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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999*  
*Industrial Court Rules 1997*

NOTICE

The following Agreements have been certified by the Commission:—

No/s	Title	Date certified	Cancelling
CA401/00	Inghams Enterprises (Park Ridge Processing) - Certified Agreement 2000	17/8/00	
CA372/00	Ravenshore Pty Ltd T/A CIC Electrical - Certified Agreement 2000/2002	18/8/00	
CA373/00	L & R Electrical Pty Ltd Construction Division - Certified Agreement 2000/2001	18/8/00	
CA402/00	CKB Electrical Pty Ltd - Certified Agreement 2000/2002	18/8/00	
CA386/00	Hans Continental Smallgoods Quality Assurance - Certified Agreement	21/8/00	
CA389/00	Tourism Queensland - Certified Agreement	21/8/00	CA373/98
CA346/00	Queensland Tug & Salvage Co. Pty. Limited (Trading as Wright Launch Service) AIMPE for the Port of Brisbane - Certified Agreement 2000	22/8/00	CA10/99
CA398/00	Australian Trades & Labour Hire Pty Ltd - Certified Agreement 2000/2001	25/8/00	
CA404/00	WorkCover Queensland Agreement 2000 - Certified Agreement	25/8/00	
CA358/00	Edington Automatic Doors - Certified Agreement No 1	28/8/00	
CA433/00	Queensland Rubber Company Pty Ltd Enterprise Bargaining – Certified Agreement 2000	28/8/00	CA499/99
CA436/00	Acquired Awareness Security Services - Certified Agreement	31/8/00	

The following Agreement has been amended by the Commission:—

	Date amended
CA515/99 Queensland Abattoir Corporation - Certified Agreement 1999	30/8/00

E. EWALD  
Industrial Registrar

## INDUSTRIAL COURT OF QUEENSLAND

*Workplace Health and Safety Act 1995* – s. 164(3) – appeal against decision of industrial magistrate**Master Ryane (Qld) Pty Ltd AND Graham Anthony Thouard (No. C22 of 2000)**

PRESIDENT HALL

1 September 2000

## DECISION

This is an appeal against the severity of a monetary penalty imposed upon the appellant, a corporation under the law, for a breach of s. 30(1)(a) of the *Workplace Health and Safety Act 1995*. The fine was imposed in circumstances where the appellant pleaded guilty to a complaint that being a person in control of the workplace the appellant had failed to ensure the risk of injury or illness from a workplace was minimised for persons coming onto the workplace to work.

The complaint was triggered by a fatality on 1 October 1998. The appellant was contracted to erect a large steel-framed prefabricated industrial shed at Boyd Street, Tugan. The shed was extremely large. It was 28 metres wide and 56 metres long. It was approximately 6 metres high. It was to be used as an aircraft hangar. On 1 October 1998 six men were engaged upon the assembly of the shed. All six were on the roof. They were working upon the roof in two groups of three persons. In the course of that activity, the deceased fell through the roof. He died of injuries sustained in the fall.

The contravention of s. 30(1)(a) was a serious one. Each of two advisory standards – the Falls from Heights Standard and the Work on Roofs Standard – were relevant to the activity which had been taking place at Boyd Street. Each of the standards indicates, in some detail, how physical barriers might be put in place to avoid falls. Each of them deal with certain travel restriction devices, nets etc, which although not recommended as an alternative to physical protection barriers go some way towards minimising injury in a fall. Not one of the measures canvassed was adopted at Boyd Street, Tugan. The appellant chose instead to develop and act upon a “system of work” which, if observed, would allow the roof to be attached to the shed without any of the workmen being injured in a fall. It was a clear case of substituting for a physical means of ensuring safety a means of ensuring safety dependant on human behaviour and frailty.

The appellant complains that the Industrial Magistrate failed to take into account some eighteen mitigating factors. About some of those factors I wish to have something to say.

It is submitted that the cost of adopting the measures in the advisory standards was prohibited. On the materials before the Industrial Magistrate the appellant had been constructing sheds for many years, was a preferred supplier of construction services to at least some organisations and had constructed over three hundred sheds. One might have thought that a corporation engaging in business on that scale in this particular area of construction activity would have accepted that it had to meet the expenditures involved in carrying on the business of constructing sheds. Perhaps inconsistently with the submission, it is also put that the appellant, now said to be in straitened financial circumstances because of damage to its reputation and business flowing from the fatality, has now incurred outlays supplying employees with harnesses. As previously alluded to harnesses, which may trip other workers and cause injuries in breaking a fall, are not held out by the advisory standards as the most appropriate solution.

