WorkCover Queensland for the respondent.

INDUSTRIAL COURT OF QUEENSLAND

Workers' Compensation Act 1990 – s. 6.7 – appeal against decision of industrial magistrate

Peter Arthur Casper AND WorkCover Queensland (No C4 of 2000)

PRESIDENT HALL

8 June 2000

DECISION

The issue, both before the Industrial Magistrate and before this Court, is whether the appellant is a "worker" for the purposes of the Workers' Compensation Act 1990. The Industrial Magistrate held that he was not a "worker" because he had not entered into a contract of employment with the alleged employer, viz Budbay Pty Ltd. His Worship took that view because he held that there was no mutuality of obligation and no intention to create legal relations.

On the appeal to this Court it has been accepted that the appellant cannot be held to be a "worker", if he was not a party to a contract of employment. It has been accepted also that to establish a contract of employment the appellant had to establish a mutuality of obligation and an intention by the parties to be legally bound.

The appeal was pleaded on the ground that there had been an error of law. There was no error of law. His Worship stated every legal principle with precision and accuracy and referred to every relevant reported decision. There is no basis for asserting that the decision is, on the facts, so manifestly unjust as to compel the conclusion that there has been an unidentifiable error of law.

The submissions were rather different. The appeal proceeded as if it was an appeal by way of a rehearing. I think that it follows from s. 6.7(2) of the Workers' Compensation Act 1990 that the appeal was in truth an appeal by way of a rehearing, and I have dealt with the matter on that basis.

The appellant was interested in increasing his logable hours in the hope of gaining employment as a commercial pilot. He approached Mr McVinish of Budbay Pty Ltd who provided the planes and the pilots used by the Ramblers Parachuting Club at Toogoolawah in the Brisbane Valley. He sought the opportunity, without reward, to fly those planes at the weekend in order to get his hours up. The Industrial Magistrate held:

"I find the arrangement was that he volunteered to make himself available every second Sunday in the hope of getting a flight and getting some hours up. There was no obligation to fly every second Sunday, it was only that if he wanted to fly, to turn up, and he might get a flight. There was no requirement to do anything, as other pilots were available including Allan McVinish. If he wanted the opportunity to fly and increase his flying hours he had to be there and sometimes the opportunity presented itself and sometimes it didn't."

On His Worship's finding that the appellant had no obligation to attend at the site on Saturday and His Worship's finding that Budbay Pty Ltd had no obligation to allow him to fly any of its planes, that conclusion that there was no mutuality of obligation and no intent to create legal relations is inevitable. It must be remembered that Warren v Coombes (1979) 142 CLR 521 at 551 per Gibbs ACJ, Jacobs and Murphy JJ, does no more than allow an appellate Court to substitute an inference drawn from facts which are undisputed or which, having been disputed, are established by the findings by the Court of first instance.

Much has been made of the very significant measure of control which Mr McVinish exercised over the appellant's activities in flying the aircraft. Whilst the presence of control (or more accurately the right to exercise control) is critical to characterisation of a contract as a contract of employment, the existence of control is not necessarily evidence that a contract of employment exists. It seems to me that in this case the control that was exercised was the sort of control that the alter ego of the proprietor of the aeroplane might have been expected to exercise, in order to protect the aeroplane and discharge the obligation to the parachutists who were flying in it.

In all the circumstances I dismiss the appeal. I have been asked to deal with the matter of costs on the basis that the relevant power is that of s. 6.7(3) of the Workers' Compensation Act 1990. Although that provision refers to costs on appeal being "in the discretion of the Industrial Court" costs under the provision were traditionally awarded on the basis that costs follow the event. Doubtless a statutory discretion cannot be given up to established practice, but the justification for withholding the grant of costs developed in this case, viz that there was no authority directly in point, seems to me to be quite insubstantial. I order that the appellant pay the respondent's costs of and incidental to the appeal. I am told that the parties can agree on the quantum of costs. Lest that expectation prove incorrect, I reserve the matter of assessment of costs.

Dated this eighth day of June, 2000.

D.R. HALL, President.

Appearances:-
Mr D. P. O'Gorman instructed by Quinlan Miller and Treston, Solicitors for the appellant.
Mr G. Jones of Counsel instructed by WorkCover Queensland for the respondent.

Released: 8 June 2000

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Workplace Relations Act 1997 – s.225 – application for costs

Ian Douglas Warry AND Speedy Corporation Pty Ltd (No. B1407 of 1999)

COMMISSIONER BLADES

1 June 2000

DECISION

Unfair dismissal application – Extension of time – Application dismissed – Application for costs – Section 225 of the Workplace Relations Act 1997 – Applicant lacking bona fides – Application vexatious – Costs awarded.

