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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
CA601/99	Toowoomba Catholic Education Diocese - Certified Agreement 1999	19/1/00	CA151/96
CA602/99	Mt St Bernard College - Certified Agreement	19/1/00	CA170/96
CA603/99	St Patrick's College - Townsville - Certified Agreement 1999	19/1/00	CA168/96
CA604/99	Rockhampton Catholic Education Diocese - Certified Agreement 1999	19/1/00	CA167/96
CA605/99	Townsville Catholic Education Diocese - Certified Agreement 1999	19/1/00	CA153/96
CA606/99	Cairns Catholic Education Diocese - Certified Agreement 1999	19/1/00	CA150/96
CA608/99	Lutheran Church of Australia Queensland District Clerical Employees - Certified Agreement 1999	19/1/00	CA404/98
CA218/00	Stanthorpe Shire Council - Certified Agreement	6/6/00	CA688/97
CA219/00	Nanango Shire Council - Certified Agreement 2000	6/6/00	CA44/99
CA220/00	CEPU Plumbing Division and Hoslab Systems Queensland Pty Ltd - Certified Agreement 1999-2002	6/6/00	

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

*Industrial Organisations Act 1997 – s. 245 – application for orders under s. 246 for contravention of
Industrial Organisations Act 1997*

**Queensland Nurses' Union of Employees AND Churches of Christ in Queensland t/a Churches of
Christ Care (No. C21 of 1999); and Churches of Christ in Queensland t/a Churches of Christ
Care AND Queensland Nurses' Union of Employees (No. C29 of 1999)**

PRESIDENT HALL

9 June 2000

DECISION

Within the city of Maryborough is an aged care facility known as Fair Haven. In the period immediately prior to the end of March 1999 the facility consisted of certain studio apartments, a hostel and a nursing home. The hostel and the nursing home were contained within the same building. There was but one roof-line. They were separated by a passageway estimated by one witness to be 50 paces in length. Certain shared facilities, eg a staff cloak room, ran along the length of the passageway. For completeness I should add that at the nursing home end of the passageway, there was a short ramp.

Though physically proximate the nursing home and the hostel were conducted as distinct operations. Prior to 1997, it was inevitable that that would be so. Nursing homes were regulated by the *National Health Act 1953 (C'th)*. Only persons requiring a relatively high level of either technical or intensive nursing care were eligible for admission to nursing homes. Hostels were regulated by the *Aged or Disabled Persons Homes Act 1954 (C'th)*. Only relatively independent persons might be admitted to hostels, though it was accepted that post admission a resident's health might so deteriorate that in the end result a person who was not capable of making independent decisions about his/her health and welfare would be resident in a hostel. Under no circumstances were nursing home funds to be expended on hostel services. Under no circumstances were nursing home staff to devote their time to providing care for hostel residents.

Over time, the arguments for maintaining the rigid distinction between hostels and nursing homes lost persuasive force. Merit was seen in permitting aged persons to age-in-place, ie in permitting hostel residents to age in the familiar circumstances of the hostel rather than move to a nursing home once it became clear that they required higher levels of care. Further, with the growth in life expectancy and the number of persons dependent upon a higher level of care, considerable numbers of high-care aged folk remained in hostels because there was no available bed in a nursing home to receive them. Ultimately the *Aged Care Act 1997 (C'th)* was enacted. Henceforth both nursing homes and hostels were regulated and funded pursuant to the same statute. A potential entrant to a hostel or a nursing home is now assessed and classified to determine the level of care required by him/her. The assessment is undertaken pursuant to a set of principles determined by the Minister which are known as the Classification Principles. The more intense or complex the person's care requirements, the higher level of care category in which that person is placed. The principles govern also the type of care or services to be provided to the residents of aged care facilities, whether hostel or nursing home. The type of care or services to be provided, of course, depends upon whether the resident is classified as a high-care or a low-care resident. The standards set by the Quality of Care Principles must be met by a facility to obtain accreditation and maintain funding. In appropriate cases, the principles permit entry of a high-care resident to a low-care facility, permit a resident in deteriorating health to age-in-place in a low-care facility and, once again in an appropriate case (eg high-care partner low-care partner), permit entry of a low-care resident into a high-care facility.

The operator of the Fair Haven aged care facility, viz Churches of Christ in Queensland t/a Churches of Christ Care, saw a window of opportunity in the new funding arrangements. The executive director of Churches of Christ Care, Reverend Donald Edward Stewart, told the Court that he had long been concerned with the "nursing model" of care in the nursing home. He said that he considered it to be hierarchical, controlled by supervision and responsibility, hospital mimicking and concerned with care of the residents' ailments rather than care of the residents. He says the model compared unfavourably with the model of care in the hostel where personal care workers, drawn from a variety of backgrounds and wearing civilian clothes rather than uniforms, had brought a homely and family atmosphere to the facility. Additionally, he saw great merit in permitting a low-care resident to enter the nursing home area to accompany and care for a partner in deteriorating health and in permitting residents to age-in-place. He says that as from the end of March 1999 he took advantage of the opportunity. The facilities were merged. A low-care patient in the hostel whose condition had so deteriorated since entry that a higher level of care was required was permitted to age-in-place. A low-care partner was permitted to enter the nursing home to support a high-care partner. The "nursing care" model was put aside. The enrolled nurses and assistants-in-nursing employed in the former nursing home became aged-care workers. They were formed into teams. There was to be team leader, but the team leader's role, as I understand it, was to facilitate cooperation rather than supervise. Registered nurses would no longer supervise. Like a person such as a podiatrist, they would serve as consultants to the various teams. Staff would work over the whole area of what had previously been a nursing home and a hostel, but which henceforth was to be an integrated facility.

I am satisfied that the changes did not occur. (In those circumstances, it is unnecessary to consider whether, in proceedings such as these, s. 247 of the *Industrial Organisations Act 1997* reverses the onus of proof on issues of fact relating to which industrial instrument applies to a particular engagement.) I have come to that conclusion that the changes did not occur because –

- (1) What was previously the nursing home and what was previously the hostel continued to be separately funded;
- (2) What was previously the nursing home and the hostel continued to hold separate provider numbers;
- (3) The "former" nursing home and the "former" hostel continued to be separately signed until the signage was made an issue in evidence. After the signage had been made an issue the word "nursing" was deleted from the sign saying "Alf Popp Nursing Home" so that the sign read "Alf Popp Home";
- (4) In correspondence with funding authorities the "former" nursing home continues to be referred to as the Alf Popp Nursing Home;
- (5) Those who contend that the nursing home and the hostel are merged, and who studiously avoid those terms, speak of a "high-care facility" and a "low-care facility";
- (6) When a Commonwealth audit team visited the aged-care facility to assess the nursing home, it assessed the original Alf Popp Nursing Home only. No attempt seems to have been made to inform the team of the merger of the facilities;
- (7) On the best view of the evidence only one low-care resident, who is no longer there, has been accommodated in the what was originally the nursing home;

- (8) Residents whose condition deteriorates continue to be moved from the previous hostel to the previous nursing home. Amongst the reasons for those movements is the circumstance that the equipment and aids used in the care of high-care patients continue to be located in what was originally the nursing home, and the circumstance that the design of the hostel is such that in some areas lifters and wheelchairs cannot be used;
- (9) The team leaders were not appointed until December of 1999. One witness (Michael John Shultz), who admittedly left his employment at the aged-care facility earlier this year, gave evidence that his team had held only one meeting and that he had not attended the meeting. Another witness, Ms Bernece Burke gave evidence that her team leader had still not been appointed;
- (10) Staff in the former nursing home have continued to work under the supervision of a registered nurse. Each of the Director of Care and the Care Manager is a registered nurse. Other registered nurses are employed. The burden of the evidence is that the staff do not treat them as consultants, but report to them and are supervised by them as they previously were. It is the evidence of the Director of Care that the tradition of supervising enrolled nurses and assistants-in-nursing is so instilled in registered nurses that it was inevitable that supervision would continue. Certainly, she envisaged that it would and as she is the senior resident officer of Churches of Christ Care, it seems to me that Churches of Christ Care must be fixed with her knowledge and expectation;
- (11) Although permanent staff may work across the "integrated" facility, on any particular roster they will be rostered to work in either what was formerly the nursing home or what was formerly the hostel. (Night staff may be asked to go from the nursing home to the hostel to assist on a special occasion, eg if a resident falls and needs to be lifted.) Permanent part-time staff are similarly treated. Only the casual staff actually work across the facility;
- (12) Holistic care has long since been adopted as part of acceptable nursing practice. The manner in which the residents as distinct from their ailments are cared for in respect of all aspects of their lives, eg physical and emotional, have not changed since March of 1999;
- (13) The job outcomes, not job descriptions, distributed at or about the time of the "changes" lack specificity. No formal training accompanied the "changes". I can understand the argument that those who received the job outcome statements did not need to be told how to achieve the outcomes, eg a satisfactory state of hydration, because they knew how to do it. But implicit in that is acceptance that the staff were going to continue to render care in the same way that they always had.

Looking at the undertaking, the only changes seem to have been that those employed as enrolled nurses or assistants-in-nursing were "re-badged" as aged-care workers, and that some enrolled nurses and all assistants-in-nursing were subjected to a reduction in salary and annual leave entitlements. There seems to be no significant change in the duties of persons previously employed as enrolled nurses or assistants-in-nursing. Both before and after 29 March 1999 those persons continued to assist registered nurses in providing the nursing services particularised at *Quality of Care Principles 1997*, Schedule 1, Part 3, Item 3.8. There was a standard deviation in that enrolled nurses (previously and now) assist registered nurses in the provision of all of those services (whilst previously and now) assistants-in-nursing provide assistance in or about some services only. There are also random deviations, eg Mr Shultz had not provided assistance in or about tracheostomy care because no person requiring such care resided at the nursing home/high-care facility in the time that he was employed there.