It is contended that the Industrial Magistrate should have taken into account that further proceedings related to the events of 18 October 1998, or perhaps more accurately drawn to the attention of authorities by the events of 18 October 1998, may yet be taken against the appellant. If indeed any such proceedings are taken and are overlapping with the complaint out of which the current appeal arises, the appropriate point at which to debate whether a global view should be taken is that of which the appellant is found guilty of those other offences (or pleads guilty to the other offences). It is inappropriate to take those unspecified, and certainly not particularised, offences into account at this stage in an anticipatory and speculative way.

In reliance on *Laing v. Phillips* (1990) 135 QGIG 127 at 128 the Industrial Magistrate is said to have erred in failing to take into account that a director of the appellant had also pleaded guilty and had been fined \$7,500. The sentences were dealt with contemporaneously. It is inherently unlikely that the Industrial Magistrate was unaware of the circumstance that the director was being fined as well. (The fine imposed upon the appellant was 11.67% of the maximum penalty. The fine imposed upon the director was 12.67% of the maximum penalty for a director.). On a proper consideration of the passage in *Laing v. Phillips, ibid*, relied upon Moynihan, President, adversely to the appellant, really seems to have made the point that in ordinary circumstances it will be a miscarriage of a sentencing discretion to take into account that each of the company and a director was being fined, there being an exception where there is overlapping culpability. Here, on the materials, the appellant was not the “one man band” which it now claims to have been. There was another director. That other director, indeed, has had carriage of the appeal. The culpability of the director who was fined seems to have been a little worse than that of the appellant, in that, being the senior officer of the appellant at Boyd Street, Tugan, he failed adequately to supervise compliance with the system of work.

The suggested mitigating circumstances rely heavily on the appellant’s previous good record. I would respectfully adopt the well known passage in *WorkCover Authority (NSW) v. Waugh* (1995) 59 IR 89 at 96:–

“While previous good industrial citizenship and the absence of prior convictions are proper considerations, their importance lies well behind the two primary aspects of the matter, namely the nature and quality of the offence and the clear policy of the act in relation of the establishment of safe standards in the protection of the workforce.”.

As for the subsequent remorse, business dislocation and introduction of (for reasons given not wholly adequate) safety measures, it is sufficient to note that a man has perished and adopt the observations of Maimment J in *Inspector Callaghan v. Saunders Constructions Pty Ltd* unreported, CT 1062 of 1993, 26 November 1993 at 7:–

“Commendable though it is to introduce appropriate Occupational Health and Safety measures after the event it needs to be remembered that the legislation is not directed at *ex post facto* measures, it requires positive preventative steps being taken to ensure that workers are afforded safe working environments irrespective of their own laxities.”.

I make the final point that too much may not be made of mitigating factors lest the objective gravity of the offence is diminished and the purpose of the Act frustrated, compare *Fletcher Construction Australia Ltd v. WorkCover Authority (NSW) (Inspector Fisher)* (1999) 91 IR 66 at 79.

Compared to the maximum penalty available, ie \$300,000, the fine imposed, *viz* \$35,000, seems to me to be modest enough. It is to be noted that no conviction was recorded.

The appellant places great reliance upon a table of comparative penalties going back some ten years. It is true that the fine of \$35,000 exceeds most of the fines in the table. But over the ten year period the maximum penalty has escalated from \$120,000 to \$300,000. I accept of course that one does not

simply multiply the fine actually imposed in a roughly comparable case to bring that fine "up to date". However, one must take into account that the legislature has taken an increasingly serious view of offences of this type and that the penalties moved upwards, in assessing where a current fine sits against the fines imposed in other cases. Expressing all of the fines as a percentage of the then available maximum – which is not a decisive guide to fairness – it appears that the current fine is, if one puts aside an exceptionally heavy fine imposed in connection with the removal of certain sails after Expo, a fine at the middle of the range.

In the premises, I can see no reason for interfering with the fine imposed by Industrial Magistrate.