In an ex tempore decision on 22 March, 2000 (163 QGIG 441-3) the Commission, as presently constituted, dismissed an application by Ian Douglas Warry for an extension of time within which to file his unfair dismissal application. The application was dealt with under s. 218 of the Workplace
B:\GAZETTES\INDUSTRIAL\2000\06 JUNE 2000\16-6-00\31300-C.DOC31300-c.doc

*Relations Act 1997* (the Act) being the Act which applied when the dismissal was affected. The respondent now makes an application for costs pursuant to s. 225 of that Act. In his response to that application, Mr Warry himself seeks an order for costs based upon the respondent's failure to appear at the initial conciliation conference set for 1 November, 1999.

The application for costs by the respondent is based upon the following statement in the decision rejecting the extension of time application:

*"... I am further of the view that because of the late application, raised only after a defence was lodged to the civil proceeding that his actions in lodging this application lack bona fides, that there is no acceptable explanation for the delay and that the prejudice to the respondent would be considerable."*

Section 225 of the Act provided:-

*"(1) 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."*

The application for costs is contested on the following basis:-

*"As the Commissioner ruled only on the matter as to the application for extension of time, no consideration was given as to the merits of the case before the commission.*

*The commissioners view that the late application was lodged only after a defence was lodged to the civil proceedings is both erroneous and flawed inso (sic) much as no consideration was given to any evidence procured at the conference before Commissioner Baldwin on the 24.11.99. For the Commission to be satisfied that subsection (a) of section 225 has occurred then all relevant evidence as to the merits of the case would have to be examined."*

As to whether the merits need to be examined, I need go no further than to refer to the following statement of Hall CC (as he then was) in *Boyter v. Tayco Pty Ltd* (1998) 157 QGIG 199:

*"... I consider s. 225(1) to be the relevant head of power where an interlocutory application is made in the course of proceedings in respect of an unlawful dismissal."*

What was dealt with in that case was an apparent refusal by one party to abide by the terms of a settlement entered into at a conciliation conference. That was an interlocutory proceeding, the same as the application for an extension of time is an interlocutory proceeding. Moreover, in *Ainsworth v. Carpentaria Gold Pty Ltd* (1998) 157 QGIG 93, the Chief Commissioner ruled that, after the applicant had failed to appear at the extension of time hearing, he would award costs because "I find it difficult to think of a clearer case of vexation". Moreover, the subparagraph in s. 225 provides for an application made "frivolously, vexatiously or without reasonable cause". Thus an application made "with reasonable cause" could still be made "frivolously or vexatiously". It is clear that a matter does not have to be heard "on the merits" before the provisions of s. 225(1)(a) could apply.

The question is whether the dismissal application was made vexatiously. The evidence revealed that the applicant had no interest in an unfair dismissal claim. At all times, he pursued a claim for outstanding wages and allowances. The applicant was dismissed on 4.2.99 and on 20.7.99 sued the respondent in the Holland Park Magistrates Court for those monies. A defence was lodged by the respondent on 18.8.99. It was only then that he considered the reinstatement application which was eventually filed on 12.10.99. What occurred at the conference held before Commissioner Baldwin on 24.11.99 is of no relevance. It is the circumstances existing at the time the application was made that attract relevance.

A "vexatious action" according to the 4<sup>th</sup> edition of *Osborn's Concise Law Dictionary* is a proceeding in which the party bringing it is not acting *bona fide*, and merely wishes to annoy or embarrass his opponent, or which is not calculated to lead to any practical result. The term "*bona fide*" is defined to mean "In good faith, honestly, without fraud, collusion or participating in wrong-doing."

I have already stated that the applicant lacked *bona fides* in lodging the application. Had it been an honest attempt at litigating an unfair dismissal claim, it would have been lodged much sooner than it was. The fact that it was lodged after the defence was filed to his suite in the Magistrates Court clothed the claim in dishonesty.

Something that is without *bona fides* has been held to be vexatious. In *Ketter v. Mijan Pty Ltd* (1997) 154 QGIG 362 Ambrose Acting President, said:-

*"Upon the facts of this case the application could properly be called vexatious if it was one which on its face a reasonable person would probably treat as not being bona fide."*

There is also a statement by North J, dealing with the meaning of "vexatiously" in the context of s. 347 of the *Workplace Relations Act 1996 (Federal)* in *Nilsen v. Loyal Orange Trust* (unreported IRCA Dec 267/97 that:-

*"The next question is whether the proceeding was instituted vexatiously. This looks to the motive of the applicant in instituting the proceeding. It is an alternative ground to the ground based on a lack of reasonable cause. It therefore may apply where there is a reasonable basis for instituting the proceeding. This context requires the concept to be narrowly construed. A proceeding will be instituted vexatiously where the predominant purpose in instituting the proceeding is to harass or embarrass the other party, or to gain a collateral advantage . . . ."*

That is what I see has occurred here. The purpose of instituting the dismissal proceedings could only have been to gain a collateral advantage or to harass the respondent after the suite in the Magistrates Court was defended. The institution of the proceedings was not done so honestly with a view to seeking reinstatement or compensation in lieu. They were instituted because of the defence raised to the only claim in which the applicant was interested.