It is contended for Churches of Christ Care that at times, all of those services will be rendered to low-care residents, and certainly high-care residents (who have grown in number from 7 to 12) in the former hostel. For the purposes of the argument the assertion may be accepted as correct. That is not the point. The high-care residents in the hostel are at the lower end of the high-care categories. They do not require all or substantially all of the particularised services and, in the case of the low-care residents, reliance on those services is even less. In the former nursing home the 40 beds are occupied by residents at the higher end of the high-care categories. Very many of them require many of the services particularised with regularity. And because of the advanced state of certain of their conditions, greater effort is involved in rendering the services than in the case of residents in the hostel area. Jill Robertson, the Director of Care at the aged care facility acknowledged that "The work is the same, the intensity is different, depending on the type of resident that you are looking after in either area.". She went on to explain that what gives rise to a greater or lesser intensity of work is "the amount of care that is required for that resident".

Churches of Christ Care place great store on the circumstance that under the alleged changes the enrolled nurses and assistants-in-nursing commenced to perform domestic duties. (Under the pre 1997 funding regime enrolled nurses and assistants-in-nursing in nursing homes were not permitted to perform domestic duties.) Granted that domestic duties, serving of meals and gathering up soiled linen, were not allocated to the former enrolled nurses and assistants-in-nursing until some time after 29 March 1999 and, more importantly, after these proceedings (which relate to conduct engaged in prior to the allocation) were commenced, I doubt the relevance of the evidence going to domestic duties. In any event, even after domestic duties had been allocated to the former enrolled nurses and assistants-in-nursing, I consider them to have been performing substantially the same work.

As an example of the type of work which the former assistants-in-nursing performed at the Alf Popp Nursing Home prior to 29 March 1999 and the type of work with the assistants-in-nursing who became aged care workers performed in the high-care facility after 29 March 1999, I attach as Appendix A paragraphs 27 to 53 of the first affidavit of Catherine Jessie Proctor. (I acknowledge that the work performed by those who were previously employed as enrolled nurses at the Alf Popp Nursing Home was (and is) different, but there is no great advantage in the repetition of evidence. There is some advantage in fleshing out and giving flavour to what are otherwise perhaps bland findings of fact.) Each of the persons who were previously employed as enrolled nurses in the Alf Popp Nursing Home and each of the persons who were previously employed as assistants-in-nursing in the Alf Popp Nursing Home performed the same duties before and after 29 March 1999. The domestic duties were additional duties. The content of the duty of "serving meals" needs to be appreciated. The enrolled nurses and the assistants-in-nursing actually fed the residents in the high-care facility prior to the allocation of domestic duties. They continued to do so after the allocation of domestic duties. Neither before nor after 29 March 1999 did/do those who were previously employed as enrolled nurses and assistants-in-nursing cook the meals. What happened was that after the allocation of domestic duties they commenced to lay the trays and serve the food onto the plates etc on the trays. Although over the course of time each of them fed residents and prepared trays/served food, they did not discharge the same functions contemporaneously. In any given month, those rostered to set trays/serve food were not the persons rostered to feed the residents. There was, of course, the additional duty of washing up, though the state of the evidence leaves me in some uncertainty as to which rostered group performs that task. I note that the quantum of time which those previously employed as enrolled nurses and assistants-in-nursing devote to domestic duties now bears the ratio of one is to three to the duties which they previously performed. However, given the qualitative nature of those other duties, their significance in the care of the residents and the factors previously referred to, I am not satisfied that the change in duties justifies characterisation of the Alf Popp Nursing Home as a hostel rather than a nursing home.

I turn then to the preliminary questions posed by Williams, President on 21 July 1999, viz –

- "a) What was the period during which the Nurses Aged Care Interim Award – State applied to the employees named in these proceedings;
- b) What was the period during which either CA184/98 of CA435/98 applied to the employees named in these proceedings."

It is common ground that CA435/98 may be put aside. It applies to an aged care facility operated by Churches of Christ Care at Hervey Bay. It has no application to the facility at Fair Haven or to any part of it. It is clear also that question (b) is not an appropriate question. CA184/98 relies on the patronage of the *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division*. If that Award has not at any time applied to the engagement to the four named employees at the Alf Popp Nursing Home, then CA184/98 cannot at any time have applied to the four engagements. On the other hand, if the *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division* has at some time applied to the four engagements then, subject to arguments about whether CA184/98 is valid, void or voidable (which arguments have not been heard in these proceedings) CA184/98 will also have applied to the four engagements.

It will I think promote understanding to set forth the application clauses of each of the three awards, viz *The Hospital Nurses' Award – State*, the *Nurses' Aged Care Interim Award – State* and the *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division*.

A. The “*Nurses' Aged Care Interim Award – State*”

“2. This Interim Award shall apply to nursing employees in the private sector (non-governmental) employed in the industry of aged care, including aged care residential facilities, including nursing homes, hostels, retirement villages and aged respite care centres in the State of Queensland:

Provided that this Interim Award shall not apply to employees covered by any other award or industrial agreement or to members of religious orders.”.

The Award classifications for Registered Nurses, Enrolled Nurses and Assistant Nurses as follows:–

“3.(1) Classification of Employees – . . .

(a) ‘Registered Nurse’ shall mean an employee:

(i) registered under the *Nursing Act 1992* as a registered nurse;

(ii) who is subject to the regulations and/or by-laws of the Queensland Nursing Council and who holds a current practicing certificate . . . ;

(f) ‘Enrolled Nurse’ means an employee:

(i) who is enrolled under the *Nursing Act 1992* as an enrolled nurse;

(ii) who is subject to the regulations and/or by-laws of the Queensland Nursing Council who holds an annual licensing certificate as such.

(g) ‘Assistant Nurse’ shall mean an employee, who is solely required to assist in the performance of nursing duties under the supervision of a registered nurse or an enrolled nurse.”.

B. The “*Hospital Nurses' Award – State*”

“1. This Award shall apply to nursing employees for whom provision is made in Clause 4 hereof employed in non-government public hospitals, private hospitals, nursing homes, and retirement hostels and ‘villages’ accommodating the aged or infirm in the State of Queensland . . .

Provided that this Award shall not apply to employees covered by any other award or industrial agreement including the *Nurses' Aged Care Interim Award – State*, and the *Private Hospital Nurses' Award – State* or to members of religious orders.”.

It includes classifications for Registered Nurses, Enrolled Nurses and Assistant Nurses as follows:–

“2. Classifications – . . .

(1) ‘Registered Nurse’ shall mean an employee:

(a) Registered under the *Nursing Act 1992* as a registered nurse; and

(b) Who is subject to the regulations and/or by-laws of the Queensland Nursing Council and who holds a current practicing certificate . . .

(11) ‘Enrolled Nurse’ means an employee:

(a) Who is enrolled under the *Nursing Act 1992* as an enrolled nurse; and

(b) Who is subject to the regulation and/or by-laws of the Nurses registering Authority for Queensland and who holds a current practicing certificate as such.

(12) ‘Assistant Nurse’ shall mean an employee, who is solely required to assist in the performance of nursing duties under the supervision of a registered nurse or an enrolled nurse.

C. The “*Accommodation Award*”

“2. This Award shall apply to all employees, for whom classification and rates of pay are prescribed herein, employed in or in connection with the provision of accommodation for aged persons in hostels, retirement villages, Garden Settlements or any other residential accommodation facility (including clients own home); and short and long term respite and day respite care; and to their employers, and to contractors and/or subcontractors to the said establishments and their employees performing work to which this Award ordinarily is applicable. The Award also applies where care is co-ordinated from a hostel or aged care facility as outlined above.

This Award shall not apply to employees of the Government of Queensland as identified in Part VII of the *Industrial Conciliation and Arbitration Act 1961-1987*.

This Award shall not apply to work covered by the *Hospital Nurses' Award – State*, and the *Private Hospital and Nursing Home Employees Award – State*. . . .”.

The list of classifications includes "Personal Care Attendant".

In short form, the *Hospital Nurses Award – State* applies to nursing employees in nominated classifications in named facilities. The "*Nurses' Aged Care Interim Award*", of which award the "*Hospital Nurses' Award – State*" is the parent, applies to nursing employees in nominated classifications employed in the private sector industry of aged care, in which industry named facilities (including nursing homes) are taken to be included. The "*Accommodation Award*" applies to employees in the specified classifications engaged in named facilities. It is a matter of some significance that the "*Hospital Nurses' Award*" and the "*Nurses' Aged Care Interim Award*" specifically refer to "nursing homes" whilst the "*Accommodation Award*" does not. On any view of it, industrial awards have to be read in the context of the circumstances in which they are intended to operate. Construction is not a barren epistolary exercise. Words must be read in context. The purpose of the awards when made was to regulate employment, *inter alia*, in aged-care facilities funded by the Commonwealth. At the time, as previously explained, the funding arrangements placed nursing home and hostels in different worlds. It would be passing strange to reach the conclusion, as a matter of construction, that of the three Awards the one which applied to the Alf Popp Nursing Home was the one Award which made no reference to nursing homes.

I do not propose to refer yet again to the duties performed by the two named persons previously employed as enrolled nurses, and the two named persons previously employed as assistants-in-nursing. Having perused the definition of "nurse" in the Macquarie Dictionary, the literature about the practice of nursing put in through the witness Marea Vidovich, the definitions contained in the *Aged or Disabled Persons Care Act 1954*, and the *Nursing Homes Assistants Act 1974*, I have come to the conclusion that each of the four named employees has at all times been performing nursing work. Indeed, I do not understand Churches of Christ Care to contend to the contrary. Rather, the submission of Churches of Christ Care is that the duties which the four named employees have performed before and after 29 March 1999 may also be characterised as the duties of a personal care attendant employed in a hostel for aged persons pursuant to the *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division*. I do not accept that submission. Duties are coloured by the context in which they are performed. To visualise a personal care attendant employed pursuant to the *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division* performing the duties which the four named persons have described, one would have to visualise a personal care attendant rendering those caring services exclusively to very high-care residents, subject to the supervision of a registered nurse, in premises which contain the equipment and aids necessary to render the services and which are architecturally designed to facilitate the rendering of care to high-care residents. It seems to me, with respect, that at that point one is visualising a hostel for aged persons which has made the transition from hostel to nursing home.

It is then contended that in any event the two persons who were assistants-in-nursing were beyond the reach of the *Nurses Aged Care Interim Award – State* because they were not solely engaged to perform nursing duties, ie they were engaged to perform domestic duties as well. I adhere to the view which I previously expressed that because the proceedings relate to conduct which occurred well before domestic duties were allocated to the two persons formerly employed as assistants-in-nursing, the evidence about domestic duties is simply irrelevant to the issues in these proceedings. In any event, as I previously found, the domestic duties (time consuming as they were) did not change the essential nature of the work performed by the two persons formerly employed as assistants-in-nursing. Their services were rendered by way of assistance to and under the supervision, in some cases a physical and immediate supervision and in other cases an in-direct supervision by way of a mandatory care plan, or a registered nurse.

It is irrelevant that the Churches of Christ Care "re-badged" the four named employees.

The "yielding" clause of s. 2 of the *Nurses Aged Care Interim Award – State* avails Churches of Christ Care not at all. On the construction of the *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division* adopted above, there is no other award which applied at any time to the four named employees.

Question (a) "What was the period during which the *Nurses Aged Care Interim Award – State* applied to the employees named in these proceedings" should be answered "At all times from the date on which the Award was made until after the conduct complained of in these proceedings.". Question (b) "What was the period during which either CA184/98 or CA435/98 applied to the employees named in these proceedings" should be answered "Neither CA184/98 nor CA435/98 has applied to the employees named in these proceedings at any material time.".

I reserve the question of costs.

I do not propose to re-list the matter to hear argument on the further issues until requested to do so by one of the parties.

Dated this ninth day of June, 2000.

D.R. HALL, President.

Appearances:-

Mr S. Howles instructed by M. Healy, Solicitor, for the Queensland Nurses' Union of Employees.

Mr A. Herbert instructed by Dillons Solicitors for the Churches of Christ Care.

Mr C. Simpson for The Australian Workers' Union of Employees, Queensland.

Released: 9 June 2000

APPENDIX A

"27. Prior to the addition of extra duties in late May/early June 1999 I worked 27 hours per fortnight, made up of 3 shifts, each of 9 hours duration. The shifts were from 9:00pm to 6.30am. A routine shift included at least the following duties:

- a) I would attend a verbal handover delivered by the RN on the afternoon shift. At times handover could take up to half an hour. Handover is a description by the RN of resident care issues arising out of the previous shift. It was designed to inform us as to what had occurred on the shift and of resident care issues that we would need to attend to on the night shift;
- b) I then commenced the change up round of residents with the assistance of the other AIN or EN on duty;
- c) A change up round would involve checking on all 60 residents in the nursing home;
- d) We would undertake pressure area care (PAC) that involved turning the residents. On this round we would routinely turn about three quarters of the residents;
- e) Almost all of the residents in the nursing home had no bladder or bowel control.
- f) For those residents with no bladder or bowel control we would often have to conduct a whole bed change which involved changing all the bed linen. This would also involve washing the residents in their beds and changing their night clothes and in some cases it would involve taking them to the showers and showering them;

- g) In checking on each of the residents we would check on their comfort and on their condition. These checks were conducted in relation to all aspects of the residents health. It was my nursing training and experience which enabled me to conduct these checks and assessments;
- h) Some residents would require a rub down and some work on limb mobility;
- i) We would conduct a pain assessment of residents and always consult the Registered Nurse (RN) on duty about it. In some instances we would respond to resident complaints of pain but more often I would recognise the signs and symptoms of pain in the residents and check with them as to whether they required any pain relief. Again it was my nursing training and experience which equipped me to undertake this work. Quite often I would undertake this work with an RN or EN or another AIN;
- j) Many of the above duties would involve a lot of lifting and transfer of residents. Lifting and transferring the residents was necessary when we placed them on the commode. A commode is a toilet in a chair which was permanently place (sic) beside every residents bed. It has a removable bed pan in it. We would also lift and transfer residents to shower or toilet them or to place them in chairs or fall out chairs (fall out chairs are large foam chairs, covered in vinyl and hollowed out for the residents comfort and to stop them from falling out). It was also necessary to lift residents during position changes as part of their pressure area care.
28. The first change up round would take between two and two and a half hours. It would normally take me two and a half hours. I am meticulous with my work and my attention to the residents. For their sake, I have always attended to all of the abovementioned duties as thoroughly as time would allow.
29. The first round would end at approximately midnight.
30. Subsequent to that I would attend to the following duties until approximately 1.30am:
- a) I would write up documentation including the residents progress notes and the notes for the Resident Classification Scale (RCS) from which the nursing care plans are produced;
 - b) I would change the batteries on the trixie lifters. These are lifters which enable us to lift the residents. They are run on large batteries and these need to be constantly charged. We swap one set of batteries from the lifter into the charger and vice versa;
 - c) I would work in the pan room. This involved cleaning the bed pans and bottles and tidying up the pan room;
 - d) I would empty the sluices. The sluices are the sterilisers used to clean the bed pans;
 - e) I would attend to the re-ordering of stationery which included resident progress notes, RCS notes, hygiene and bowel charts and general stationery;
 - f) I would attend to answering buzzers from any residents who use them during this time. All of the residents have buzzers. Demands from residents who ring their buzzers varies widely on every shift. However, there would routinely be several buzzers ringing and several residents calling every hour. Residents use their buzzers for a whole range of reasons. These include discomfort, respiratory problems, a need to be toiletted, pain relief and for numerous other purposes which required some nursing care.
31. At approximately 1:30am I would commence the second round. The tasks performed on this round were virtually identical to those performed on the first round. I worked with the RN and the other AIN or EN. This round would always take a solid two hours. It would never finish before 3:30am. The RN on night duty would often verbally refer to the nursing care plan during this round and would often go and read it to check on a resident's medical and other requirements.
32. At approximately 3:30am I would go from the nursing home to the hostel. I would go there to assist the ACW to complete a change up on one high care resident. Of the 3 nursing staff on duty in the nursing home, one of us would leave the nursing home to go to the hostel. That would leave just one AIN or EN and the RN to attend to the needs of the 60 residents.
33. If I remained at the nursing home instead of going up to the hostel between 3:30am and 4:15am I would attend to duties such as completing the hygiene and bowel charts, completing the resident classification scale (RCS) progress notes, entries in the communications book, completing accident forms for residents who had fallen and other sundry duties.
34. I would commence the third round of attendance upon the residents at approximately 4:15am. This round would take me through to very close to the end of my shift at 6:30am. At the conclusion of this third round I had to get all of the residents that I had showered during the night up out of bed, dressed and in chairs or fall out chairs. Otherwise the third change up round was almost identical to the first two.
35. At the end of the round I would write up the residents progress notes, hygiene and bowel charts and the resident classification scale documentation.
36. Notwithstanding that I have been given some additional duties since May/June 1999 I still undertake all of the above duties on every shift that I work.
37. The additional duties that have been added to the duties I have referred to above include such things as the following:
- a) Collection of all water jugs from all 40 residents in the nursing home, washing them, refilling them and returning them to the residents bedside table;
 - b) Preparing thickened fluids for the resident consumption the following day. Thickened fluids are such things as milo drinks, fruit juice drink etc.;
 - c) Setting up the kitchen trolleys in the kitchen.
38. I was not required to commence undertaking the abovementioned additional duties when I was reclassified as an ACW on 29 March 1999.
39. I was not required to start the water jug collection until May/June 1999.
40. I wasn't required to start preparing the thickened fluids until late May/early June 1999.

41. I was not required to set up the kitchen trolleys in the kitchen until mid April.
42. The night duty shifts that I currently work commence at 11:00pm and conclude at 7:00am. Of those seven and a half hours of work I estimate that the time I devote to the additional duties referred to above is approximately one and a half hours. The other 6 hours of work time is devoted to the nursing work I have always done at Fair Haven as an AIN.
- The water jugs only have to be collected every second night. On the nights they don't have to be collected I would spend approximately one and a quarter hours attending to these additional duties and the rest of my shift attending to what I have described as the nursing duties that I have always done.
43. Between 11:00pm and 12:30am I still have to attend upon residents if they ring their buzzers. I am often required to leave my work in the kitchen and go and attend upon the resident. Such attendances often include cleaning up body fluids such as urine, faeces or vomit. I think it is disgusting and potentially unsafe to have to clean up body fluids albeit with gloves and then go back to the kitchen and do such things as handle kitchen utensils, items on meal trolleys and prepare thickened fluids.
44. On the two afternoon shifts I work each fortnight which are each of 5 hours duration I would estimate that the time I am required to spend attending to the abovementioned additional duties is approximately 1 hour and that is spent either dishing up the afternoon meal or collecting and washing the dishes after the meal. I spend the remaining 4 hours of the shift attending to the same nursing duties that I have always attended to during the sixteen years that I have been previously employed as an AIN at Fair Haven.
45. The duties that I am now required to undertake on permanent night duty and have been required to undertake since approximately mid June 1999 are as follows:
- Between 11:00pm and approximately 12:30am I collect the water jugs of each of the forty residents. I wash them, refill them and return them to the residents bedside. During this time I also set up kitchen trolleys for breakfast. I also prepared the thickened fluids for the residents for the next day.
 - Between 11:00pm and 12:30am I am also required to attend upon the residents who require assistance. The residents require assistance for all the sorts of needs that I have already described in this Affidavit;
 - The attention I provide to residents during this time includes cleaning beds which have been soiled with both urine and faeces, taking residents to the toilet, assisting residents who need to be toiletted to use bed pans, obtaining drinks for the residents and assisting those residents who feel sick. I also attend on residents particularly those with dementia who may have fallen. The incidents of falls has increased because severe limitations have been placed on the use of restraints including medication on residents. I speak to residents who may require pain relief. I talk to the RN in relation to this issue. I am completely accountable to the RN in relation to medications. I report the need for medication to her and discuss it with her. However, the RN is responsible for the administration of all medication. I also check upon those residents who appear to be close to death. My nursing training at St Andrews Hospital, Rockhampton which involved a lot of work with cancer patients equipped me with the knowledge and skills to undertake this type of work and the counselling role with the family and relatives that naturally arises in these types of situations as well;
 - I also attend to residents who have been vomiting. This will often require a wash or shower for them and a complete change of their bed linen.
46. We change and charge the batteries in the lifers.
47. We clean the commodes in preparation for the morning because this is the only time available to attend to this task. On some shifts we will have a cup of coffee in between tasks if we are able to do so. On many shifts that is not possible.
48. At 1:00am we begin the change up rounds for the forty residents in the nursing home section. The change up rounds are identical to the change up rounds I have described earlier in this Affidavit.
49. I am required to shower or bed sponge about 5 of the most incontinent residents per shift. Incontinence in this context refers to both urine and faeces. I also apply skin care treatments as part of the pressure area care and attend to the dressing of minor wounds. A number of residents have skin with the consistency of tissue and skin tears occur very easily and so great care is required in the handling and transfer of such residents. I dress minor wounds under the supervision of the RN but refer more serious ones to the RN.
50. This change up round will usually take from 1:00am to between 3:30am and 4:00am to complete. During this time we work side by side with the RN on duty, as she works with us during the two and a half to three hours of change ups. Accordingly I am supervised directly by the RN during the whole of this change up round. She provides supervision to me in relation to my care of all the residents. She will make observations about the condition of residents and direct me to undertake nursing care of the residents. The RN is working alongside me and is therefore supervising me the whole time.
51. Between the end of the first change up round at about 4:00am and the second change up round which starts at 4:30am I attend to the completion of the necessary documentation which includes the hygiene and bowel charts, the RCS documentation and notes in the communications book.
52. At 4:30am we start the second change up round. In addition to all of the other duties undertaken on round one I will again attend to simple dressings. I am confident in undertaking this work because of my nursing training. The Registered Nurse administers the residents medication and undertakes the complex dressings the tube feeds. I assist the RN with each of these tasks as required. I also empty urinary catheter bags. I empty the urinary catheter bags into a jug at the bedside and take the jug to the pan room. If a catheter needs replacing, the RN undertakes this task but she requires my assistance to do so. I also empty linen bags which contain heavily soiled linen into the pan room and replace the trolleys so that they can be used on the next round.
53. I also undertake further documentation including hygiene charts and bowel charts and the other documentation I have previously referred to.”

INDUSTRIAL COURT OF QUEENSLAND

Industrial Organisations Act 1997 – s. 245 and s. 246 – application under s. 245 and s. 246 that penalties be imposed on respondent for contraventions of s. 237 and s. 238 of *Industrial Organisations Act 1997*

Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees AND Performance Security Services (No. C35 of 1999)

PRESIDENT HALL

13 June 2000

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 8 June 2000, President Hall stated:–

“ I find this a difficult matter. I have great difficulty with section 246. It is obviously drawn from the Federal Act.

If the language of the Federal Act be treated as carrying with it the interpretation previously placed upon it, it seems to me that, in these circumstances, one would, as a matter of course, impose a penalty and for reasons developed by Mr Justice Marshall in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v DMG Industries Proprietary Limited* 89 IR 360 at 365, the penalty would be substantial in order to assert the Court’s disapproval of the conduct in which the respondent has engaged.

The difficulty is that in enacting section 246, it was enacted against parallel legislation, the *Penalties and Sentences Act 1992*, which operates in the criminal jurisdiction. One would have assumed that in saying that the penalty under section 246 was to be a pecuniary penalty and that it was not to be a matter of conviction for an offence, the legislature was trying to deal with the matter as less serious than a true criminal offence.

In the case of a true criminal offence, a Court, by section 12(2)(c) of the *Penalties and Sentences Act 1992*, would be required to consider the impact that recording a conviction would have on the offender’s economic or social well being, and I stress the word ‘economic’. By section 14, in a case where it is appropriate for the respondent to pay compensation to moderate the quantum of any penalty, to ensure that, in utilising what limited resources the respondent has, preference is to be given to satisfy any order for compensation.

I frankly think that in the respondent’s straiten circumstances, if this were a true criminal matter, a conviction would not be recorded. The respondent would be required to enter into a recognisance. A penalty would not be imposed in order that moneys be freed up to pay compensation. (I note that, at one stage, in consequence of the deed of settlement, the applicant was prepared to accept a sum of money.)

I think in all the circumstances, the appropriate course is to adjourn this matter until 15 March 2001. I shall mention it on that day. If, on that day, the outstanding sum of \$1,668 is not then paid, I shall turn my mind to the question of whether, by way of analogy with a recognisance, the recognisance should be treated as breached.

I adjourn the Court.”.

Dated this thirteenth day of June, 2000.

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

Appearances:–

Mr J. Martin of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees, for the Appellant.

Ms P. Hay instructed by Harvey and Associates, Solicitors, for the Respondent.

Mr C. Murdoch instructed by Crown Solicitor, with him Mr F. Pulsford, for the Crown.

Released: 14 June 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application to make, amend and repeal award

Borallon Private Correctional Facility Award (No. B380 of 2000)

COMMISSIONERS EDWARDS, BECHLY, SWAN

13 June 2000

Rescission of Existing Award – Application for New Award – 38 Hour Week — Inspections – Facility Operated and Managed Privately – Tender Process – Flow-On of Certified Agreement Wage Rates – Approved Rescission of Existing Award and Creation of New Award with 38 Hour Week – Date of Operation 5 June 2000.

DECISION

This is an application by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU) for the rescission of the Borallon Private Correctional Facility Award and the creation of a new award entitled the “Borallon Correctional Centre Award”.

On 5 May 2000 the Registrar received correspondence of even date from the Department of Corrective Services regarding this application (Exhibit 1) which states: –

“ . . .

Borallon Correctional Centre is a Department of Corrective Services facility, currently privately managed and operated under contract by Corrections Corporation of Australia. Whilst the Department has no direct interest in the proceedings before the Commission, the Department would like to inform the Commission that the application has been made during the tender period for the continued management and operation of the Correctional Centre.

The Department recognises that the Commission has an application before it, which requires consideration in accordance with due process and the Department does not wish to change that process or intervene in proceedings. However, it may be appropriate for the Commission to be informed with respect to some details of the tender process. The following details are provided for the Commission’s information:–

- . The invitation to tender for the management and operation of Borallon Correctional Centre was released by the Department on 29 March 2000;
- . The Tender period closes on 23 May 2000;
- . The term of the new contract is for five years with an option for a further five years;
- . Material provided in the Invitation to Tender included a copy of the current enterprise agreement and award for the centre;
- . Four private sector companies have expressed an intent to tender for the new contract;
- . The current contract with Corrections Corporation of Australia expires on 30 September 2000;
- . A decision on the new contract is targeted for late August 2000.
- . In view of the fact that the current application has the potential to impact on the centre operating costs for the successful tenderer (whether or not that is the current operator), action is being taken to advise tenderers of the application before the Commission and to indicate that they may obtain further information about the application from the Industrial Registrar or the ALHMWU.

It would be appreciated if action could be taken to bring this information to the attention of the Commissioners hearing this application.”.

Commissioner Edwards undertook an inspection of the Centre on 18 May 2000.

Section 129 of the *Industrial Relations Act 1999* states:–

“Flow-on of certified agreements

129. The commission may include in an award provisions that are based on a certified agreement only if satisfied the provisions –

- (a) are consistent with principles established by the full bench that apply for deciding wages and employment conditions; and
- (b) are not contrary to the public interest.”.

In opposing the application Mr French outlined that the parties have been successful in negotiating an agreement even though the negotiations were quite robust. Should the application be granted the respondent was uncertain if such would act as a disincentive to further negotiations.

In considering the application, submissions were made relative to the appropriate classification levels for spine officers and the differentiation between unit and security personnel. The evidence as detailed is insufficient for a decision to be made to vary the existing arrangement. We are of the view that these classification levels should continue to be part of the agenda for enterprise bargaining.

In relation to wage rates the application has provided that existing rates as well as rates as from 1 September 2000 should be accommodated. As such clause 5.2 of the Borallon Correctional Centre Certified Agreement states:–

“Wage Increase

The rate of pay applicable to that of the classification of Unit Correctional Officer Level 3 as at the commencement of this Agreement, shall be increased by 3% on 1 September 2000. All other rates of pay shall be adjusted accordingly to ensure that the classification relativities in dollar terms established at the commencement of this agreement, shall be maintained.”.

Co-incident the last decision of the State Wage Case operated as from 1 September 1999 with a current application seeking an increase as from 1 September 2000. The Commission has received submissions in regard to the 38-hour week. On consideration of the material available, the Commission is satisfied with the efforts to minimise costs provided that issues relating to flexibility in implementation of award conditions relating to morning and afternoon tea breaks, accumulation of rostered days off etc. are included in the new award as discussed during the hearing.

Taking all factors into consideration we have decided:–

- (a) The provisions in the certified agreement are consistent with principles established by the full bench that apply for deciding wages and employment conditions and are not contrary to the public interest;
- (b) To create a new award entitled the “Borallon Correctional Centre Award”;
- (c) To grant a 38 hour week;
- (d) The matter of levels for spine officers and master control officers continue to be subject to negotiations at the enterprise level. If those discussions are not successful the parties are at liberty to seek the assistance of the Commission;
- (e) The wages rates including clause 5.2 of the current Borallon Correctional Centre Certified Agreement be reflected in the new award;
- (f) Accept the submissions of the parties relative to State Wage case applications B615 and B620 of 2000 that wage rates have no application to this new award either in 2000 or at a later time; and
- (g) The Borallon Private Correctional Facility Award be rescinded.

The new award shall operate as from 5 June 2000.

The applicant is directed to provide a draft document to the Industrial Registrar within 21 days of the date of release of this decision.

The Commission Orders accordingly.

K.L. EDWARDS, Commissioner.

R.E. BECHLY, Commissioner.

D.A. SWAN, Commissioner.

Appearances:–

Mr J. Martin on behalf of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.

Mr L. French of Redwing Consulting and with him Mr G Howden on behalf of Corrections Corporation of Australia.

Released: 13 June 2000

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – extension of time***Carey Adams AND Jarvis Fielding Carrol Pty Ltd (No. B 331 of 2000)**

COMMISSIONER BECHLY

7 June 2000

Application for reinstatement – application for extension of time in which to make application – advertising industry – loss of position consequent upon diminution of trade – failure to file application within time notwithstanding legal advice to do so – application rejected.

DECISION

Extension of time within which to file an application has been sought by Mr Carey Michael Adams who seeks re-employment as Production Manager with Jarvis Fielding Carroll Pty Ltd.

Mr Adams' employment was terminated on 23rd September 1999 by the giving of five week's payment of wages in lieu of the option offered of five weeks notice. He was also paid an amount said to be one month's salary as a redundancy payment.

On 27 September he consulted a solicitor and instructed that a letter be sent to the respondent seeking a greater redundancy payment (eight weeks) and further proposing that the termination had been unlawful in that the redundancy was not genuine. Compensation of the order of six months salary was sought.

The respondent was put on notice by letter of 30 September 1999 that if a reply was not received within seven days that an application would be made in the Industrial Relations Commission for relief and the hope was expressed that "such a step would not be necessary".

By reply of 5 October 1999 the respondent's solicitors rejected the claim that the redundancy was not genuine and made some challenges as to the nature of payments made to Mr Adams on termination. It seems that the view held by the respondents was that the one month's salary earlier referred to was an *ex gratia* payment and that, as the applicant was not covered by an award, no redundancy payments were applicable. This comment appears to be in conflict with the respondent's statement of final payment to the applicant which refers to a "notice redundancy payment" of \$5,288.46.

Mr Adams was informed of this response and instructed that a further letter be sent to the respondent. His solicitor then wrote to the respondent's solicitor on 11 October 1999 noting the respondents intention to strenuously oppose any application to the Commission and proposing that the matter be resolved without the commencement of formal proceedings.

Approximately two weeks after 11 October Mr Adams rang his solicitor to see if there had been a response to this correspondence. On being advised that there had not been and that his solicitor did not expect to receive one he made a decision not to proceed further with the matter.

His evidence is that he made this decision based on the understanding that he could anticipate achieving only a further one month's salary with respect to a redundancy payment. He balanced that against the cost of legal fees and the unwanted stress that would be associated with further proceedings.

Mr Adams' evidence is that he was made aware of the fact that an application had to be made to the Commission within 21 days of termination. His evidence is that his solicitor "did tell me that, yeah, and I – when I decided not to pursue the matter I thought, well, that's the end of that. . .". (transcript page 11, L53).

In January Mr Adams was prompted by a friend to reconsider his decision when he was advised that he could take the matter further if an application had been lodged with the Commission. He contacted his solicitor to ascertain whether an application had been lodged and was reminded that he had instructed that the correspondence earlier referred to, be sent. Mr Adams' evidence is that he assumed that if an application had to be lodged within twenty-one days then his solicitor would have taken the necessary steps to do so. There appears to be some conflict between this assumption and the evidence that it was decided that a letter be sent to the respondent in the terms outlined above. It appears from Mr Adams' evidence that he was provided with a full explanation of the procedures required under the *Industrial Relations Act 1999* (the Act) when he initially consulted his solicitor. Given that there was a full understanding of the requirements of the legislation the appearance is that there was no desire to proceed formally with the matter at that stage.

No further action was taken by Mr Adams until March 2000 when he was told by a friend that he thought he had seen his job advertised. This later proved to be incorrect but it prompted him at the time to make further enquiries of the Registrar as to steps which might be taken. He was advised to seek further advice and contacted Mr Steinitz who immediately filed the application now before the Commission.

It is Mr Adams' claim that his solicitor failed in his professional duties by not lodging an application for reinstatement and that he was wrong in his advice as to the amount that might be achievable as a redundancy payment.

Mr Adams said in his evidence that he decided to have a long holiday after his termination. His wife had died some nine months previously and he wanted some time to himself before seeking further employment. This formed part of his decision not to progress his claim in the Commission.

It appears from the limited evidence that the formalities as to the making of an application and what could follow therefrom were explained to Mr Adams by his solicitor, that is the need to make an application within twenty-one days, the fact that a conference is held before a hearing, the stresses of a hearing, the cost of litigating, the maximum compensation the Commission is empowered to order if it finds that the termination contravened the Act but that reinstatement was not appropriate, etc.

The advice given to Mr Adams as to redundancy payments appears to relate to the standard contained in the Termination of Employment, Introduction to Changes, Redundancy Policy adopted by the Commission. Correspondence tendered during the hearing from the Respondents' solicitors rejects the application of that standard and terms the payment of one month's salary as an *ex gratia* payment.

The policy came into effect in 1987 and, while it remains as the current policy document it does not necessarily reflect practice adopted with respect to non-award employees. In any event, the payment of one month's salary, even if taken as a redundancy payment, is half of an entitlement that would accrue under that policy to award employees within the respondents' employment. It falls well below the long service leave accrual which any prudent employer would have provided for. Mr Adams had nine years service at the time of termination. It also falls well below standards that have been adopted by employers who are responsive to realistic trends accepted by the community.

However this aspect of his claim was only one part of the claim made on the respondent. The other aspect of the claim was a payment for six months compensation on the basis that the termination was harsh, unjust or unlawful.

It is Mr Adams' evidence that he decided not to pursue the claims made on the respondent. That decision related both to the six months compensation sought and an additional payment which, on the face of the six months compensation sought, was beyond the limits available to the Commission to award.

On the evidence before me it is not available to draw the conclusion that Mr Adams was badly advised by his solicitor. Taken by itself, the eight weeks redundancy pay sought was meagre but the claim taken as a whole was not inappropriate, that is the claim made upon the respondent could not be taken as bad advice by the applicant's solicitor.

The decision not to file an application was made by Mr Adams in the knowledge that an application had to be filed within 21 days and that that time period was passing or had passed. That knowledge was given to him by his solicitor and, shortly after the time had passed, he decided to abandon his claim.

Having abandoned the action in October 1999, on the advice of a friend, he made enquiries in January 2000 to see if the matter could be revived. He was reminded that the decision had been given not to file an application. The opportunity was available at that time to seek other advice but no such advice was sought. It was not until March 2000 that any further action was taken.

Both parties referred me to the prejudice they believe they would suffer if an adverse decision was given. The applicant will lose the right to argue that the dismissal was unfair. That matter was abandoned in October 1999.

The respondent argues that it had a reasonable belief that the claim had been abandoned and has proceeded accordingly in the management of its business. It argues that a true redundancy existed as a result of loss of a major client. The work previously performed by Mr Adams had been spread between other employees, one a working director, and became additional to other duties carried out by them.

The loss of a major client of the business taken over by the respondent was acknowledged by Mr Adams as was the effect that such losses have in some advertising agencies on staff. Losses and gains of clients often result in decreases or increases in employment of various categories of labour within an advertising agency. However, Mr Adams' employment had been continuous for nine years.

The business for which Mr Adams worked for almost nine years was purchased on 1 July 1999 by Carroll Delaney Pty Ltd and now trades as Jarvis Fielding Carroll Pty Ltd.

Mr Adams' employment was transferred to the new entity and he states that he was advised that his employment was secure. The respondent does not acknowledge that any indication was given that could be taken as an absolute guarantee of continued employment. I accept this as a matter of realism. At the time that the major client was lost two other management staff left the employment, one being a media manager who was terminated and another who was the account coordinator who resigned.

On the face of the material before me there is no acceptable explanation of the reason for delay.

The application for extension of time is dismissed.

R.E. BECHLY, Commissioner.

Appearances:-

- Mr R.H. Steinitz, of R.H. Steinitz and Associates, Advocacy & Industrial Advisory Services, for the Applicant.
- Mr R. Livingstone, of Livingstones (Australia), for the Respondent.

Released: 13 June 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 229 – notification of dispute

Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees AND Signet Identification Systems Pty Ltd (No. D298 of 1999)

**PAINT INDUSTRY AWARD – STATE
PRINTING INDUSTRY AWARD – STATE**

COMMISSIONER BLOOMFIELD

14 June 2000

Dispute – Award Coverage – Argument as to whether company was engaged in “paint” or “ink” industry – Inspections by Tribunal – Witness Evidence – Evidence as to difference between paint and ink – End use of product – Similarity in product manufacturing processes – Arbitrated Matter – Commission found Paint Industry Award–State did not apply to company.

DECISION

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU) notified the Commission of a dispute between the Union and certain of its members and Signet Identification Systems Pty Ltd (Signet) concerning award coverage.

Mr J. Martin, who represented ALHMWU, informed me that the Union believed that several of its members engaged by Signet were engaged in the manufacture of paint and the products used to apply such paint, including aerosol cans. He said that eighty per cent of the work that they performed was work which could be covered by the Paint Industry Award – State.

The employer had rejected the Union's contention claiming that the company was actually producing ink and the work in question was covered by the Printing Industry Award – State. He said that the matter of award coverage needed to be resolved because it was the intention of the Union to pursue enterprise bargaining and it was essential that the award coverage question be determined for that reason.

Mr M. Cuthbertson, who represented Signet, indicated that the company was properly engaged in the printing industry and performed a whole range of work properly covered by the Printing Industry Award – State.

Included in the company's product range was an ink product which was applied as a signate mark, usually by an aerosol can. The dispute was about the proper award coverage of this work.

The Commission conducted an on-site inspection which involved a complete walk-through of the company's operations as well as a particular examination of the disputed work.

During the course of the inspection the Commission was shown the company's labelling and printing production operations; its laser printing equipment sales and repair section; its stencil, stamp and custom printing manufacturing sections; its warehouse and dispatch operations; and its dangerous goods and maintenance areas. The Commission was also taken to its marking systems area and shown the disputed "ink" mixing operation; the aerosol production operation; the plastics injection moulding operation; the "ink" filling operation and the product assembly operation.

During the course of the inspections all of those present were able to discuss with various staff the nature of their work and the nature of the company's product range.

The disputed work included the manufacture of what was described as the company's aerosol stencil sprays, fluoro marking sprays, line marking "paint", spot marking "paint", one shot ink and each products' respective container/applicator.

During the course of the inspections Signet's Managing Director, Mr Mark Brennan, informed myself and other members of the inspection party that the company had begun its operations in industrial identification through sales of stencils and ink. In its early form ink was applied by roller over the top of a stencil to such products as wool bales, timber, cartons and the like. Over the last thirty years or so the product range had expanded to suit the ever-changing needs of industry. The company now marketed a variety of specialised labels and label application equipment such as ink jet sprays, as well as a variety of specialist inks, aerosol marking sprays, stencils and other packaging materials and applicators.

Mr Brennan said that the disputed product range was entirely used for marking purposes and that none of it was applied for decorative or surface protection reasons. Even the products (above) marked "paint" were used as a signate or for marking. The product contained within the aerosol cans used a unique trigger cap for easy inverted marking on roadways and building sites (such as could be seen at p. 55 of exhibit 3), on trees which were to be culled (p. 45) and in such specialist areas as underground mines (p. 56).

In resumed formal proceedings evidence was given by Mr Ross Harry, the company's Operations Manager. Having regard to the dispute as to whether the company manufactured paint or ink Mr Harry's evidence was particularly enlightening.

He had worked for Dulux Australia Limited over a twenty-three year period during which he held a number of positions including Manufacturing Manager – Padstow, New South Wales, Production Manager – Rocklea and Engineering Manager – Rocklea. During that time he gained an in-depth exposure and understanding of paint manufacture including raw material acquisition, product mixing, manufacturing and packaging.

He said that having worked in the paint industry for twenty-three years and in the ink industry with Signet for the last three years he was of the belief that the ink products manufactured at Signet differed from paint in a number of areas. These included raw materials, product formulation, processing, packaging, product characteristics, and product end use.

He said that Signet's ink products were formulated using dyes and pigments in low mixing ratios. They were also formulated using low ratio resin binding systems. Signet's products did not contain lead/zinc driers or coalescing agents to aid drying, film build or film integrity.

On the other hand, paint products are formulated using high pigment and resin loading ratios. This is necessary to achieve the required film build to obtain a protective and/or decorative finish. Paint products also require driers and coalescing agents to form the film. Such was not the case with inks produced by Signet which have low film build and are formulated to penetrate or etch into the surface.

Mr Harry said that a large number of Signet's ink products are produced using liquid dyes and fluorescent powders. In his experience liquid dyes are not used in paint manufacture and he was aware of only limited use of fluorescent powders in paint manufacture.

He also said that both ink and paint is manufactured using slow stirring or high-speed dispersion and milling machines. Such equipment was generic for milling and mixing of powders and liquids through a number of industries, including ink and paint.

He said that Signet uses volumetric pumps to fill ink products into plastic squeeze containers and drums fitted with pourer spouts and taps. Whilst he had used similar equipment in the process of product filling in the paint industry, ink had a lower specific gravity and viscosity and, as such, could be drawn from floor level. On the other hand, paint had a high specific gravity and viscosity and needed to be presented to the filling head by gravity feed or other pumping methods.

Mr Harry also said that Signet's aerosol and ink products are formulated for specific end uses. They are designed to write, mark or print a directional message onto the ground, trees, pipes, timber, steel, and a range of industrial products. The aerosol products are fitted with special actuators designed by Signet to satisfy a specific end use requirement. For example, the trigger cap used on Signet's spot marking spray (i.e. "paint") is designed to give a thin line ideal for writing on overhead, vertical and horizontal surfaces. Front spray actuators, such as those used in Signet's colour code sprays and forestry sprays, are manufactured so as to give a concentrated spray for writing.

Signet's aerosol inks and ink products are generally low viscosity, low density, low pigment and low in resin that provide little, if any, corrosion protection or decorative appearance. They were designed to provide a low cost marking solution where a durable or protective coating and appearance was not a priority.

On the other hand, from his experience in the paint industry, paint products are specially formulated to provide a protective and/or decorative coating to surfaces. Paint utilised a much higher pigment and resin loading system. It was also higher in density and viscosity than the ink manufactured at Signet. Paint was designed to be durable, to offer corrosion protection and to give a decorative appearance. Paint was used to give a protective, durable and decorative coating in the domestic, architectural, marine, structural engineering and automotive industries.

Mr Harry said that Signet's aerosol inks were used for ground marking, tree marking, warehouse and factory lane marking and stencilling. Its other inks were used for timber branding, wool bale marking, carcass coding, and generally by industry to record production or directional information on their product.

Mr Harry also tabled confidential statistics of the company's production in the disputed areas. These disclosed that the ratio of basic inks to aerosol products was approximately 1:3 and that ink and aerosol production combined represented approximately 17.5% of the company's overall sales volume.

Under cross-examination by Mr Martin, Mr Harry claimed that the company had used the term "paint" at several points in its buyers' guide (exhibit 3) because it was a generic marketing terminology. He agreed that the use of the term would give the customer an understanding of what the product was. He also agreed that the company's buyers' guide index showed the aerosol products as "paints" under the letter "P" and not as inks under the letter "I".

In answer to a question about how the company's ink was applied Mr Harry answered that it could be through special applicator tools or re-fillable cartridges, some examples being ball marker pens, special brushes, unconventional rollers and ink jet coating systems. He also agreed that ink was traditionally applied through offset printing stereotypes.

In his submissions Mr Martin said that for the very same reason that the company was in the ink industry by virtue of its manufacture of ink, the company was in the paint industry by virtue of its manufacture of paint (p. 29). He conceded that whilst that would cause some difficulty in determining who might be employed where, and at what time, it was not to say that the employer could not be covered by a number of awards at the one time.

He submitted that the company's buyers' guide index, and the inspections, clearly established that a number of paints were made and marketed by the company.

Mr Martin said that the definition of "paint" under the Oxford Dictionary was "a solid colouring matter dissolved in a liquid vehicle used to impart colour by being spread over a surface". He said that the definition did not require the product to be "decorative" and nor did it require it to be "protective", as had been suggested by the company throughout the proceedings.

In Mr Martin's submission the end use of the product was not important. What was important was how it was manufactured and how it was applied.

He said that the Oxford Dictionary defined "ink" as "the coloured, usually black, fluid ordinarily employed in writing with pen on paper, parchment etc or a viscous paste used in printing".

Mr Martin also said that whilst the inspection had disclosed that the company did manufacture some ink it had also disclosed that the company manufactured paint – as that term was commonly understood – as well as the applicator to house and apply that paint.

The coverage clause of the Paint Industry Award – State clearly applied to those persons involved in the paint manufacturing process as well as to those involved in manufacturing the various parts of the applicators such that the finished product was suitable for marketing purposes. This included the persons engaged in the filling of the aerosol cans.

Accordingly, the Commission was asked to decide that the terms of the Paint Industry Award – State applied to the disputed work.

Mr Cuthbertson submitted that the real issue for determination by the Commission was whether the Paint Industry Award – State was broad enough to cover certain employees employed by Signet. In this regard the ALHMWU, as the applicant, was required to make a substantive case in support of its contention that the Award applied to the seven employees working within the marking systems area of the business.

Those seven employees were engaged in the general positions of mixer and line operator/packer in the task of filling and packing aerosols and other containers as seen on the inspection and as shown in the company's buyers' guide. He said that the inspections highlighted that the company manufactured and distributed a diverse range of products, systems and services for the purpose of printing and/or marking.

Mr Cuthbertson also referred me to several cases concerned with the principles of award interpretation and submitted that I was required to consider the whole of the terms of the Paint Industry Award – State before I could determine whether that Award applied to the employees in question. In that regard clause 1.5 – Coverage required that an employee be covered by a classification included in the Award *and* for the employer to be engaged in "the manufacturing and/or processing of paint and/or varnish and/or associated products in a paint and varnish manufacturing establishment". It was submitted that neither of those conditions had been met.

The company was not engaged in "paint and/or varnish manufacture" and nor were there classifications for the employees involved in the dispute.

Like Mr Martin, Mr Cuthbertson also took me to dictionary definitions of the terms in dispute. He said that the Macquarie Concise Dictionary, third edition, defined "paint" as "a substance composed of solid colouring matter intimately mixed with a liquid vehicle or medium and applied as a coating".

It defined "ink" as being "a fluid or viscous substance used for writing or printing". He submitted that the ordinary person on the street would accept that ink was a product that could be used to print and/or mark by some form of applicator, whether that be a pen, ink jet printer, a printing device, a marking device, a stamp pad or, in the company's submission, by an ink aerosol spray.

By contrast, he submitted, the ordinary person in the street would understand paint to be something quite different. It would be a product used as a decorative and/or protective coating applied to surfaces. The ink products manufactured by the company were designed for a completely different end use.

Conclusion

The ALHMWU has argued that the Paint Industry Award – State applies to certain of its members employed by Signet at its operations at Wakerley. The employer has identified that seven of its employees are engaged in the manufacture of the disputed products and on the filling/capping/packing line for those products.

The Commission as presently constituted has had the opportunity of a detailed inspection and explanation of the disputed work as well as the opportunity of hearing from the management and employees involved.

Further, I have had the benefit of hearing evidence from Mr Harry who has had twenty-three years experience in the paint industry followed by three years in his current employment with Signet.

It is easy to understand how the dispute has arisen and why the parties are at odds about the appropriate award coverage.

Not only does the disputed product look like paint to a lay observer, it is also packaged in a similar way to aerosol cans of paint and, in several instances, described by the company itself as "paint".

In that regard the evidence of Mr Harry was most revealing. His undisputed evidence was that whilst there were certain similarities in the product manufactured by Signet and the product manufactured by paint companies, the product manufactured by Signet differed from paint in a number of areas. These included raw materials, product formulation, processing, packaging, product characteristics and product end use.

After considering his evidence (above), what I saw on the inspections and my own knowledge of industry, it is clear to me that – with three possible exceptions – the products manufactured by Signet are not paint. The three possible exceptions are the manufacture of “line marking paint”, the manufacture of “cover-all tan” and the manufacture of “steel colour coding”.

Those three products aside, it seems to me from my inspection of the company’s operations, the evidence of Mr Harry and my own knowledge of areas where the company’s products are used, that the products have been manufactured with a particular end use in mind. That end use has been for marking a particular product, item or surface for the purposes of identification or disclosure to someone who might look at the end product, item or surface.

In particular, I am not satisfied that the great bulk of the disputed product is “paint” as that term might traditionally be understood.

In that regard, the Paint Industry Award – State is of no assistance. The Award contains no definition of what constitutes the “manufacture and/or processing of paint and/or varnish”.

Similarly, the definitions of “paint” referred to by Mr Martin and Mr Cuthbertson are of little, or no, assistance. However, each of the definitions of “ink” seem to suggest that ink is used to impart some form of words or message onto the intended surface by application of a coloured fluid, paste or viscous substance. “Paint” on the other hand is suggested as being a product which is “spread over a surface” or “applied as a coating”. The purpose for which the product is used would therefore appear to be important.

Further, the Shorter Oxford English Dictionary sheds some light on the term “ink”. It suggests that inks are distinguishable by their colour or “by the purpose which they serve, as copying, lithographic, marking, printing (or printer’s), writing ink; by some special quality . . .”. It thus appears that ink might have a different composition depending on its intended use. In this regard it is noteworthy that the company has argued that the disputed product is marking ink.

Consequently, after looking at the company’s products in turn to consider whether they might properly be regarded as “paint” or as “ink” I have determined that all but three of the company’s disputed products should be regarded as ink.

Dealing with the disputed products, in turn, as they appear in its buyers’ guide (exhibit 3), I record why I have found the product to be ink and not paint.

- Page 34 – Stencil Spray – Stencils have traditionally been ink based and applied by a roller. The move to application of the ink by an aerosol is simply a development in the method of application and does not change the product, or its purpose. It is still an ink used for marking a particular product. The product is not intended for use by being spread over a surface or applied as a coating as a paint would be.
- Page 39 – Oneshot Ink – This product is simply a new form of the traditional stencil applicator. The product is clearly ink and its use and purpose has been unchanged for centuries. Again, the product is not intended for use by being spread over a surface or applied as a coating.
- Page 41 – Aerosol Stencil Spray – This is the same product mentioned at page 34 (above).
- Page 45 – Fluoro Marking Spray – According to Mr Harry’s evidence this product contains fluorescent powders which are rarely used in paint manufacture. Further, the product is designed for use either as a direct marker or with a stencil. It is not used to coat, decorate or protect the item to which it is applied. The nozzle is also designed for the particular end purpose i.e. direct, narrow application to the surface for the purpose of marking. The product is not intended for use by being spread over a surface or applied as a coating.
- Page 55 – Spot Marking Paint – The end use of this product is very similar to that of the fluoro marking spray above. It is designed for inverted marking on roadworks, building sites, golf courses, sporting areas etc. The nozzle shape and applicator mechanism are designed to allow direct application of the product to the end surface without the need for a stencil. In that regard it appears to simply be a new marking device which allows markings to be applied to areas which might not have previously been able to be marked by traditional stencil methods. The product is not intended for use by being spread over a surface or applied as a coating.
- Page 56 – Layout 360 – Except for the 360 degree nozzle, which allows horizontal and vertical writing, this product appears to be the same as the one immediately above.

The three products which appear to be closer to paint than they are to ink are the “cover-all tan” mentioned at page 42, the “steel colour coding” mentioned at page 44 and the “line marking paint” mentioned at page 54. I say “closer to paint than they are to ink” solely for the reason that each of the intended purposes is somewhat different from the other products in dispute. I have no direct evidence about the material make-up of the product.

The “cover-all tan” is designed to be used for surface coating to cover over other markings. In that regard it fulfils the job that paint would fulfil. It is not suggested that the cover-all tan is used as any form of marker.

The steel colour coding applies a coloured surface to the end of steel. Whilst the colour that is applied might be a marker in itself the application of the product is in the form of a sprayed coating to the end of the steel.

The line marking paint seems to be intended for long term marking of lines in factories, carparks etc. It is also applied in straight lines as a surface coating. Whilst it might mark the boundaries of certain areas its intended use is more permanent than any of the company’s other products.

However, looked at as a whole, the manufacture of these three products, considered amongst the whole range of the products in dispute, would not cause the company to be covered by the Paint Industry Award – State. To be covered by that Award the employees in question would need to be working for the major and substantial portion of their time on work covered by the Paint Industry Award – State.

In that regard, I am not satisfied that the employees who might be involved in the manufacture of the three identified product lines are involved in the manufacture to such a degree that it would occupy them for the major and substantial portion of their time. It is not good enough for them to be covered for short periods of time on the manufacture of the product which I might have identified as being closer to paint than to ink. Rather, the evidence suggests that they would spend the vast bulk of their time engaged in the manufacture of ink products (as they have been identified above) which is an operation not covered by the Paint Industry Award – State.

Accordingly, I have decided that the Paint Industry Award – State does not apply to any of the employees employed by Signet Identification Systems Pty Ltd at its operations at Wakerley.

The Commission determines accordingly.

A.L. BLOOMFIELD, Commissioner.

Appearances:-

Mr J. Martin for the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.

Mr M. Cuthbertson, of the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers, with Mr R. Harry and Ms R. Fahy for Signet Identification Systems Pty Ltd.

Released: 14 June 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 335 – application for costs

David John Foldi and Beralt Pty Ltd trading as The Court House Hotel, Southport (No. B1550 of 1999)

COMMISSIONER EDWARDS

15 June 2000

Application for Costs – Termination of Employment – Difficulties Communicating with Respondent – Summonses Issued – Non-Appearance by Respondent – Costs Awarded.

DECISION

The decision released on 13 April 2000 (163 QGIG 608-610) outlined in detail the difficulties experienced in communicating with the respondent employer. As such it was necessary for the Industrial Registrar to issue Summonses on two occasions and a number of hearings did not proceed because of the non-appearance by the Respondent. Section 335 of the *Industrial Relations Act 1999* states:-

- “(1) The court or commission may order a party to an application to pay costs incurred by another party only if satisfied –
 - (a) the party made the application vexatiously or without reasonable cause; or
 - (b) for an application for reinstatement – the party caused costs to be incurred by the other party because of an unreasonable act or omission connected with the conduct of the application.”.

In view of the repeated failure of the respondent at the conciliation stage to honour agreements and the lack of acknowledgment of the arbitration procedures the Commission on this occasion has determined that an award of costs is appropriate.

An application has now been received from Mr P. O’Brien on behalf of the applicant seeking costs of \$5,446.00 in accordance with Schedule 5 of the Magistrates Courts scale.

The Commission orders that Beralt Pty Ltd trading as The Court House Hotel, Southport pay costs amounting to \$5,446.00 to David John Foldi within 21 days of the date of release of this decision.

I order accordingly.

K. L. EDWARDS, Commissioner.

Appearances:-

Mr P. O’Brien on behalf of the applicant.
Mr J. Wright of Colwell Wright on behalf of the respondent on 17 February 2000 – under Summons; Ms W. Buckland on behalf of the respondent on 8 March 2000; and no appearance by the respondent on 10 February, 15 and 21 March 2000.

Released: 15 June 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Narelle Kirkby and Franklins Ltd Queensland Distribution and Support Centre (No. B1266 of 1999)

COMMISSIONER EDWARDS

15 June 2000

Termination of Employment – Dismissal – Reinstatement – Evidence – Interview – Disagreement – Formal Counselling – Medical Certificate – Dismissal Harsh, Unjust and Unreasonable – Compensation Awarded.

DECISION

This is an application by Narelle Kirkby for relief as follows:-

- (A) That the applicant be reinstated to her former position (or as nearly as possible) without prejudice to the applicant’s former conditions of employment.
- (B) That the respondent pay remuneration for lost wages between the date of termination, 25 August 1999 and the date of reinstatement.

(C) That the respondent pays the applicant such amount of compensation, which the Commission considers appropriate.

The following witnesses were called:—

Narelle Vicki Kirkby
Debra Millward
Robert Nicholas Kirkby
Deidre Fay Morrow
Theresa Deanne Burrows
Michelle Dixon
Jason William Crane

The applicant was employed by Franklins Ltd Queensland Distribution and Support Centre (the Company) in a number of capacities for certain periods since 1983. At the time of separation she was the Accounts Payable Clerk. On Wednesday 25 August 1999 she was approached by her supervisor, Mr Jason Crane, Team Leader to arrange an interview. The resulting interview led to disagreement and the subsequent separation of employment.

From the evidence the Commission is satisfied that this meeting on 25 August 1999 was the first occasion upon which the Company had undertaken a formal counselling process. The Commission accepts the evidence of Mr Crane that on occasions he had spoken to the applicant for which diary entries had been recorded. There is no doubt that the Company had no intention of dismissing the applicant as a consequence of this counselling session. In consideration of these facts the Commission has placed weight on the reason that the counselling session concluded together with the events that followed.

In evidence Mr Crane outlined that the applicant concluded the session by stating:—

“You can stick this job up your arse.”.

In this regard Mr Crane stated:—

“So how, apart from what you’ve said earlier about you perceiving Mrs Kirkby to be angry and defensive, at no time did you perceive that she looked upset or emotional? — It is my recollection that Mrs Kirkby was more aggressive than emotional.

You say that Mrs Kirkby stated, shortly before leaving the room, ‘You can shove this job up your arse’. What was the volume of her voice when she said this? Was it raised, do you recall? — Yes, it was.

It was raised? ‘You can stick this job up your arse’.

And to your mind would you describe a raised voice as an indicator of being emotional, upset, or even angry? — On many occasions that I had watched Narelle interact with other staff she had raised her voice. It was very typical of her type of behavior.

And then further, would you not describe banging the door into a chair as evidence of someone being in an emotional or upset state. — No. I’d describe that as aggressive.”.

The evidence of the applicant was as follows:—

“Now, can you just go back to the words that were spoken after the meeting was conducted. Your words were more along these lines, weren’t they: ‘We can stop this right now. I’ll just hand in my resignation and you can stick this job up your arse?’ — I don’t believe I used those words, no.

You spoke those words, didn’t you? — I just answered that question.

Could you have spoken those words? — No, I don’t believe I could, because I do not use those sort of words.

But you use words like ‘shit’? — Oh, everyone says ‘shit’ occasionally.

Right. — And I did say it that day. I told him I couldn’t believe the shit he was putting me through.

So without seeming crude, you used the word ‘shit’, but ‘the arse’ is — the word, ‘arse’, is offensive to you; is that right? — It’s a word I don’t use.”.

Upon leaving the meeting Mrs Kirkby was taken to a medical practitioner by her husband. She was provided with a medical certificate. On Thursday 26 August her husband spoke to Mr Duncan Carsons to inform the Company of his wife’s absence and on Friday 27 August he delivered the medical certificate. In evidence Mr Crane accepted that he had received the message from Mr Carsons. Also on Thursday 26 August 1999 Mrs Kirkby contacted the Australian Municipal Administrative Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees (the Union) and outlined the dispute situation. In attempting to sort out the situation Ms D. Morrow of the Union contacted Ms T. Burrows, Regional Human Resource Manager of the Company. Contact was made at approximately 9 am on 27 August 1999. In evidence Ms Morrow outlined that the result of the communication was as follows:—

“The conversation became — we became in conflict. You know, the conversation — Ms Burrows actually yelled at me and told me that I needed to understand a few things and, of course, the communication fell down and I in turn got angry and hung up to terminate the conversation.”.

Ms Morrow could not recall when she again contacted Ms Burrows. As a representative of a registered industrial organization, Ms Morrow acted in an irresponsible manner by not pursuing the request of her member. From the evidence there was no responsible effort made to arrange a traditional meeting to attempt to resolve the issue or to even ensure that the Company was well aware of the intention of Mrs Kirkby. The Commission is of the view that the Union should train their organizers so that they are aware of the responsibilities they have to their members. Had Ms Morrow acted in a responsible and professional manner the employer/employee relationship between Mrs Kirkby and the Company may have followed a more contemporary manner.

Having been informed of the circumstances surrounding the failure of the meeting on 25 August 1999, Ms Burrows attempted to make contact with Mrs Kirkby. On 27 August 1999 she received a call from Ms Morrow but the call was terminated by Ms Morrow before conclusion. At the time Ms Burrows was attempting to make contact, the Company was in possession of the medical certificate which had been delivered by Mr Kirkby on 27 August 1999.

It is disappointing that Ms Burrows as Regional Human Resource Manager did not progress the matter in a more practical and mature way. Even though her communication with the Union was unsuccessful because of the actions of Ms Morrow, there is no reason why a more formal mechanism could not have been put in place to ensure that the status of the medical certificate had been determined and recorded on the Company records. As a result the only formal mechanism of finalising the employer/employee relationship was by means of the wages advice slip.

On consideration of these issues the Commission has determined that the termination was harsh, unjust and unreasonable. The Commission accepts that the employer/employee relationship could not be restored.

Accordingly, the Commission must give consideration to the alternative remedy. Mrs Kirkby suffered economic loss of 12 weeks together with certain other accountable losses which were outlined in submissions. The Commission accepts that Mrs Kirkby should have acted in a more mature manner at the meeting on 25 August 1999 but also acknowledges the failure of the Company to clarify the areas of uncertainty. The Commission is satisfied that the efforts Mrs Kirkby made to mitigate her losses are acceptable in the circumstances.

On consideration of all the evidence, submissions and exhibits the Commission orders that Franklins Ltd Queensland Distribution and Support Centre pay to Mrs Kirkby twelve weeks remuneration (\$6,571.80) within 21 days of the date of release of this decision.

The Commission orders accordingly.

Dated this fifteenth day of June, 2000.

K. L. EDWARDS, Commissioner.

Released: 15 June 2000

Appearances:-

Ms A. Stubbs for the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees on behalf of the applicant.

Mr M. Smith of the Retailers' Association of Queensland Limited, Union of Employers, on behalf of Franklins Ltd Queensland Distribution and Support Centre.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Patrice Maree Gason AND Café Chino (Case No. B1470 of 1999)

COMMISSIONER BLADES

15 June 2000

Costs application by both parties – Written submissions – Applicant seeking compensation for pain and suffering – Not pursued at the hearing – No evidence to substantiate – Respondent entitled to defend – Applicant’s application refused – Applicant recovered more than respondent offered – Respondent’s application refused.

DECISION

On 10 May 2000, a decision (164 QGIG 74) was published by which the applicant was awarded \$3,834.26 compensation for unfair dismissal against the respondent. The applicant seeks costs in the sum of \$3,915.00 under s. 335(1)(b) of the *Industrial Relations Act 1999*, which provides:

“(b) for an application for reinstatement – the party 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 is contested and met with an application for costs of an equal amount. Final submissions were to be delivered to the Commission by 4.00 p.m. on 13 June, 2000.

The basis of Ms Gason’s application is that she offered to settle the matter for the sum of \$3,300 plus costs and outlays of a “couple of hundred dollars” by letter dated 18 November 1999. On 25 November, there was a response that the employer would pay \$2,600 inclusive of costs. There were further negotiations but on 10 January 2000, the respondent (apparently because of the advice he received) withdrew all offers of settlement.

There was a short hearing over legal representation at Maroochydore on 8 March when it was recommended by the Commission that the parties consider settlement. In response, the applicant again offered to settle for \$3,300 plus costs (which of course were mounting and were, by this time, \$1,754.90). There was no response by the respondent to that offer.

At the hearing, the respondent appeared and whilst he cross-examined witnesses and argued principle, he did not call any evidence.

To trigger the discretion to award costs, the respondent must have committed an unreasonable act or omission. The failure to respond in a reasonable fashion to a reasonable offer of settlement has attracted an award of costs in other recent cases before the Commission. (*Riley v. MKKM Aboriginal Corporation* 164 QGIG 45; *Hoffmannbeck v. Gold Coast Equipment Hire Sales and Service* 163 QGIG 359). But it is not every failure which qualifies. The act or omission spoken of must be unreasonable in the circumstances.

The offer to settle proposed by the applicant contained as an element, “\$2,758.64 representing general damages for pain, suffering and discomfort” and a reference was made to defamation. A settlement in those terms was first proposed on 18 November, 1999, then 14 December, 1999 and finally on 31 March, 2000. On each occasion it was proposed, the costs also sought to be paid in the settlement, mounted.

Mr Cain said he had been advised that general damages for pain and discomfort could not be awarded.

In my view, that advice was correct. There was no evidence led at the hearing that the applicant suffered pain and/or discomfort. An award of damages for distress is awarded only in exceptional circumstances. (In this regard, see *Sheedy v. Farmers Arms Hotel* 160 QGIG 99). It did not appear, nor was it suggested, that this case was appropriate for an award of damages for distress or pain, suffering and discomfort.

The way the settlement demands were framed by the applicant entitled Mr Cain to defend the claim.

I am also of the view that the respondent was entitled to argue the issue as to the breach of fidelity. Cases involving breach of fidelity are not common and the law is not that clear.

I am unable to conclude that the respondent's opposition to the action was an unreasonable act or omission. He was entitled to argue principle and he was entitled to resist a claim for distress damages which in fact was not ultimately pursued.

The costs application is dismissed.

With regard to the respondent's application for costs, nothing has occurred which triggers the discretion to award costs in his favour. The applicant was awarded more than the respondent was prepared to pay, albeit on a different basis. His application for costs is also dismissed.

The Commission orders accordingly.

B.J. BLADES, Commissioner.

Released: 15 June 2000

Appearances:-

Ms B. Callaghan, instructed by Mr M. Devine of Boyce Garrick Lawyers, for the applicant.

Mr R. Cain, for the respondent.