The appeal was filed twenty days out of time. There is no proper explanation of the delay. The explanation shows that the solicitors and counsel who appeared on the appeal moved promptly once they received instructions. It shows that the director with carriage of proceedings was given inaccurate advice about the time period, but on the inaccurate advice was still out of time. How he came to delay so long has not been explained. Frankly, if the matter had come before the Court as a preliminary point I rather suspect that an extension of time might not have been granted. In the result, by the time the matter was called each of the appellant and the respondent had filed written submissions going to the merit of the appeal and I had read those submissions and the cases there cited. It would be churlish after that time and money had been spent to decline to hear the appeal where only twenty days were lost, and the respondent could not be prejudiced.

I extend time to appeal until 25 May 2000. I dismiss the appeal.

Having read the very detailed submissions, having perused the cases cited and having heard the oral argument I find it quite impossible to say that this was a case which could not succeed. Indeed, given the length of time occupied by the oral argument against the background of the voluminous submissions (two and a-half hours) it would, I think, be a little odd to conclude that the appeal was obviously recognisable as hopeless. I dismiss the respondent's application for costs under s. 335 of the *Industrial Relations Act 1999*.

Dated this first day of September, 2000.

D.R. HALL, President.

*Appearances:-*

Mr R. Frigo instructed by Allansons Solicitors for the appellant.

Mr S.A. Habermann instructed by Workplace Health and Safety for the respondent.

Released: 1 September 2000

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#### INDUSTRIAL COURT OF QUEENSLAND

*Workplace Health and Safety Act 1995 – s. 164(3) – appeal against decision of industrial magistrate*

**Clive John Newman AND G James Glass & Aluminium Pty Ltd (No. C25 of 2000)**

PRESIDENT HALL

6 September 2000

#### DECISION

This is an appeal under s. 164(3) of the *Workplace Health and Safety Act 1995* against the decision of an Industrial Magistrate given on transcript on 24 August 1999. Shorn of its formal parts the complaint was that G James Glass & Aluminium Pty Ltd being a person on whom a workplace obligation, prescribed by s. 28(1) of the *Workplace Health and Safety Act 1995*, was imposed, failed to discharge the obligation contrary to s. 24 of the Act in that being an employer the said G James Glass & Aluminium Pty Ltd did fail to ensure the workplace health and safety of each of the employer's workers at work.

The particulars given were as follows:-

“Workers:	Graeme Leslie Hammond and Matthew John Gladdes
Work:	Installation of glass
Place of work:	Gold Hill Plaza Hotel, 515 Queen Street, Brisbane
Failure:	G James Glass & Aluminium Pty. Ltd. did fail to provide a system of work that was safe without risk.”.

Over time, the particulars were significantly amended. Materially, by the time the Industrial Magistrate gave his decision, the particulars had been expanded to include:-

“G James Glass & Aluminium Pty. Ltd. did fail to provide adequate means of preventing or minimising falls from the awning; and

G James Glass & Aluminium Pty. Ltd. did fail to provide adequate means of preventing or minimising falls through the awning.

It will be alleged that the following control measures should have provided adequate means of preventing and / or arresting falls from or through the awning:-

Installation of guardrails and / or scaffolding, around all sides of the awning where a person might fall;

Use of safety harnesses; and

Use of glass of sufficient strength to support the persons likely to stand on it.”.

In the end result the complaint was not pursued insofar as it related to the allegation that G James Glass & Aluminium Pty Ltd failed to provide adequate means of preventing or minimising falls through the awning. The complaint was pressed insofar as it related to the allegation that G James Glass & Aluminium Pty Ltd failed to provide adequate means in preventing or minimising falls from the awning.

In an extempore decision following a two day hearing the Industrial Magistrate dismissed the complaint because His Worship held that G James Glass & Aluminium Pty Ltd had established a defence under s. 37(1)(b)(i) of the *Workplace Health and Safety Act 1995* in that an advisory standard having been made stating a way or ways to manage exposure to the risk, G James Glass & Aluminium Pty Ltd had adopted and followed a stated way to prevent the contravention. The conclusion that that defence had been made out was based on acceptance of the proposition that the glass awning upon which

employees of G James Glass & Aluminium Pty Ltd had been working at all material times was a “working platform” within the meaning of the “advisory standard Falls from Heights 1996”. His Worship was plainly wrong. A “working platform” which is not installed with edge protection systems is not a “working platform” within the standard. There were no edge protection systems in this case.