I propose to award costs against the applicant.

I note the complaint by the applicant that the respondent failed to appear at the conference before Commissioner Baldwin on 1.11.99. That failure to appear was defended on the basis that the respondent company was not notified. That may well be correct. A perusal of the file relating to this matter reveals that notification of the hearing on 1.11.99 was sent by facsimile to the respondent at 02 9891 6644, the number advised to the Commission by the applicant. A file note on 1.11.99 or 2.11.99 indicates that the number was not that of the respondent and that is confirmed by reference to a letterhead on file. Further fax notifications were sent to a different number. There is therefore an explanation for the non-attendance at that conference.

The costs sought are based on the Magistrates Court Scale G and are alternatively \$3,119.30 or \$2,616.30. I have regard to those scales, particularly to items under "instructions to defend", one-half only of the allowance for "preparing for trial" which includes the conciliation conference on 24.11.99 and "other applications" for the appearance to contest the extension of time proceeding. Because the Further Directions Order required discovery by both parties prior to the hearing of the extension of time application, it is also appropriate that an allowance be made for discovery. There was also a filing fee of \$6.30. The fees claimed of \$2,616.30 appear reasonable.

I order the applicant to pay to the respondent within a period of three months, costs in the sum of \$2,616.30. I order that the applicant's application for costs be dismissed.

B.J.BLADES, Commissioner.

Appearances:-

Mr I.D. Warry on his own behalf.

Ms J.R. Thomson, of Crouch & Lyndon, for the Respondent.

Released: 1 June 2000

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 319 – representation of parties

Malcolm MacDonald AND Mount Isa Mines (B1752 of 1999)

Lindsay Perkins AND Mount Isa Mines (B1761 of 1999)

Warren Kemp AND Mount Isa Mines (B208 of 2000)

COMMISSIONER BROWN

19 May 2000

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 19 May 2000, Commissioner Brown stated:-

"In the matters B1752 of 1999, B1761 of 1999, B208 of 2000, Mount Isa Mines Limited (the respondent) has sought leave to be legally represented. Such leave was opposed by the applicant, The Australian Workers' Union of Employees, Queensland (AWU).

The Industrial Relations Act 1999 at s. 319(2) provides:

'(2) The party or person may be represented by a lawyer if, and only if –

(a) for the proceedings in the court –

(i) the proceedings are for the prosecution of an offence; or

(ii) all parties consent; or

(iii) the court gives leave; or

(b) for proceedings before the commission, other than proceedings under section 278 –

(i) the proceedings relate to a matter under chapter 4; or

(ii) all parties consent; or;'

which is not the case in this instance, or importantly:

'(b) (iii) on application by a party or person, the commission is satisfied, having regard to the matter the proceedings relate to, that there are special circumstances that make it desirable for the party or person to be legal represented; or

(iv) on application by a party or person, and the commission is satisfied the party or person can be adequately represented only by a lawyer.'

Mr Swan for the AWU has argued that none of the circumstances contemplated in s. 319(2)(b)(iii) or (iv) exist and further that the foreseen arguments are of such a nature that the Commission, when considering s. 319(4)(a) to (f), should be satisfied that the respondent could adequately be represented by somebody other than a lawyer.

With respect to s. 319(4)(g) Mr Swan claimed that the cost involved of the lawyers could increase the costs of the proceedings.

Mr Murdoch for the respondent argued the matters involved constituted special circumstances and were complex in nature to the extent that his client could not be adequately represented other than by a lawyer. Mr Murdoch indicated that cross-examination of expert witnesses constituted special circumstances if that cross-examination were to take place by telephone. He claimed that the cross-examination likely to be required would be both complex and technical.

Mr Swan relied upon *Prencipe v Nisselle*, Victorian Supreme Court 137 and the decision of Deputy President Reardon in the matter of *PKIU v Cumberland Press* to support his arguments. Mr Murdoch cited *Le Pierres v Herzfeld*.

Having heard from the parties today and having considered the material in my possession I find that in all three matters the issues likely to be canvassed would appear to be *inter alia* alleged theft, alleged receipt of stolen property, the opinions of a medical specialist, indeed two medical specialists, mitigation of loss and procedural fairness.

I am satisfied that the nature of the evidence to be adduced and the cross-examination of witnesses likely to be required are likely to be of such complexity as to create the special circumstances contemplated in s. 319(2)(b)(iii).



Filed at my office this first day of June, 2000.

E. EWALD  
Industrial Registrar.

Filed date:	1 June, 2000
Notice of Retirement:	Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees