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No. 10

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
CA507/99	Brisbane Turf Club - Certified Agreement 1999	26/10/99	
CA523/00	Richard Fuller Nominees Pty Ltd T/A Rick's Doors - Certified Agreement	26/9/00	CA135/97
CA524/00	Annette Stokes t/a Two Good Signs & Stuff - Certified Agreement	26/9/00	CA415/99
CA525/00	John Ross t/a Rowan Internal Linings - Certified Agreement	26/9/00	
CA539/00	Maggdale Pty Ltd - Certified Agreement	3/10/00	CA391/97
CA541/00	Kings Parking Airport - Certified Agreement	3/10/00	
CA540/00	Australia Meat Holdings - Dinmore Maintenance - Certified	4/10/00	
CA543/00	Mount Morgan Shire Council - Certified Agreement 2000	17/10/00	
CA544/00	Ilfracombe Shire Council - Certified Agreement	17/10/00	
CA546/00	Miriam Vale Shire Council Enterprise Bargaining - Certified Agreement	17/10/00	CA262/99
CA536/00	Goprint - Certified Agreement 2000	23/10/00	CA497/99
CA537/00	SDS - Certified Agreement 2000	23/10/00	CA276/99

The following Agreement has been amended by the Commission:--

	Date amended
CA409/99 Australian Building Services Association - Queensland Division - Certified Agreement 1999	4/10/00 9/10/00
CA435/00 Crowd Control Industry - LHMU - Certified Agreement	9/10/00

The following Agreement is terminated:-

	Date terminated
CA434/96 Hervey Bay RSL Services Memorial Club Inc - Certified Agreement	31/10/00

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement***Graham Gilmour AND Gladstone Port Authority (No. B351 of 2000)**

COMMISSIONER SWAN

20 October 2000

Application for Reinstatement – Summary Dismissal for “Misconduct” – Non-adherence of safety Policy – long term employee – Provocative behaviour by some employer representatives – Previous Infringements – *Ad hoc* approach to enforceability of Policy by employer – Dissatisfaction with Policy by employee – Procedural Fairness lacking – Reinstatement Ordered.

## DECISION

This is an application made by Mr Graham Gilmour against his former employer, Gladstone Port Authority (the employer) for his allegedly unfair summary dismissal from employment on 1 March 2000.

Mr Gilmour was employed as a Level 5 Plant Operator with the employer and had been in employment for a period of some twenty-five years. In effect, Mr Gilmour was dismissed for what the employer viewed as “persistent and provocative breaches” of Company Policy relating to the wearing of hard-hats over an extended period of time.

The employer introduced a ‘hard hat Policy’ on its site around March 1999. Hard hats were to be worn in designated areas by employees, contractors and visitors to the site, with some exceptions.

**General Overview of Applicant’s Evidence**

It is the applicant’s evidence that, whilst the Policy was formally in place, it was not always adhered to by the various persons to whom it applied. In these instances, the employer would at times remind the offending party to adhere to the Policy, and on other occasions, the Policy was ignored. The applicant does not deny that, at times, he had failed to comply with the Policy. On these occasions, no action was taken by the employer except to request that the applicant adhere to the Policy – this he did. After the applicant’s termination of employment, and prior to this litigation, work colleagues kept a diary of occasions when hard hats were not worn on site by a range of persons (including management employees) and upon which allegedly no action was taken by the employer.

An incident occurred on 31 December 1999 which appeared, from the applicant’s perspective, to trigger the eventual dispute between he and the employer. From the applicant’s evidence, he was part of a crew rostered to work on the evening shift on that date. He claims that at the time he was standing with other members of the crew in the car park area – a non-hard hat designated area. There was evidence put to the Commission (from the applicant, Mr C. Hunt and Mr R. Walters) that at least six other members in the work crew were not wearing their hard hats at this time. Mr B. Muir (a supervisor) spoke to the applicant about the non-wearing of his hard hat but did not speak to any others about their similar situation. The employer does not challenge that employees do not have to wear their hard hats in this particular area of the site.

Notwithstanding that fact, the applicant was requested to attend a meeting with Mr R. Boundy (Human Resources Manager) regarding this incident. The applicant claimed that Mr Boundy had stated that the meeting did not constitute a formal warning or counselling session. Mr Boundy’s evidence (later considered) on this discrete point is that no formal warning issued.

An incident occurred on 31 January 2000 where the employer Safety Officer, Mr L. Kiernan advised Mr Boundy that the applicant had been observed not wearing his hard hat. As a consequence of this event, Mr Boundy sought to meet with the applicant’s Union delegate, Mr Nesbit and advised him that the applicant’s job was now in jeopardy as a result of this incident. There was no direct communication from the employer to the applicant on this point. Mr Nesbit’s evidence is that while he accepted Mr Boundy’s version of events as true, he failed to advise the applicant of this final warning prior to his termination on 1 March 2000.

On 1 March 2000, the applicant stepped out of a company vehicle, without wearing his hard hat, for the purpose of boarding a bulldozer. The area in question was one where hard hats were required to be worn, however, it was some distance from overhead cranes and gantries. The applicant states that he had forgotten to wear his hard hat on this occasion and that whilst in this state he had engaged in a discussion with Mr Ibbotson (Training Officer). There is some dispute (later dealt with) between the applicant and Mr Ibbotson as to precisely what occurred at this time, however, Mr Ibbotson stated that during the conversation he had with the applicant he did not order the applicant to put on his hard hat.

As a consequence of this incident, the applicant’s services with the employer were terminated.

The applicant alleges that the dismissal was harsh and unreasonable for a range of reasons. Firstly, he states that the dismissal did not comply with the employer’s own “Counselling and Disciplinary Procedure Policy” in that it failed to adhere to the “3 stage approach in circumstances where employees’ work habits or performance does not meet the required or acceptable standards”. In the applicant’s submissions the Policy “at the first stage requires an action plan to be developed by either the employee or supervisor to be followed up with a review. Stage two of the Policy requires the issuing of a written reprimand (Form RPI, The Development of an Action Plan and a Review Assessment) and the third stage of the Policy requires a warning of possible termination of employment (Form WNI) to be issued to the employee. An action plan is also to be developed by the employee’s manager”.

Secondly, the applicant states that he had never received a written warning concerning his behaviour and the possible ramifications of continued breaches of Policy.

The applicant claims, in effect, that the punishment in this case did not fit the crime when one took into account his lengthy (and prior to these incidents) solid record of employment with the employer.

**General Overview of Employer’s Evidence**

The employer states that it dismissed the applicant’s employment for “serious misconduct” relating to “persistent and provocative breaches of the safety Policy of the Authority”. The employer believes that it had appropriately informed its employees of its hard hat Policy and that the applicant was fully aware of the ramifications of non-adherence to such Policy.

The employer states that “the breaches were provocative in that they occurred despite Gilmour’s understanding of the Policy and on the job counselling by supervisors and management representatives and were characterised by argumentative and confrontational exchanges with supervisors and management representatives”.

The employer poses the following scenarios regarding the applicant's behaviour:-

- Gilmour made a series of innocent mistakes;
- Gilmour chose to use the safety Policy as an opportunity to provoke supervisors;
- Gilmour disagreed with the Policy and his breaches were an on-going expression of his disagreement.”.

The employer did not accept that the applicant had a sound history of employment over his twenty-five years of with the Company. It cited his “individual health and safety record” stating that it was “three times worse than that applicable to the average employee. After 25 years employment he has exhausted his sick leave entitlements – there was no accumulated leave”.

The employer expressed interest in what it viewed as the apparent intention of the applicant to rely, for a significant part of his case, upon the incident which occurred on 31 December 1999. It states that there is acknowledgment that a hard hat was not required to be worn in the car park but that the issue at that time was the “disregard for the Authority's Policy and his (Gilmour's) history of breaches”.

The employer believed that it did warn the applicant at the meeting of 12 January 2000 that “his job was on the line” over the 31 December 1999 issue. The employer does not believe that its failure to formally warn the applicant, in writing, alters the situation in any fundamental manner. It believed that the better course was to orally communicate with the applicant to inform him of its concerns.

From the employer's perspective, neither victimisation nor inconsistency in its approach to offending personnel were factors in the dismissal of the applicant. Rather, the applicant's general disregard for company Policy was the predominant factor coupled with his allegedly abrasive manner when dealing with management on the issue.

The employer believed that whilst there may have been incidents of non-adherence to the hard hat Policy by some employees, this occurred only in isolated incidents and usually with contractors on site. The employer believed that compliance with the Policy had improved since the applicant had left its employment.

Whilst there may have been a lack of strict formality in the processes adopted by the employer in its treatment of the applicant, the employer does not believe that this should be seen as an impediment in terms of its determination to act in the manner in which it did. At all times, it believed that the applicant was fully aware of the need to adhere to Company Policy and, by repeatedly breaching this Policy, placed himself in danger of losing his job.

#### Analysis of evidence

I am satisfied with employer evidence to the point that employees were appropriately advised of Company Policy on the question of the wearing of hard hats. The Policy, under the heading of “GPA Workplace Health and Safety Handbook” states, *inter alia*,

“It is a condition of employment that you wear your safety helmet.”.

Certainly, all of the evidence around the issue of the wearing of safety hats (ie employer and employee evidence) refers to varying degrees to the employer's Policy of compliance. That is not in question.

What is in question, from the applicant's perspective, is whether the employer had a genuine belief in enforcing the Policy given that non-compliance occurred frequently and whether the employer had side-stepped its own disciplinary procedures in dealing with the situation, amongst other matters.

The employer claims that the applicant could, and often did, become aggressive when the issue of hard hats was raised. While it does state that the incident which occurred on 31 December 1999 needed to be viewed in context, the applicant's evidence around this point is telling. The applicant claims that Mr L. Robson (shift supervisor) had “instructed” him to put his hard hat on in the mess room (which was not a hard hat designated area). The applicant refused to do so, responding with strong, but not abusive language. It appears that after this incident, and on the same evening, the applicant, along with fourteen other crew members, assembled in the car park area. According to the applicant, at least six other employees were not wearing their hard hats. The applicant's evidence is that he was then approached by Mr B. Muir (acting senior supervisor) who stated only to him, “put your hard hat on”. This evidence is supported by other employees, Mr C. Hunt and Mr R. Walters who were present at the time. The applicant states that he said he was not required to wear a hard hat in this area to which he claims Mr Muir replied “are you disobeying a direct order” and “I will see you in the office about this on Monday morning”. Neither Mr Robson nor Mr Muir gave evidence before the Commission. Other matters occurred on that evening where there was an alleged altercation between the applicant and management over the question of employees observing fireworks on a different part of the site. The applicant is alleged to have acted inappropriately at this time.

More relevantly, whilst the employer wishes to distinguish this evening (31 December 1999) from other events involving the applicant and the wearing of hard hats, it is evident that employer representatives were provocative in their behaviour towards the applicant on this date. He was not required to wear a hard hat in either area (ie the mess room or the car park) and to single him out for the non-wearing of a hard hat when, firstly it was not required and secondly, when work colleagues were in the same position as he, was provocative and possibly vindictive behaviour on the part of the employer representatives.

If, as the employer states in its final submissions, one should not pay undue attention to the events of 31 December 1999, then perhaps the meeting scheduled for 12 January 2000 should be viewed in this context as well. Present at this meeting were Mr B. Muir, Mr R. Walters and Mr R. Boundy. The applicant claims at this meeting that Mr Boundy said that he had “blatantly disregarded safety regulations and that I did not want to wear a hard hat”. Previous incidents of non-adherence to the Policy by the applicant were cited although the applicant stated that on those occasions, when advised to correct the situation by a superior, he acted accordingly. He did not view those situations as being abnormal as he believed many employees did not wear their hard hats, but when advised to do so, immediately complied with the request. At this meeting no formal warning issued. According to Mr Boundy, he discussed the need for the wearing of hard hats with the applicant; he referred to previous incidents involving non-compliance by the applicant and he “warned Graham that his continued employment with the Authority required his observance of this Policy”. I accept that the employer wished to deal with the issue concerning the applicant and compliance with the Policy on hard hats in a reasonable and non-confrontational manner, however, the reality is that the applicant may well have been left with the belief that, whilst the issue was important to the employer, he was not in serious trouble as a consequence of this meeting as no formal warning had issued. Certainly, the issue which triggered the meeting of 12 January 2000 (ie the incidents relating to the wearing of hard hats on 31 December 1999) did not justify a formal warning from the employer. On that discrete issue (ie the wearing of hard hats on that occasion) the applicant was not at fault. The employer appears not to have taken any overt action over prior infringements.

Subsequently, on 2 February 2000, Mr Boundy sought a meeting with Mr J. Nesbitt (the CFMEU delegate on site) to discuss a further issue concerning the applicant and his non-wearing of his hard hat. Mr Boundy claimed that since the meeting of 12 January 2000, the applicant had been observed not wearing his hard hat. It appears that the applicant was not spoken to by Mr Boundy but that Mr Nesbitt was warned that were the applicant to be found without his hard hat in future then his employment would be terminated. Mr Nesbitt stated that he would speak directly with the applicant upon the issue.

Mr Nesbitt called a "tool box" meeting to discuss the issue of the hard hat Policy. Unfortunately, however, the applicant was on annual leave. As it transpired, Mr Nesbitt did not get to speak to the applicant prior to his termination to pass on to him Mr Boundy's warning. This evidence is not challenged. This set of circumstances is most odd. This "warning" could never constitute a warning within the industrial relations framework. A warning was not given to the applicant; he was not spoken to about the alleged infringement, he was given no opportunity to respond to the allegation and, in any event, he remained unaware of any such meeting and/or "warning".

I would find that, upon the lead up to his termination, the applicant, at best, was aware that the employer was concerned about the issue of his not wearing a hard hat when required, but that he had been given no real indication that his job was in jeopardy were any further infringement to occur. Certainly, Mr Boundy claimed that he had advised the applicant on 12 January 2000 that it was a condition of employment that hard hats be worn, but in so advising had never taken the next step of formalising the employer's concerns about the issue. The meeting of 2 February 2000 between Mr Boundy and Mr Nesbitt should play no part in any consideration of whether the dismissal, from the employer's perspective, was justified.

One then needs to consider the event which did trigger the applicant's dismissal – ie the incident of 1 March 2000. The applicant claims that he had followed Mr P. Ibbotson in his car to a particular area on site in order to request to trial a new piece of machinery. He had been unable to speak to Mr Ibbotson on the two-way radio but sought then to speak to him directly to gain permission to operate the new machine. He claims that Mr Ibbotson parked his vehicle approximately 20 feet from the machine and he parked his vehicle approximately 10 feet away from the other vehicle. He claims that both vehicles were parked approximately 300 metres away from the overhead gantry and pit area. The applicant claimed that Mr Ibbotson, in refusing him the opportunity to operate the machine, also asked him where his hard hat was. The applicant replied that it was in his car. The applicant is adamant that at no stage did Mr Ibbotson ask or order him to wear his hard hat.

Mr Ibbotson's version of events differs from that of the applicant on a number of grounds. Mr Ibbotson stated that the applicant had approached him and asked whether he could operate the machine. Mr Ibbotson responded by asking the applicant where his hard hat was. The applicant had claimed that his hard hat was in his car (some metres away), but Mr Ibbotson in his evidence stated that he suspected that this was not true. Mr Ibbotson claims that the applicant stated that he would not have to wear a hard hat on the machine as he would have earmuffs on. Mr Ibbotson claims that he proceeded to advise the applicant of "the rules regarding hard hats", that the applicant "had to comply with the hard hat Policy", that he was "jeopardising his employment by refusing to wear a hard hat", and that he would be "reporting the incident to Ross Boundy and he probably would hear more about it". Mr Ibbotson agreed that at no stage did he request or order the applicant to put his hard hat on.

From a consideration of the evidence before me, I am unsure about the accuracy of each party's version of events. Somewhere between the two versions lies the truth. I accept that there was a discussion around the issue of the wearing of a hard hat but that the applicant was not asked or directed to put his hard hat on. Following an investigation of this incident by management, the applicant's services were terminated.

There was evidence before the Commission from employer witnesses who attest to the applicant's general opposition to the wearing of hard hats and his alleged disregard for the principles behind the Policy. Evidence from Mr S. Paterson (Mechanical Foreman) and Mr L. Kiernan (Safety Officer) was to this effect.

### **Conclusion**

This is not a case where culpability falls more naturally to one side or the other. There are serious competing interests which must be weighed appropriately. There are the clear interests and obligations of the employer and the fact that a very long term employee (one with twenty-five years of service) has been summarily dismissed.

To elaborate, on the one hand, there is in existence a sensible and appropriate employer Policy regarding the wearing of safety hats on site and, on the other, a situation where the enforceability of such Policy is enacted in such a manner as to seriously question the employer's commitment to the Policy. It appears that, for offending employees, their non-compliance with the Policy (which occurred not infrequently) was met by the employer with a friendly suggestion that they put their hard hat on and not much more.

From considering the applicant's evidence, and after considering all witnesses' evidence, it seems to me that the applicant harboured some resistance towards the employer Policy on the wearing of hard hats. This could have the potential to cause concern to the employer, however, it had obligations to conform to its own and accepted procedures in dealing with the issue.

The employer, quite rightly so, introduced the Policy for the wearing of hard hats in various parts of the work site. It communicated this Policy appropriately to its workforce. None of this is in question. However, I am unable to accept employer evidence that non-compliance with this Policy was merely occasional. Mr C. Hunt (Production Employee) gave evidence before the Commission that, since the applicant's termination of employment, he had kept a record of employees' non-compliance with the Policy at the workplace. The alleged incidents are numerous. Some incidents were witnessed by other employees, but were I to consider only those incidents cited by this witness, then in themselves they give rise for concern. I accept the general thrust of Mr Hunt's evidence.

This then brings into question the following consideration. Just because some employees choose not to observe company policy, did this minimise the importance of the Policy? It should not do so. The Policy in itself is clear. That the company on occasion did not act in accordance with or enforce its own Policy is problematic for them. This then raises the question of fairness as it relates to employees and the enforceability of the Policy.

In this instance, the following needs to be considered:-

- The first meeting to occur between the employer and the applicant regarding the Policy arose when there had been no breach of the Policy by the applicant. Previous infringements were discussed (for which no warnings had issued), but no formal warning in this instance issued. These previous infringements appear to have been treated by the employer in the same manner as incidents involving infringements by other employees – a friendly reminder to put the hard hat on.
- An alleged non-wearing of the hard hat by the employee for which the employee was not warned. The employer asked the applicant's Union delegate to pass on a final warning to the applicant. For reasons which were not challenged, this did not occur. It is simply a matter of fact that the applicant had not been advised that this was his final warning
- The final incident. The applicant was not told or ordered to put his hard hat on, but was certainly asked where his hard hat was and why he did not have it on. His response was that it was in his car (some metres away) but that there would be difficulty wearing the hat whilst wearing earmuffs.

In light of these circumstances, and other intervening events around which evidence has been drawn, I am asked to consider whether the dismissal of the applicant has been so sufficiently harsh and unfair that the Commission should interfere with the decision made by the employer.

The length of the employee's service with the employer is, in these circumstances, a relevant consideration. He was a long-term employee who appeared to have had a reasonably unblemished work history with the employer. He had expressed some difficulty with the employer's Policy on the wearing of hard hats. Unfortunately for the applicant, this was his problem. However, he states, and I accept, that when asked to put his hard hat on (like other employees) by the employer he always complied.

The employer has fairly and appropriately, in my view, adopted a sensible Policy applicable to all employees. The Policy is not oppressive or harmful in any way – quite the contrary. Whether employees agree with the Policy or not is irrelevant. They have a duty to adhere to it. The fact that the Policy was not properly administered is problematic for the employer. I have already expressed concern, on the one occasion, at supervisors' attempts to impose the Policy inappropriately and provocatively upon the applicant. The failure of the employer to directly warn the applicant personally that one more infringement of the Policy would result in his termination of employment creates a difficulty for the employer – this was a stand it had taken unbeknown to the applicant. The approach adopted in that instance was unusual to say the least. The employer should not be selective as to whom the Policy should apply. All employees to whom the Policy applies should be treated equally. This appeared not to occur – and has not occurred on too many occasions to ignore.

The Policy and its enforcement must mean something. Given the manner in which the employer stated that it would enforce the hard hat Policy (ie that it was a condition of employment that the hard hat must be worn in designated areas), it seems that "chipping" someone for not wearing his hard hat, but nothing more, makes the Policy somewhat ineffective. There did not appear to be in place a process whereby offenders were issued with any type of formal warning from the employer. Certainly the non-wearing of hard hats by employees appeared not to have triggered any previous summary dismissals. Having a "chat" with an employee around the issue does not equate to a warning. This appeared to have happened more often than not.

In weighing all of these circumstances, I find that the actions of the employer were sufficiently unfair as to cause me to accept the applicant's claim for relief (see s. 77 of the *Industrial Relations Act 1999* (the Act)). I believe that reinstatement would be appropriate in this instance. The applicant should, however, be placed on an official warning from the employer. Provided the employee knows precisely where and when he should wear his hard hat, any infringement (without appropriate excuse) could result in his termination of employment. This position should be made clear to all employees. If hard hats are not worn (without appropriate excuse) employees (regardless of whether they are management, non-management etc...) should be held liable and treated equally.

In *Bostik (Australia) Pty Ltd –v– Gorgevski (No 1)* (1992) 411R 452 at 460, Justices Sheppard and Heery state as follows:–

"Employers can propagate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in particular circumstances of individual cases, be harsh, unjust and unreasonable."

In accordance with s. 78(2), (4)(a), (b) and (c) of the Act, I order the reinstatement of Mr Graham Gilmour to his formerly held position of Level 5, Plant Operator with the employer together with adoption of the relevant sections of the Act mentioned in this paragraph – the maintenance of the applicant's continuity of service, the employee to repay any relevant amounts of money received upon termination and the employer should pay the applicant "the remuneration lost, or likely to have been lost, by the employee because of the dismissal, after taking into account any employment benefits or wages received by the employee since the dismissal".

It would be expected that the parties negotiate an appropriate return to work date for the applicant, but in any event it should be no later than three weeks after the date of release of this decision.

Order accordingly,

D.A. SWAN, Commissioner.

*Appearances:–*

Mr M.A. Stroppiana of Hall Payne Lawyers, with him Mr G. Betts for the Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch, Union of Employees, for the Applicant.

Mr G. Black of G & R Black, Industrial Relations & Management Consultants, for the Respondent.

Released: 20 October 2000

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#### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – jurisdictional question to be determined*

#### **Department of Employment, Training and Industrial Relations AND Peter John Keogh (W43 of 2000)**

COMMISSIONER SWAN

23 October 2000

Wages claim – Jurisdictional question – Matters heard *in toto* – Employee or subcontractor – Ambiguous contract – *Indicia* relating to employee/subcontractor considered – Findings of fact – Applicant an employee – Application granted.

#### DECISION

This application has been made by the Department of Employment, Training and Industrial Relations (DETIR) on behalf of Mr Manus Anthony Shearer. It is claimed that Mr Peter John Keogh (the employer) employed Mr Shearer in the capacity as a Driver – Grade 3 pursuant to the terms and conditions of the *Transport, Distribution Courier Industry Award – Southern Division* (the Award) and that Mr Keogh owes Mr Shearer an amount of \$1736.50 for wages owing under a previous contract of employment.

Mr Keogh challenges the jurisdiction of the Commission to hear the matter claiming that at all relevant times Mr Shearer was a sub-contractor rather than an employee.

Mr Keogh was unrepresented in this matter. It seemed more appropriate to hear the matter *in toto* rather than attempt to segregate the various legal arguments. This course was acceptable to both parties.

Mr Keogh, in partnership with his wife, Mrs Maria Keogh, operates a trucking business which transports motor vehicles. The business operates from Lot 204, Spreight Street, Brighton. These parties subcontracted their trucks to a company named Plencorp Pty Ltd trading as SupaTow. It was one of these trucks which was driven by Mr Shearer.

Mr Shearer worked during the period from 12 July 1999 to 30 July 1999 driving a 2 axle rigid vehicle or any other rigid vehicle exceeding 4.5 tonnes GVM but not exceeding 13.9 tonnes GVM.

Mr Keogh's evidence is that he and his wife (in partnership) owned a 1988 model Mazda truck and trailer which they contracted to SupaTow. He claims that he and his wife sub-contracted Mr Shearer to operate the truck on a commission basis only. Mr Keogh stated that he operated the truck on this basis as a consequence of advice received from the Australian Taxation Office (ATO), and with knowledge of the industry generally. This was so because he believed that if a driver wished to make more money, then there would be an incentive for that person to perform more work in the truck. Mr Keogh stated that he would not contemplate employing rather than sub-contracting Mr Shearer in this type of business as there would never be any way of his knowing whether work was being performed or not.

Mrs Keogh claimed that her role within the partnership was:-

"to collect the duplicate invoices off Mr Shearer, copy them for our records and forward same to Plencorp Pty Ltd. They would then take all the details and if payment wasn't received from the clients, for the invoices Mr Shearer delivered with each vehicle he dropped off, they would then issue an end of month invoice/statement to the clients in order to receive payment. It was also my responsibility, after receiving these duplicates from Mr Shearer to calculate how much was earned in the trust for the week and give Mr Shearer his percentage the week after."

Mrs Keogh referred the Commission to a contract drawn between Mr Shearer and the Keoghs which states, *inter alia*, as follows:-

"The Following is an agreement of Subcontractor work and conditions between Manus Shearer of .....and Peter and Maria Keogh (hereafter called Employer). Dated this 11<sup>th</sup> day of July 1999.

The Employee is to:

1. Wear full uniform of long black pants, SupaTow shift and steel capped boots while at work.
2. Keep truck clean at all times.
3. Keep paper work up to date and legible.
4. Give employer two (2) weeks notice of resignation.
5. Let employer know of any problems with the truck and or trailer so they can be repaired.
6. Supply his own mobile phone and pay his own bill.
7. Pay for any damages to vehicles or pay insurance excess for any claims (which ever is the lesser).
8. Advise employer immediately of any repairs or maintenance required to keep truck & trailer in a Road Worthy Condition.

The Employer agrees to:

1. Pay employee 30% of the gross turnover from the truck.
2. To deduct 20% for tax.
3. Service Truck on a regular basis.
4. Fix any problems with truck/trailer to keep them in a RWC.
5. Give employee one (1) weeks notice of termination.

NB. The employer will not pay Sick pay, Holiday Pay, Superannuation or Work cover to employee as it is their own responsibility.

Failure to comply with clause (8) of the above terms, or, through sheer negligence or carelessness on the employees behalf, if the truck/trailer became unroadworthy resulting in an infringement notice/fine it will be at the employees expense.

Instant Dismissal will be a result if:-

Employee does private work without going through correct SupaTow channels.

Employee collects cash from clients for work done and then proceeds to use any of this cash for private/personal use.

Employee uses truck/trailer for personal use without prior permission.

(signed) Peter Keogh and Maria Keogh (employer) : M. Shearer (employee)."

In her evidence, Mrs Keogh agreed that whatever jobs were to be done were organised by SupaTow, the vehicle was provided by Mrs Keogh to Mr Shearer, petrol was also provided by Mrs Keogh as well as maintenance for the vehicle. Mr Shearer's level of involvement in the collections of payments from clients was that he would hand the original invoice to the client, and sometimes collect a cheque from clients. Mrs Keogh stated that Mr Shearer was able to commence work at whatever time suited him, work for as long as he liked, choose whether he worked on someone else's vehicle, have PPS tax deducted and advise SupaTow if he would be unavailable for work at any time. Mrs Keogh stressed, however, that if Mr Shearer only chose to work occasionally on their truck, then they would have had to review the arrangement as little money would be generated for the business.

Mr R Fletcher (Company Director of Plencorp Pty Ltd trading as SupaTow) believed that the manner in which he and Mr Keogh conducted business was the "only way that it is possible for us people in our business for the business to be viable is for us to pay them on jobs done, each particular job, or on a commission basis. There's no other possible way". The only stipulation placed upon sub-contractors, according to Mr Fletcher, was that they telephone SupaTow in the morning so to advise of their availability for the day as drivers could arrange to work for someone else. Mr Fletcher calculated that the truck could generate income from between \$1500 and \$2000 per week if properly utilised.

Mr Fletcher stated that in making his business arrangements so as to engage the services of sub-contractors, he had submitted his contractual documents to the Taxation, Superannuation and Workers' Compensation Boards and had been advised that all was in order.

Against these submissions, Mr Powell (representing DETIR) called Mr Shearer and Mr Pflingst (Industrial Inspector) to give evidence. Mr Pflingst claimed that in an interview he conducted with both Mr and Mrs Keogh, the following assertions were made by Mr Keogh with regard to the cessation of the arrangement between Mr Shearer and the Keoghs.

"He quit, he ditched the truck on the side of the road. He rang me the night before and we were discussing insurance excess because he had lost a car off the trailer. He said he wasn't going to pay the excess and that he wanted all his money, the job didn't suit him and I wasn't getting the truck back until he was paid up in full. I organised with him to drop off the cars he had on and I was to meet him at Strathpine but it was changed to Carseldine. I was supposed to meet him at 8.00 am to pay him a cheque from Ross and one from me. He refused the cheques unloaded his stuff from the truck and walked off."

Mr Shearer claimed that he commenced employment upon responding to a job search advertisement at Centrelink. The advertised position was for a truck driver (car transportation). Mr Shearer, upon discussing the issue with the notifier of the job, was told that he was to undergo training which was unpaid. He claims that he was to advise Ross Fletcher by 6.30am each day to receive advice regarding jobs. He claims to have been told that the average "daily

wage” would be around \$100.00 and that his tax would be at the PPS rate of 20%. The hours worked varied according to the jobs which were handed out and Mr Shearer was to telephone at the completion of a job before receiving advice concerning the next job.

Telephone records from Mr Shearer’s account showed that he had contacted Mr Fletcher on each morning for work instructions. In all, for the period worked, the applicant received an amount of \$661.20. At the time of cessation of the arrangement, Mr Shearer states that he had asked Mr Fletcher to pay his all moneys owing (as regular payment hadn’t been made into his bank account when due on 29 July 2000) but that Mr Fletcher had stated that he “would not be paid until I signed an agreement for me to pay the insurance excess. I refused to sign the agreement and I was not paid wages owing.”

In his final submissions, Mr Powell contended, amongst other things, the following:–

- . That Mr Shearer was not “free to come and go as he pleased” from the job.
- . That he was required to drive the respondent’s truck for five days one week and six the next.
- . That he was given a starting time and “ongoing instructions regarding work to be performed from SupaTow”.
- . That Mr Shearer was under the control of the respondent.
- . That Mr Shearer was in constant contact with SupaTow.
- . That the signed contract between the parties reflected an employer/employee relationship with references eg to instant dismissal.
- . That the advice received from the Australian Taxation Office related to a set of circumstances inconsistent with those pertaining to the applicant.

### **Conclusion**

Section 5 of the *Industrial Relations Act 1999* (the Act) defines “employee” under the heading “Who is an employee”. Findings of fact must be made to determine whether a person fits under this category or not.

The named respondent in this matter is Mr Peter John Keogh, however, Mrs Maria Keogh should be included as a respondent as she is in partnership with her husband. A contract (previously cited) was signed by Mr Shearer and Mr and Mrs Keogh. The contract in itself is ambiguous. It refers to “subcontractor work” and then proceeds to speak of “employer” and “employee”. The relevant terms of that contract will be considered hereunder.

*Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16 is authority for establishing the basic tests to be applied in considering whether an employee/employer relationship exists between parties. Mason J at page 24 sets out the relevant principles to be considered in these circumstances. They include whether:–

“ultimate authority over the person in the performance of their work resided in the employer so that they were subject to the latter’s order and directions”.

The “control” test is not the only consideration to be given to these matters. Other considerations include:–

- The mode of remuneration
- Provision and maintenance of equipment
- Obligation to work
- Hours of work
- Provision of holidays
- Deduction of Income Tax
- Delegation of work by the alleged employee.

Further in that case, Wilson and Dawson JJ at pages 36 and 37 state that the following *indicia* are suggestive (but more of a guide only) of an employee/employer relationship and an independent contractor arrangement –

“The other *indicia* of the nature of the relationship have been variously stated and have been added to from time to time. Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like. Those which indicate a contract for services include work involving a profession, trade or distinct calling on the part of the person engaged, the provision by him of his own place of work or of his own equipment, the creation by him of goodwill or saleable assets in the course of his work, the payment by him from his remuneration of business expenses of any significant proportion and the payment to him of remuneration without deduction for income tax. None of these leads to any necessary inference, however, and the actual terms and terminology of the contract will always be of considerable importance.”.

Applying that criteria to this case, the “mode of remuneration” (ie 30% of the gross turnover from the truck) was not that which would normally apply in an employee/employer relationship (see *Bruce v Rimade Pty Ltd t/a Abel Courier Co* (McIntyre Vice President, Australian Industrial Relations Commission, Print N4691). Mr Keogh supplied Mr Shearer with the truck and paid for its maintenance. The applicant was to supply his own mobile phone and pay this account. On these facts, it would be more suggestive of an employer/employee relationship (see *Daniels v Bentleigh Callisthenics Incorporated*, Whelan C, Australian Industrial Relations Commission, Print N9259).

There is contention between the parties around the question of whether the applicant was free to reject work as he pleased. The applicant states that he was expected to work a full week and commenced each day by telephoning Mr Fletcher to ascertain what jobs had to be performed. Mr Fletcher and Mr and Mrs Keogh state that the applicant could choose whether or not to work on any day, but that if he did not perform enough work then they would review the success of the operation for themselves and for the applicant, he would receive little money. To support his claim, Mr Shearer supplied the Commission with a print-out of his telephone records for the period in question. These records show that on the mornings in question, Mr Shearer telephoned SupaTow in most cases reasonably early in the morning. Mr Fletcher and Mr and Mrs Keogh state that the applicant could choose his starting time, but, on the direct evidence of the applicant and upon considering the telephone messages, I accept that there was a requirement for the applicant to commence work around a particular time as would most employees (see *Bruce v Rimade Pty Ltd t/a Abel Courier Co*, McIntyre VP, Australian Industrial Relations Commission [Print N4691]).

In terms of the applicant being free to undertake other work separate from SupaTow’s, the evidence shows that the applicant appeared to be under a requirement to constantly call SupaTow advising availability for the next job – this would leave little time for other work to occur and shows that there was a requirement for the applicant to continually keep in touch with SupaTow.

A term of the contract (previously cited) states that the applicant was not free to undertake work with any other organisation unless the “correct SupaTow channels” (not elaborated upon) had been gone through – and if work did occur without going through those “channels”, then instant dismissal would

follow. Certainly, during the course of a day, the applicant made numerous telephone calls to SupaTow. This would indicate that SupaTow did exercise considerable control over the applicant's working day, in that he was under direction to keep constantly in touch with that body. "Instant dismissal" represents an action taken by an employer against an employee.

The contract was specific in that holiday and sick pay were not to be paid. As well, Superannuation and Workcover payments were not applicable to the applicant. These elements are indicative of a subcontract arrangement however there is support for the contention that the absence of these provisions (ie Superannuation and Workcover payments) should be afforded "little weight" in determining the question. (see *Sammartino v Mayne Nickless Express t/as Wards Skyroad* (Munro J, Duncan DP and Jones C, Australian Industrial Relations Commission Print S6212, May 1999).

Payment of taxation occurred under the Prescribed Payment Scheme (PPS). Generally, the payment of Taxation in this manner would be indicative of a subcontract arrangement rather than an employer/employee arrangement. This, however, is not a prime determinant in deciding the issue. (see *Jackson & Wilson v Monadelphous Engineering Associates Pty Ltd* (1997) Moore J, 42 AILR @ 658).

As stated earlier, the contractual arrangement between the parties, in its written form, is confusing. It appears that overt attempts have been made to attract the benefits for the business of a subcontracting system with significant elements of an employer/employee relationship where the terms are weighted against the employee. These areas have been identified.

I accept that the respondent parties attempted to ensure that a subcontracting arrangement was in place. Reliance was placed upon a Decision from the ATO which states *inter alia* that "the payments made by SupaTow to drivers using SupaTow's vehicles are considered to fall within the ambit of the Prescribed Payments System by virtue of Regulation 126 of the Income Tax Regulations." The ATO listed, in its decision, the facts it believed related to SupaTow as a consequence of being supplied with a copy of a written contract applicable to SupaTow and its drivers. There are differences between the facts cited in that decision and the information supplied in the contract tendered to the Commission during the course of this case (and the contract signed between the parties) – eg in the ATO decision it is stated that "it is expected that the driver who is given the job will carry it out, but drivers can "recruit" other drivers to take their place. In this situation, SupaTow pays that substitute driver" and "some drivers use SupaTow's vehicles, others are owner-drivers". It may well be the case that, based upon the material supplied to the ATO, SupaTow can act in the manner in which it does, but in terms of this particular contract and this particular applicant, this is questionable.

Having weighed all the factors presented to me in this matter, I would find in favour of the applicant. The terms of the contract, together with an acceptance by me of the evidence of the applicant, support a finding that the applicant was an employee for the purposes of the Act. (see s. 5 of the Act). I find that Manus Anthony Shearer was an employee of Mr and Mrs Keogh for the period 12 July 2000 to 30 July 2000. As such, the applicant should be paid the rate applicable to a Driver-Grade 3 in terms of the *Transport, Distribution and Courier Industry Award – Southern Division*. It has been calculated that wages owing amount to \$1736.50. This amount should be paid to the applicant within three weeks from the date of release of this decision unless some other agreed arrangement occurs between the parties.

An appropriate order will be released in conjunction with this decision.

Dated this twenty-third day of October, 2000.

D.A. SWAN, Commissioner.

Released: 24 October 2000

*Appearances:-*

Mr D. Powell, of the Department of Employment, Training and Industrial Relations, for the Applicant.

Mr P. Keogh, (the Respondent).

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#### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 125 – making of a new Award*

#### **Australian Liquor, Hospitality and Miscellaneous Workers' Union, Queensland Branch, Union of Employees, Queensland Independent Education Union of Employees AND Queensland Catholic Education Commission (B1585 of 1999)**

COMMISSIONER SWAN

24 October 2000

#### DECISION

B1585 is an application made by The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Queensland Branch, Union of Employees (ALHMWU) for the repeal of The Catholic Boarding Schools and Colleges Employees South-Eastern Division – Industrial Agreement and the making of a new Award entitled "Catholic Boarding Schools and Colleges Employees' Award – South-Eastern Division".

During earlier preliminary hearings of this matter, the Queensland Independent Education Union of Employees, represented by Mr J. Spriggs, sought and was granted, in accordance with a recent Rules change, leave to appear in the matter.

I have determined that the Industrial Agreement aforementioned has the same effect as an Award of the Commission given that there was no applicable award to which these parties could respond (see Chapter 19 – "Saving and Transitional Provisions for *Industrial Relations Act 1999*", s. 713 "Existing industrial agreement continues" *Industrial Relations Act 1999*).

It is my understanding that all but one part of the proposed Award is agreed to by the parties. The ALHMWU and the employing body (represented by Mr K. Cuddihy) are in agreement on all components of the proposed Award. The difference of opinion exists between Mr Spriggs' organisation and the employing body.

The difference goes to consideration of one specific clause relating to "term time employment". The concept in itself is not in dispute between the parties – what is in dispute is whether the clause agreed to between the ALHMWU and the employing body should be incorporated, as drafted, within the Award.

Mr Spriggs' submissions are as follows:-

- . The proposed concept of "term time employment" was not contained within the Industrial Agreement.
- . The Industrial Agreement did reflect a position around the issue which provided a reasonable safety net provision which should be retained.

- . During discussions between the ALHMWU and the employing body, an agreement was reached to include within the Award a modified form of the earlier provision including the introduction of a "term time employment" provision.
- . The Industrial Agreement, as a consequence of changes to the relevant Legislation, was unable to be varied to reflect basic safety net conditions and safety net wage adjustments.
- . The Industrial Agreement before the Commission for consideration is not a "contemporary document".
- . Notwithstanding that, as a consequence of enterprise bargaining outcomes, employees have received appropriate wage increases etc.
- . Were it to be the case that enterprise bargaining outcomes were not in the future achieved with some of the employing party's constituents, then the parties would be required to rely upon the Industrial Agreement/Award for its safety net provisions.
- . Having a safety net Award in place, one would then look to a Certified Agreement which should reflect the arrangements reached between the parties beyond the Award provisions.

Mr Cuddihy's submissions are as follows:-

- . In "other non-governmental" sectors, specific definitions regarding "term time employment" have been included within the Award.
- . There is a belief that the clause as proposed should be within the Award as there is no Certified Agreement in place to reflect this agreed situation.
- . The provision proposed for the new Award was in fact more beneficial to employees than the clause being debated between the parties during their enterprise bargaining discussions.
- . If and when an agreed position is reached between the parties in enterprise bargaining negotiations around the issue, then to the extent of any inconsistency with the Award, the provisions in the enterprise bargaining document would prevail.

### **Conclusion**

There is agreement between the parties around the concept of "term time employment". I understand that the specifics around that clause are to be determined through enterprise bargaining. Without challenge, Mr Spriggs has asserted that the existing provisions contained within the Enterprise Agreement permit the employer to do what it wishes to do in this regard, in any event.

It would seem to me that, notwithstanding the agreement which exists between the ALHMWU and the employing body regarding this provision, the more appropriate course would be to incorporate within the proposed Award those provisions already existing within the Industrial Agreement, and to leave the fine tuning of "term time employment" provisions to the enterprise bargaining negotiations. The safety net would then exist for employees within the Award, and whatever is then achieved through enterprise bargaining would over-ride those safety net provisions where applicable. There is technical correctness in the submissions made by Mr Spriggs around the Principles of this Commission, the nature and content of Awards of this Commission and specifically as it relates to enterprise bargaining outcomes. It is my understanding that the proposed Award would provide the standard provisions reflecting (with the exception of enterprise bargaining outcomes as they go to wages etc.) the general nature of the industry as it now operates.

It seemed to me that the debate between the parties was more philosophical than practical. In any event, I am more persuaded by Mr Spriggs' argument. In permitting retention of the clauses in the Industrial Agreement to which Mr Spriggs refers, my understanding is that no damage is done to either party. The parties can then continue to debate in more detail the actual specifics around the issue of "term time employment" as they see fit during enterprise bargaining.

The draft document put before the Commission requires a number of amendments as discussed during the course of the hearing. The parties are directed to confer on these points and to submit to the Commission the amended document within two weeks from the date of release of this decision:

Provided that material is received within that time, the appropriate repeal of the Industrial Agreement and the making of the new Award will occur. The operative date should be 7 November 2000.

Order accordingly,

D.A. SWAN, Commissioner.

*Appearances:-*

Mr J. Spriggs of the Queensland Independent Education Union of Employees, and Ms J. Billingsley of The Australian Liquor, Hospitality and Miscellaneous Workers' Union, Queensland Branch, Union of Employees, for the Applicant.

Mr K. Cuddihy, with him Mr B. Cooper, of Queensland Catholic Education Commission, for the Respondent.

Released: 24 October 2000

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### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

### **Rebecca Wain AND Julia Ross Personnel (No. B736 of 2000)**

COMMISSIONER THOMPSON

20 October 2000

### DECISION

As a preliminary matter in these proceedings, the respondent, Julia Ross Personnel, submitted that the Commission determine an issue of jurisdiction in respect of the applicant Ms Rebecca Wain's right to have her application for reinstatement proceeded with on the basis that she was a short term casual and therefore an excluded person pursuant to Chapter 3 – "Dismissals", Part 1 – "Exclusions, s. 72(1)(c) of the *Industrial Relations Act 1999* (the Act).

Mr L. French, representing Julia Ross Personnel, stated that the company was a leading provider of temporary staff to both business and government throughout Queensland and Australia, and that in general terms the nature of placements, to which temporary staff may be assigned, range from single day placements to cover absentees, to longer term arrangements to businesses wishing to outsource sections of their operations.

He claimed that the fundamental basis upon which the temporary employment industry operates is that of providing staff to clients on an as needs basis.

Mr French submitted that if the applicant's employment status was found to be that of a permanent employee, then, in his view, it would virtually mean the end of any long term placements being provided on a temporary basis.

To the matter at hand, evidence was presented that upon securing employment with Julia Ross Personnel, the applicant was clearly advised of the temporary nature of the placement and signed a company document titled "Temporary Employee Agreement – Terms and Conditions of Employment".

In terms of the employment conditions applicable, the respondent provided details that the *Clerical Employees Award – State* was the industrial instrument of coverage and the rate of payment would be nineteen (19) dollars per hour inclusive of annual and sick leave, both of which would be available to be accessed by the applicant on a without pay basis.

The applicant is said to have completed an appropriate Tax File form on commencement and placed a tick in the box marked "casual" which was an indicator as to the mode of employment undertaken.

Upon her appointment as a team leader, the applicant's assignment was with Telstra, a client of the respondent, and she remained in the same classification at the same place of work until her termination effected on 5 May 2000.

Through submissions and evidence, it was acknowledged that the applicant was employed on a regular and systematic arrangement in which hours between 36.75 and 37/38 per week were worked as part of a six (6) week roster which was established pursuant to the Clerical Employees Award – State.

The respondent had a contract with Telstra which was of a long-term nature and provided a significant number of temporary jobs on an "ongoing" basis.

In the course of the applicant's employment, the respondent produced an Australian Workplace Agreement (AWA) which was signed by both parties in September 1999.

Evidence was given by Ms Karen Dixon who was a Temporary Recruitment Consultant with Julia Ross Personnel at the time of the applicant's engagement and the person who conducted the job interview when the applicant responded to the newspaper advertisement.

Ms Dixon, during evidence-in-chief stated that the applicant was advised of the temporary nature of the employment on offer and not given any guarantees as to the term of employment. Ms Dixon recalled providing a run down on the Temporary Employment Agreement with the applicant and indicated, in her opinion, that the applicant had little difficulty with signing the document.

Under cross-examination, Ms Dixon agreed that the word "casual" had never been used during the course of the interview, but reference had been made to temporary employment.

Under further questioning, Ms Dixon acknowledged that she could not remember the conversation with the applicant during the job interview, but was comfortable with the view that in general terms she recalled the process used to conduct the interview.

Mr French referred to the matter of *G.B. Graham -v- Bluesuits Pty Limited t/as Toongabbie Hotels* (C No. 20632 of 1999) 1265/99 MPrint S0282, in which a Full Bench of the Australian Industrial Relations Commission found against a decision of Deputy President Duncan, to allow a casual employee a remedy under the *Workplace Relations Act 1996*.

Mr French, in submissions, requested that the Commission strike out the application on the basis of s. 72(1)(c), with further reference to s. 72(8) ("short term casual employee" definition).

The applicant, in evidence, said that in June 1999 she responded to an advertised position of Recruitment Consultant with Julia Ross Personnel, and in discussions with a senior management person, comment was made that the applicant was somewhat over qualified for that particular position.

It was stated that discussions took place in respect of other employment and that the applicant expressly informed the management person of her desire to obtain a permanent position.

In late June, or early July, 1999, the applicant answered an advertisement placed by the respondent in the Courier Mail for a trainer in a call centre which referred to the "ongoing" nature of employment and whilst there were two references to "temp" at the top of the advertisement, there was no mention of casual employment in the position description. Contact was made between the applicant and Ms Dixon in a direct response to the advertisement which was followed by a subsequent interview and the offer of employment was made to the applicant for a position as a Team Leader.

The applicant's statement reflected a clear recollection of the interview with Ms Dixon in which a number of important matters were subject to discussion including the available work with the client Telstra being "ongoing", with the likelihood of a lengthy period of employment.

Other matters that were discussed such as wage rates and the term "temporary" employment but there was never a mention of "casual" employment.

The applicant stated that if the position had been "casual" she would not have commenced employment with the respondent.

The applicant clearly recalled Ms Dixon providing information of the long-term nature of the respondent's contract with Telstra.

In terms of the signing of the Temporary Employment Agreement, the applicant claimed that numerous issues were discussed and that Ms Dixon acknowledged the points raised by the applicant at the interview.

The applicant maintained during both evidence-in-chief and cross-examination that she believed the employment would be "ongoing" and of a more permanent nature than that of casual employment.

The respondent presented the applicant with a number of versions of Australian Workplace Agreements (AWA) and the applicant acknowledged signing each version.

It was stated that the applicant and other persons employed by the respondent at the Telstra location raised with a Senior Management representative of the respondent upon commencing employment their concerns regarding the status of "temporary employee" and its meaning.

Additionally, questions were also raised as to what "ongoing" meant. The applicant in her statement at paragraph 34 states "ongoing meant and we were told that the assignment would go for as long as the contract with Telstra lasted, at the very least".

The applicant believed that at all times she expected that the position was of a full-time nature or until, at least, the expiry of the Telstra contract.

In respect of hours, the applicant considered that the hours of employment were never anything less than those of a full-time employee.

Ms M. Hindman, in submissions for the applicant, argued that in respect of the *G.B. Graham -v- Bluesuits Pty Limited t/as Toongabbie Hotels* (C No. 20632 of 1999) decision, it presented, in essence, a different set of criteria from which to look at to determine whether employment was in fact casual. However, the point was made that this decision did not say that if you are termed "a casual employee", but you work regular and systematic hours, that you will now be a casual employee.

Ms Hindman contended that there were a number of factors that were outlined in the *G.B. Graham -v- Bluesuits Pty Limited t/as Toongabbie Hotels* (C No. 20632 of 1999) case that should be considered by the Commissioner in determining whether Ms Wain was in fact casual or permanent.

Ms Hindman also made reference to other matters that should be considered in the determining of this matter. They included *Swan Yacht Club (Inc) -v- L. Bramwell* (No. 1485 of 1997) WAIRComm 291, and *P. Reed -v- Blue Line Cruises Limited* (No. NI4990R of 1995) 571/96.

The duties of the applicant, according to Ms Hindman, were that she worked a full-time roster, attended management meetings, had ongoing duties at the call centre, was responsible for training staff and the implementation of incentive schemes in the call centre and all types of other duties that you would not normally expect of a casual employee.

### **Conclusion**

In this matter, there were a number of points that were not matters of contention, but nevertheless important factors of substance in the overall considerations, being:-

1. The employee was employed for less than twelve (12) months;
2. The employee worked a regular roster (namely a six (6) week roster);
3. The employee was required to complete leave application forms and advise of an inability to attend at work because of illness;
4. The employee was not advised of the duration of her placement; and
5. The employee was paid at casual rates and was not paid sick or annual leave.

In reaching my decision, it was necessary to consider firstly, that in all probability, from the evidence, was it reasonable for the applicant at the commencement of her employment with Julia Ross Personnel to believe that her employment was on a permanent basis as opposed to that of a casual employee, as contended by the respondent.

The job advertisement that initiated the applicant's approach, in my view, was less than forthright in identifying the position as that of a casual nature, if that was, in fact, the intention of the respondent in the first instance.

I accept the evidence of the applicant that she sought to clarify the use of the word "temp" during the interview stage of the process and that the assurances given by the representative of the respondent would have allowed the applicant to form the view that the position on offer was not of a short term casual nature but "ongoing".

In respect of the applicant's signing of the temporary employment agreement, I am of the view that the applicant held the belief that despite the numerous references to temporary employment and of assurances given by Ms Dixon that her employment was to be of an "ongoing" nature, and therefore reasonable to assume it was not casual, then the references to temporary employee was not applicable.

On page 53 at paragraph 50, Mr French, in his final submission, says "I sometimes think, Commissioner that if we had included the word 'casual' before the word 'loading' we might not have been here today, but one can rest assured that these matters will be looked at for future reference.". This comment, in my view, raises a level of uncertainty, even from the advocate for the respondent, as to how one could interpret the employment position of the applicant, particularly as it relates to temporary, casual or permanent employment.

The signing of the Australian Workplace Agreement by the parties more than likely could have led to a view from the applicant that clause 15 of the agreement would, in effect, render the terms of the temporary employee agreement null and void. Whilst I would place limited weight on this matter due to the fact that there was no evidence introduced that confirmed the registration of the AWA, again it would be reasonable for the applicant to have her concerns on the contents of the "temporary employee agreement" further allayed at that point in time.

The respondent raised issue with the applicant's marking of the "casual" box on the Taxation Declaration Form at the commencement of employment. However, I find the explanation given by the applicant that such action was on the basis of advice of a Julia Ross Personnel staff member as plausible and would not be an unlikely occurrence in any number of instances where a person takes up employment.

In relation to the payment of a loaded rate of pay for the duration of the applicant's employment this was in my view a most important issue of which great reliance was placed by the respondent in clearly indicating that the applicant was a casual rather than permanent employee.

It is, however, my view that the method of loaded, or all up payments, is a growing trend occurring more regularly in the workplace and on its own can no longer be sufficient to draw a reasonable conclusion that a person is a casual rather than permanent employee.

In this matter, I am of the opinion that from the evidence before the Commission that the applicant, after reading the job advertisement, participating in the interview process, and receiving various assurances from representatives of Julia Ross Personnel, could reasonably draw the conclusion that the employment on offer from the commencement was not that of a casual nature.

In respect of the *G.B. Graham -v- Bluesuits Pty Limited t/as Toongabbie Hotels* (C No. 20632 of 1999) decision, which was subject to varying views from both the respondent's and the applicant's representatives, I find that whilst there were some areas that were consistent with the matter before the Commission, I am unable to reach the position that it was appropriate for that decision to have such an effect that it would deny the applicant, Ms Wain, the opportunity to have her application for reinstatement heard.

Accordingly, I reject the argument from the respondent, pursuant to s. 72(1)(c) of the Act that the applicant was an excluded person, and advise that future hearing dates for this matter will be advised to the parties in due course.

J.M. THOMPSON, Commissioner.

Released: 20 October 2000

*Appearances:-*

Ms M.H. Hindman, of Quinn & Scattini, for the Applicant.  
Mr L. French, of Redwing Consulting, for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**William Kelsey AND Brisbane Institute of TAFE (No. B284 of 2000)**

COMMISSIONER THOMPSON

23 October 2000

DECISION

An application had been made by Mr William Kelsey seeking reinstatement to the position of teacher previously held at the Brisbane Institute of TAFE.

As a preliminary matter, the respondent submitted that a number of jurisdictional issues, under Chapter 3 – “Dismissals”, both Part 1 – “Exclusions” and Part 2 – “Unfair Dismissals” of the *Industrial Relations Act 1999* (the Act), were sufficient to have the applicant excluded from the jurisdiction of the Queensland Industrial Relations Commission, and for the application to be discontinued.

The respondent’s first point of argument was that the applicant had been employed for a specific period of time and therefore excluded under Part 1 – “Exclusions”, s. 72(1)(d) of the Act, which states “an employee engaged for a specific period or task, unless the main purpose of engaging the employee in that way is, or was, at the time of the employee’s engagement, to avoid the employer’s obligations under part 2.”.

It was submitted that the applicant had been employed on three separate fixed term engagements with the respondent as provided for in clause 4.4 of the *TAFE Teachers’ Award – State*.

Each of the engagements had been confirmed in writing, clearly stipulating the commencement and concluding dates of the contracts.

Details relating to the terms of engagement are as follows:-

1. 19 January 1998 to June 1998;
2. 1 July 1998 to 19 December 1998; and
3. 20 December 1998 to 19 December 1999.

The respondent submitted that there was a genuine business need for each of the fixed term employment contracts.

In conjunction with each of the three (3) contracts, a letter of appointment was given to the applicant which clearly identified the completion dates and provided no further commitments outside of what was stated in the contract, that being definite fixed term or employment.

It was submitted that, in the view of the respondent, the applicant was fully aware that the contracts were for a fixed term, and that the last of the contracts expired on 19 December, 1999.

The respondent further submitted that the final fixed term contract ceased due to the effluxion of time and, as such, the jurisdiction of the Queensland Industrial Relations Commission was unable to be accessed by the applicant as “no dismissal” had occurred.

In support of argument that “no dismissal” had taken place, the respondent provided case details: *S. Pitman -v- Queensland Department of Health* (C73 of 1996) 155 QGIG 232; *P. Whelan -v- Mater Misericordiae Hospital* (B11 of 1997) 156 QGIG 123; *S.A. Debois -v- Mackay City Council* (B1 of 1997) 155 QGIG 1185; and *A. Hughes -v- Monash University* 423/99 M Print R4303.

The final jurisdictional matter raised by the respondent was in respect of s. 74(2)(a) which states that the application for reinstatement must be made within twenty-one (21) days after the dismissal takes effect.

The respondent submitted that the application was “out of time” by some fifty (50) days from the cessation of employment which would effectively rule out the application if the Commission was to rule against the previous jurisdictional matters raised by the respondent.

Case law supportive of the out of time case presented included: *H. Petruch -v- Davy Kinhill Fluor Daniel Joint Venture* (C57 of 1996) 153 QGIG 543; *L. Groom -v- AlSCO Linen Services Pty Ltd* (B294 of 1999) 161 QGIG 163; and *G. Erhardt -v- Goodman Fielder Food Services Limited* (B1076 of 1999) 163 QGIG 20.

Evidence tendered from Ms Deborah Walker, Director – Client and Staff Services at the Brisbane Institute of TAFE, identified substantial flaws in the selection process relating to a possible three (3) year appointment to the position of Teacher (Design Services – Interior Decoration) for which the applicant had sought employment.

On a recommendation from Ms Walker, the selection process was discontinued, and on 13 January 1999, the applicant was advised that the recommendations from the selection panel in relation to the three (3) year position of teacher had not been signed off by the Institute Director.

Ms Walker recalled that also on 13 January 1999, she confirmed with the applicant that the offer of a further twelve (12) month contract to 19 December, 1999, would be honoured by the Institute.

The second witness called by the respondent was Mr Ian Abraham, Director – Strategic Initiatives – Brisbane Institute of TAFE, whose areas of responsibility included the Interior Decoration Department, which was the section of the institute where the applicant had been employed.

The witness recalled a discussion that had taken place with the applicant on 6 January 1999 by telephone to discuss an offer of an appointment for a period of approximately twelve (12) months.

On the week commencing 22 November 1999, Mr Abraham stated, in evidence, that after checking enrolment numbers for a full fee paying Diploma course, he determined that the number of enrolments were insufficient to consider running the fee for service course, and that, coupled with significantly reduced budget allocation from direct government funding, he then met with the applicant on 25 November 1999 and advised of his (Mr Abraham's) decision not to offer the applicant a further employment contract at the conclusion of his current contract, which was to expire on 19 December, 1999.

The applicant, in opposing the arguments of the respondent did not call any witnesses and did not, himself, give evidence under oath, but relied on providing submissions from the Bar.

The first matter raised in submissions by the applicant addressed the out of time question. In his submission, the applicant (on page 21, paragraph 50, of transcript) made the telling statement "I was quite shocked when I was notified there was a time limit but I proceeded to apply anyway."

The applicant submitted that there had been ongoing negotiations with the Queensland Public Sector Union (QPSU) at the time of the cessation of his employment and that he had expectations of the Union taking the matter to an Industrial Tribunal.

The applicant also stated that he was of the belief that his initial employment would be for a period of three (3) years, but acknowledged that Mr Abraham had amended documentation, which effectively reduced the terms to that of a lesser time.

### Conclusion

In reaching a decision on this matter, the Commission determined that each of the three (3) specific issues, identified by the respondent as reasons for the discontinuance of the application for reinstatement, would be addressed separately.

#### Fixed Term Employment Contract

Section 72(1)(d) "an employee engaged for a specific period or task, unless the main purpose of engaging the employee in that way is, or was at the time of the employee's engagement, to avoid the employer's obligations under part 2."

In submissions from the respondent, that were not disputed by the applicant, it was stated that each of the three (3) letters of appointment, the applicant received from the respondent, for each of the employment periods, the wording "a Fixed Term Full-Time Teacher" specifically identified the mode of employment and that each of the letters confirmed a completion date. Those dates being:

- 30 June 1998;
- 19 December 1998; and
- 19 December 1999.

The "Fixed Term Full-Time Teacher" position was consistent with the provisions on the TAFE Teachers' Award – State, clause 4.4, and a widely used method of employment within the TAFE system.

It is clear from the evidence provided to the Commission in respect of this matter, that the applicant was employed for a specific period and task under s. 72(1)(d) of the Act, and is therefore excluded from further proceeding with the application.

#### Fixed Term Contract Ceased due to Effluxion of Time

The views of the respondent in respect of this point are:

- The contract of employment of Mr Kelsey was for a specific period of time with a defined end date of 19 December 1999;
- The date of cessation was a term of the employment contract;
- The employment was formalised in a letter of confirmation from the employing authority; and
- The applicant was at all material times aware that the contract of employment would cease on 19 December, 1999.

In the case *S. Pitman -v- Queensland Department of Health* (B2265 of 1995), it was determined by the Commissioner hearing the matter that:

"the only contracts under which the applicant was employed by the respondent were fixed term contracts which ultimately (on 9 January 1994) were not renewed. The employment terminated, in other words, through effluxion of time. There being no dismissal."

The finding of the Commissioner in this matter was subsequently upheld by Justice de Jersey, President (appeal by Stephen Pitman against Decision of Industrial Commission – C73 of 1996) in the Industrial Court of Queensland.

My decision on this matter is that the applicant was not "dismissed" within the meaning of the Act and that his employment was concluded due to the effluxion of time.

#### Application Made Out of Time

An application for reinstatement must be made under s. 74 of the Act, and in accordance with clause (2) "(a) within 21 days after the dismissal takes effect" or "(b) a further period the commission allows on an application made at any time".

The application for reinstatement was received by the Commission some seventy-one (71) days after employment had ceased, and therefore fifty (50) days outside of the cut-off point for such an application to be lodged in accordance with the Act.

In the submissions of the applicant (page 22, paragraph 10, of the transcript), Mr Kelsey provided details of ongoing early negotiations with an officer of the QPSU in respect of his reinstatement and on that basis, I find it difficult to accept that the applicant was not, at that point, aware of the twenty-one (21) day time limit provision of the Act.

In fact, as referred to earlier in this decision, the applicant quite clearly proceeded with his application despite being aware of the expired time limit.

As such, I would not extend, under s. 74(2)(b), an extension of time for the applicant to proceed with his application.

I find that each of the above listed three (3) specific issues, in their individual right, would be sufficient to bring a discontinuance of the application. Therefore, collectively, there are ample reasons for the application to be dismissed. The Commission doth order accordingly.

J.M. THOMPSON, Commissioner.

*Appearances:-*

Mr W. Kelsey (the Applicant).

Ms C. Laird, of Workplace Consulting Queensland, Department of Employment Training and Industrial Relations, for the Respondent.

Released: 23 October 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Gary Eaton AND Queensland Railways Institute Inc (No. B614 of 2000)**

COMMISSIONER THOMPSON

24 October 2000

DECISION

Mr Gary Eaton made an application for reinstatement as General Manager of the Queensland Railways Institute Inc (QRI) following termination of his employment on 27 April 2000.

The applicant commenced employment with the respondent on 23 March 1994, as General Manager, and held that position until his dismissal.

At the date of termination, the applicant's annual salary was \$59,251.

Whilst General Manager, the applicant contended that he was instrumental in:-

- introducing a number of significant new services for the benefit of members, including: the commissioning of the QRI Café and Conference Centre; commissioning Café 8; organising discount fuel cards for members; providing general insurance services for members; commissioning four (4) additional licensed clubs; publishing a members' handbook; establishing an accommodation, cleaning, catering and transport business in the mining district in Central Queensland; and winning the tender for a members' gym in the Mincom Building in Edward Street, Brisbane;
- increasing the annual turnover of QRI from \$1.5 million dollars to \$6.5 million dollars; and
- maintaining membership at approximately 80% of all eligible railway employees in Queensland.

On 31 March 2000, the applicant received correspondence from Mr J. Noble, Secretary, QRI, written on behalf of the Management Committee, expressing dissatisfaction with his performance in eight (8) identified areas and requiring the applicant to respond to the eight (8) points prior to the next meeting of the Management Committee, scheduled for 27 April 2000.

The eight (8) points were:-

1. Why was the Emerald payment made against instructions of Committee?
2. Employment of a bookkeeper when instructed to employ accountant.
3. Outstanding Café debts when assured problem fixed last year.
4. Handling of Café supervisor problems (approach by letter not as instructed by Committee).
5. Inability to respond to Management Committee decisions.
6. Failure to fix problems with financial reports.
7. Employment of relatives.
8. Communication – Ipswich/Morale/Staff.

The letter from Mr Noble further advised the applicant that his response to the eight (8) points would be subject to review by the Management Committee at the next meeting and, additionally, his contract of employment with the QRI would also be reviewed at the meeting.

On April 2000, the applicant delivered a written response to the Management Committee of the QRI, forwarding by post a copy to all members of the Management Committee.

The applicant stated in that response that:-

- in each case the applicant had at all times acted to the best of his ability in accordance with sound business principles;

- in each case the applicant had, as best he could, acted in consultation with, and in accordance with, the directions of the Management Committee; and
- where he was constrained, he was constrained by decisions of the Management Committee by which he was bound.

At the meeting of the Management Committee held on 27 April 2000, at which the applicant was present, both the Secretary's letter to the applicant (dated 31 March 2000) and the response document, of some forty (40) pages, were tabled.

The applicant submitted that he was asked at the meeting of 27 April 2000, whether he had anything to add to his written response to which he replied "no". In turn, he then invited questions from the various members of the Management Committee, and none were forthcoming. The applicant was then requested to leave the meeting.

Later, on the afternoon of 27 April 2000, the applicant, in the presence of Mr Mark Dillman, a Solicitor, was advised by Mr Kenneth Cavanough, President of the QRI, that his employment was being terminated immediately and was requested to leave the workplace at close of business that day.

A letter of termination, dated 27 April 2000, and signed by Mr Cavanough and Mr Noble, was later given to the applicant.

The letter, written on QRI letterhead, stated:-

"Dear Gary,

On behalf of the Management Committee of Queensland Railways Institute Inc. I wish to inform you of the Committee's decision to give you notice of termination of your employment contract.

The Committee, as the employer, hereby gives you notice of termination of your employment with four weeks pay in lieu of notice effective close of business 27<sup>th</sup> April 2000.

All outstanding entitlements of your employment contract due at this date will be paid.

Please arrange to return all property belonging to QRI Inc.

It is agreed that you have use of the QRI vehicle to transport your personal belongings on the condition that the vehicle is returned by 0900hrs on Friday 28<sup>th</sup> April 2000.

K. CAVANOUGH  
President

J. NOBLE  
Secretary."

The applicant submitted that at no stage was he given, either written or verbally, reasons for his dismissal, and that when he sought a response from Mr Cavanough, he was told that there were no reasons and that the respondent was relying on the notice provisions of the agreed terms of his initial employment contract from March 1993 to effect the termination.

The applicant was subjected to a lengthy period of cross-examination by Ms Kylie Downs, on behalf of the respondent, during which a number of matters were canvassed including (but not exclusive):-

- applicant's employment status since departure from QRI;
- Management Committee dissatisfaction with continued lateness of financial reports at Committee meetings;
- lack of procedure documentation;
- failure to carry out directions of the Management Committee;
- Michelle Priestly's resignation/grievance procedure matter;
- staff remuneration, performance reviews;
- Emerald loan payment – transfer of funds;
- employment of relatives – wife;
- falsifying Management Committee Minutes; and
- employment of a bookkeeper as opposed to Management Committee direction to employ an accountant.

Evidence was given by Mr Dillman that along with the applicant, he attended the meeting of the Management Committee of the QRI on 27 April 2000, when the applicant's response to the eight (8) points raised in the correspondence from Mr Noble were tabled.

Mr Dillman confirmed the applicant's evidence in respect of the conduct of that meeting.

He further provided evidence that some three (3) to four (4) hours later, on that day, he appeared before the Executive of the Management Committee, at which time Mr Cavanough advised the applicant that his employment was being terminated immediately and that the applicant was to leave the workplace at the close of business on that day.

Mr Dillman stated that he asked Mr Cavanough the reasons for the termination of the applicant's employment to which Mr Cavanough replied that no reasons would be given and the QRI were relying upon its rights conferred by the contract of employment between the respondent and the applicant.

In summary, Mr Chris Wilson, on behalf of the applicant, stated that the termination of the applicant had been harsh, unjust and unreasonable within the terms of the *Industrial Relations Act 1999*, and the failure of the respondent to provide the applicant with reasons for his termination confirmed the unfairness of the dismissal.

Mr Wilson, in further submissions, indicated that the applicant, until the immediate period prior to his dismissal, had a good work record that had been unquestioned by the respondent and, under his leadership, a substantial number of new services had been introduced and the financial turnover of the organisation had tripled since the applicant's appointment as General Manager.

The remedy sought by the applicant was reinstatement to his previous position, and that the decision of the QRI to leave open the Manager position until the applicant's reinstatement issue was finalised, would allow for such reinstatement to occur in an orderly way.

The respondent, in opposing the reinstatement, called four (4) witnesses.

The first witness, Mr Christopher Barlow, a qualified Clinical and Organisational Psychologist, was engaged by the QRI after the applicant's termination to provide a written report on the following matters:-

- a review of the QRI operations; and
- to make recommendations in relation to improving the QRI's operations. The process of investigations, interviewing staff, and reviewing documentation, commenced on 21 June 2000.

In evidence, Mr Barlow submitted that, in his opinion, the issues of concern raised in his report were as a result of the applicant's failure to properly perform his duties as General Manager of QRI.

A number of contracts between QRI and various clients had been found to be unsigned, further demonstrating the lack of good management practices.

According to Mr Barlow, he found staff morale low, and was aware that a number of resignations had been tendered.

The second witness, on behalf of the respondent, Ms Juliet Schultz, is a member of the QRI Management Committee, and has been in that position for the past four (4) years.

Ms Schultz's evidence transcended across a number of areas, including: the resignation/grievance issue of QRI employee, Ms Michelle Priestly; the applicant's failure to implement decisions of the QRI Management Committee; and, the loss of confidence by the Management Committee in the applicant's ability to manage.

The main witness, on behalf of the respondent, Mr Cavanough, former Treasurer and now, as mentioned, President of QRI, detailed numerous items which the Management Committee had raised with the applicant, since 1998, relating to concerns about his work performance.

Whilst there were a number of complaints in respect of the applicant's failure to address adequately matters such as salary reviews, lateness of financial accounts and minutes, there was, however, according to Mr Cavanough, other more substantial issues that were of a major concern to the QRI. These included:-

- the applicant's handling of Ms Priestly's case and his alleged deliberate failure to adhere to the Management Committee's decision on how to proceed with resolution of this issue;
- falsifying the minutes of a Management Committee meeting by the creation of a motion to form a Proprietary Limited subsidiary company of the QRI; and
- the disregarding of a direction from Mr Cavanough to inform other Management Committee members of the transfer of loan funds to the Emerald QRI Club prior to the transfer occurring.

Mr Cavanough, in evidence, provided information relating to the process leading to the applicant's termination, and confirmed that the applicant had not been given reasons for his dismissal.

Ms K. Downes, Counsel for the respondent, in final submissions indicated that the termination of the applicant was not harsh, unjust or unreasonable and, in fact, that because of the applicant's poor work performance, it would have been appropriate for dismissal to occur at an earlier date.

It was submitted that the applicant's failure to follow directives of the QRI's Management Committee in some instances, had the potential to expose the QRI to possible legal action.

The applicant, according to Ms Downes, had demonstrated by his manner and demeanour that he was completely unsuitable to hold the job as General Manager.

Ms Downes, in addressing the important issues of Ms Priestly's employment, Emerald's loan funds, and the employment of relatives, submitted that the applicant's consistent failure to pay proper attention to Management Committee directions meant that he "wouldn't have lasted more than three months" in his job as General Manager had he not been dismissed on the 27 April 2000.

In addressing the issue of compensation, Ms Downes stated that on termination, the applicant had received four (4) weeks pay in lieu of notice and was paid a further one (1) weeks wages on the 9 May 2000, to comply with the provisions of the *Industrial Relations Act 1999*.

Ms Downes questioned whether the applicant had taken steps to reduce his financial loss since the termination and whether an appropriate mitigation of such loss, by the applicant, occurred.

### **Conclusion**

In determining whether the applicant's dismissal was harsh, unjust or unreasonable, I find that, in accordance with s. 77(a) of the *Industrial Relations Act 1999*, the evidence before the Commission is undisputed in that the respondent did not provide the applicant with reasons for his dismissal either at the time of termination, or at any other subsequent time.

Section 77(c)(i) provides for the employee to receive a warning in respect of conduct, capacity or performance. I consider that whilst a number of not so formal references were made to both the conduct and performance of the applicant in the twelve (12) month period prior to his termination, none of these references, in my view, were sufficient in either content or structure for the applicant to draw a reasonable conclusion that termination from his position as General Manager of the QRI may be eminent.

Section 77(c)(ii) relates to the employee being given the opportunity to respond to allegations relating to conduct, capacity or performance. In this matter the applicant provided an extensive response (of some forty (40) pages) to the eight points of concern raised by the respondent and after the applicant's response was considered by the Management Committee, I find it difficult to accept that no further dialogue occurred between the parties prior to the termination of the applicant.

After proper consideration of the evidence before the Commission, I find that the termination of the applicant, Mr Eaton, was harsh, unjust and unreasonable for the reasons referred to in the above mentioned first, second and third paragraphs.

In determining an appropriate remedy, the options of reinstatement and compensation that are available under s. 78 and s. 79 of the *Industrial Relations Act 1999*, were given consideration. With the decision of the QRI Management Committee not to fill the General Manager position on a permanent basis until this matter was finalised, I am in a position of being able to consider both options free of any barriers or restrictions.

In considering firstly reinstatement, I am of the view that matters raised by the respondent during evidence relating to the failure of the applicant on numerous occasions to implement decisions of the Management Committee, the serious allegations in respect of falsifying Management Committee minutes, coupled with the general nature of the relationship between the parties at the time of termination, in my view, it would be most difficult for the parties to re-establish a reasonable long term workable relationship.

In a letter attached to the applicant's statement of evidence, addressed to Ms Karen Prins of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees the applicant, when responding to a claim for reinstatement of a QRI employee (Ms Priestly) stated "the QRI workplace is small, and the number of employees is small. It is not practicable that there be reinstatement by reason of the nature of the breakdown in the relationship as expressed by Ms Michelle Priestly."

Whilst during the course of the hearing there was some conjecture as to whether Ms Priestly resigned, or whether her letter was really in effect a grievance issue, despite the fact that Ms Priestly has been re-employed to her previous position at the QRI after the termination of the applicant, what, in my view, is important is the relevance of Mr Eaton's comments in respect of the size of the workplace and it not being practicable to reinstate by reason of the breakdown of the relationship, which, for all intents and purposes, was of a minor nature compared to the breakdown between the General Manager and the Management Committee of QRI.

Accordingly, I find that the reinstatement of the applicant, Mr Eaton, as General Manager, is in all circumstances impracticable and that it would be more appropriate that an award of an amount of compensation be the remedy.

In awarding compensation, I have taken into account the following factors:-

- applicant's length of employment with the respondent (six (6) years);
- termination pay received in lieu of notice (five (5) weeks);
- time elapsed since termination and recommencing paid employment (eighteen (18) weeks); and
- what steps (if any) has the applicant attempted to mitigate his financial loss.

In consideration of all of those factors, and of the evidence before the Commission, I order that the respondent pay to the applicant an amount of \$7,971.25 gross, being seven (7) weeks pay, within twenty-two (22) days of the release of this decision.

J.M. THOMPSON, Commissioner.

*Appearances:-*

Mr C. Wilson, of Counsel, for the Applicant.

Released: 24 October 2000

Ms K. Downes, of Counsel, instructed by Mr A. Anderson of Clayton Utz, for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Department of Education, Training and Industrial Relations AND  
Peter John Keogh (W43 of 2000)**

COMMISSIONER SWAN

23 October 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 21 September 2000, this Commission doth Order as follows:-

1. That Peter John Keogh and Maria Keogh pay to Manus Anthony Shearer the amount of \$1,736.50.
2. Payment of the amount in paragraph 1 is to be made within 22 days of the date of this Order.

Dated this twenty-third day of October, 2000.

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

Operative Date: 23 October 2000  
Order – Unpaid wages  
Released: 24 October 2000

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Another (No. B1480 of 2000)**

**ORDER – APPRENTICES' AND TRAINEES' WAGES AND CONDITIONS  
(EXCLUDING CERTAIN QUEENSLAND GOVERNMENT ENTITIES)**

PRESIDENT HALL  
COMMISSIONER BROWN  
COMMISSIONER ASBURY

20 October 2000

## AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 20 October 2000, this Commission doth Order that the said Order be amended as follows as from the twentieth day of October, 2000:–

By deleting Schedule 9 “Forest Products Industry” and inserting the following in lieu thereof:–

## “SCHEDULE 9

**FOREST PRODUCTS INDUSTRY****1. General**

The following is a list of the primary occupational areas of the Forest Products Industry:

- Forest growing and management;
- Sawmilling and wood processing;
- Manufacture of timber fabricated products;
- Timber grading and merchandising;
- Manufacture of wood panel products;
- Forest harvesting; and
- Pulp and paper production.

**2. Apprentices****2.1 Training Packages****2.1.1 Forest and Forest Products Industry Training Package**

Apprentices registered in apprenticeships based on qualifications contained in the above Training Package shall receive wages in accordance with the following table:

Wage Level	Minimum Training Requirements	% of the Relevant Tradesperson's Rate Specified in the Industrial Instrument
1	Prior to the attainment of the minimum training requirements specified for Wage Level 2.	50
2	(a) When the apprentice has attained the core competencies for the apprenticeship that the apprentice is registered in plus competency units to the value of 10 points; Or (b) When the apprentice has completed: 9 months after commencing Wage Level 1, Whichever is the earlier to occur.	60
3	(a) When the apprentice has attained the core competencies for the apprenticeship that the apprentice is registered in plus competency units to the value of 22 points; Or (b) When the apprentice has completed: 9 months after commencing Wage Level 2, Whichever is the earlier to occur.	75
4	(a) When the apprentice has attained the core competencies for the apprenticeship that the apprentice is registered in plus competency units to the value of 30 points; Or (b) When the apprentice has completed: 9 months after commencing Wage Level 3, Whichever is the earlier to occur.	90

## NOTE:

The relevant tradesperson rate shall be:

- For Saw Doctor apprenticeships, the 105% rate; and
- For all other apprenticeships, the 100% rate.

### 2.1.2 *Pulp and Paper Training Package*

The wage progression arrangements for apprenticeships based on the qualifications contained in the above training package are still to be resolved by the parties.

### 2.2 Other Apprenticeships

Apprentices registered in existing apprenticeships shall continue to receive wages in accordance with the Decision of the Commission dated 8 October 1973.

## 3. **Trainees (Timber Industry Cadets)**

### 3.1 Training Packages

#### 3.1.1 *Forest and Forest Products Industry Training Package*

Timber Industry Cadets will undertake the AQF Level 5 (Management Stream) qualification contained in the above Training Package and shall receive wages in accordance with the following table:

Wage Level	Minimum Training Requirements	% of the 100% Wage Rate in the Industrial Instrument
1	Prior to the attainment of the Minimum Training Requirements for Wage Level 2.	50
2	(a) When the trainee has attained the core competencies; Or (b) When the trainee has completed: 6 months after commencing Wage Level 1, Whichever is the earlier to occur.	65
3.	(a) When the trainee has attained the core competencies plus competency units to the value of 15 points; Or (b) When the trainee has completed: 6 months after the commencing Wage Level 2, Whichever is the earlier to occur.	82
4	(a) When the trainee has attained the core competencies plus competency units to the value of 30 points; Or (b) When the trainee has completed: 6 months after commencing Wage Level 3, Whichever is the earlier to occur.	92.4
5	(a) When the trainee has attained the core competencies plus competency units to the value of 45 points; Or (b) When the trainee has completed: 6 months after commencing Wage Level 4, Whichever is the earlier to occur.	100
6	(a) When the trainee has attained the core competencies plus competency units to the value of 60 points; Or (b) When the trainee has completed: 6 months after commencing Wage Level 5, Whichever is the earlier to occur.	105

### 3.2 Other Timber Industry Cadet Trainees

Timber Industry Cadets registered in existing Timber Industry Cadet traineeships (Forest Industry Management) shall be entitled to wages and the conditions in accordance with the relevant provisions of the *Forest Resources Industry Award – State*.

## 4. **Trainees (Other than Timber Industry Cadets)**

### 4.1 Training Packages

#### 4.1.1 *Pulp and Paper Training Package*

Trainees registered in traineeships based on qualifications contained in the above Training Package shall receive wages in accordance with clause 3 of Schedule 1.

#### 4.1.2 *Forest and Forest Products Industry Training Package*

Subject to the following, trainees registered in traineeships based on qualifications contained in the above Training Package shall receive wages in accordance with the following table.

AQF Level 5 trainees undertaking a Technical Stream qualification shall receive wages in accordance with this subclause.

AQF Level 5 trainees undertaking a Management Stream qualification shall be registered as Timber Industry Cadets and shall receive wages in accordance with clause 3 of this Schedule.

Wage Level	Minimum Training Requirements	% of the 100% Wage Rate in the Industrial Instrument
1	Prior to the attainment of the Minimum Training Requirements for Wage Level 2.	50
2	(a) When the trainee has attained the core competencies for the traineeship that the trainee is registered in plus competency units to the value of 10 points; Or (b) When the trainee has completed: 6 months after commencing Wage Level 1, Whichever is the earlier to occur.	65
3.	(a) When the trainee has attained the core competencies for the traineeship that the trainee is registered in plus competency units to the value of 22 points; Or (b) When the trainee has completed: 6 months after the commencing Wage Level 2, Whichever is the earlier to occur.	85
4	(a) When the trainee has attained the core competencies for the traineeship that the trainee is registered in plus competency units to the value of 39 points; Or (b) When the trainee has completed: 6 months after commencing Wage Level 3, Whichever is the earlier to occur.	100
5	(a) When the trainee has attained the core competencies for the traineeship that the trainee is registered in plus competency units to the value of 50 points; Or (b) When the trainee has completed: 6 months after commencing Wage Level 4, Whichever is the earlier to occur.	105

#### 4.2 Other Trainees

Trainees registered in existing traineeships that are based on the provisions of the *Training Wage Award – State* shall be entitled wages in accordance with that Award and the conditions in this Order and the relevant industrial instrument.

#### 5. **Specific Conditions**

The following specific conditions shall apply to apprentices and trainees to whom this Schedule applies in addition to the conditions prescribed in this Order. Where the specific conditions are inconsistent with conditions prescribed elsewhere in this Order, the specific conditions contained herein shall prevail.

##### 5.1 Adult Apprentices and Trainees

###### 5.1.1 *New Adult Employees*

(a) Where an adult person enters into a Training Agreement such person shall receive no less than an amount equivalent to the *Queensland Minimum Wage* (QMW) as varied from time to time:

Provided that part-time adult apprentices and trainees shall not be paid less than the *pro rata* of an amount equivalent to the QMW.

(b) Provided further these provisions shall not apply to apprentices or trainees who become an adult during the term of the apprenticeship or traineeship.”

Dated this twentieth day of October, 2000.

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

Operative Date: 20 October 2000  
Amendment – Schedules  
Released: 25 October 2000