Mr Jarrett of counsel who appears for G James Glass & Aluminium Pty Ltd on the appeal seeks, as he may properly do, to defend the Industrial Magistrate’s decision to dismiss the complaint on the alternative ground that the elements of the defence had not been made out. It is put, first, that the Industrial Magistrate had misunderstood the legislative scheme and that so far from it being necessary for a defendant to prove on the balance of probabilities that relevant advisory standard had been adopted and followed, it was for the complainant to prove beyond a reasonable doubt that the defendant had not adopted and followed the way stated to manage exposure to the risk in the relevant advisory standard. Second, cumulatively and alternatively, it was put that the Industrial Magistrate could not, on the evidence, have been satisfied beyond a reasonable doubt that there was a risk of any of the employees falling from the glass awning.

On the first submission, counsel goes to s. 28(1) which imposes on an employer an obligation to ensure the workplace health and safety of the employer’s workers at work and from s. 28(1) to s. 24(1), which provides that where an obligation is imposed on a person that person must discharge the obligation and further provides for various penalties. The argument then goes to s. 26, the section heading of which is “How obligations can be discharged if regulation etc made” and in particular to s. 26(3) which provides:–

“If an advisory standard or industry code of practice states a way of managing exposure to a risk, a person discharges the person’s workplace health and safety obligation only by –

- (a) adopting and following a stated way that manages exposure to the risk; or
- (b) adopting and following another way that gives the same level of protection against the risk.”.

It is then put that, where there is an advisory standard, is for the complainant to prove that it was not adopted or followed, and that another system given the same level of protection was not adopted and followed.

With respect, the submission fails to read the Act as a whole. Division 2 of Part 3, within which s. 28, falls bears the divisional heading “Obligations of employers and others”. Division 1 of Part 3, within which ss 24 and 26 fall, bears the divisional heading “Preliminary” and, materially, states how obligations are to be discharged. Part 3 of Division 4, within which s. 37 falls bears the divisional heading “Defences” and, amongst other things, indicates who it is who bears the burden of proving discharge of an obligation imposed by Division 2 of Part 3. Materially, in the case of where advisory standard has been made, s. 37(1)(b) provides:–

“It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove –

...

- (b) if an advisory standard or industry code of practice has been made stating a way or ways to manage exposure to a risk –
  - (i) that the person adopted and followed a stated way to prevent the contravention; or
  - (ii) that the person adopted and followed another way that managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention.”. (emphasis added)

I accept that subparagraph (ii) of (b) gives rise to difficulty in that the words emphasised require proof of discharge of an obligation which is not imposed by s. 26(3)(b), but remain unconvinced that that difficulty justifies departing from the apparent structure of the Act and treating s. 37(1)(b) as otiose. I do not consider the decision in *LR and M Constructions (Q) Pty Ltd v. Division of Workplace Health and Safety* (1997) 155 QGIG 124 to be of any assistance. It is true that at 125 de Jersey, President, observed “In practice an employer who adopts a system and method of work, which incorporates reasonable precautions, and exercises proper diligence to ensure compliance with those precautions, would be taken to have discharged his obligation at s. 28.”. However, as is apparent from the paragraph read as a whole His Honour was concerned to make the points that “ensure” where it appears at s. 28(1) does not bear its literal meaning. His Honour was making no point at all about which party carried the burden of proof. In the premises, I am satisfied that the Industrial Magistrate did not misdirect himself on the matter of onus and burden of proof.

The appellant seeks to support the Industrial Magistrate’s conclusion that there was a risk of employees falling from the awning by asserting, on the basis of certain photographs which were tendered before the Industrial Magistrate, that the awning was domed or curved and, further, angled back towards the wall of the building. Photographs are notoriously a poor guide. In any event, proper scrutiny of the photographs indicates that the glass was flat. The domed impression was achieved by aluminium additions to the steel supports on top of which the glass was fitted. Further, the testimonial evidence before the Industrial Magistrate supports the view that the glass provided a flat and level working platform. As to the matter of the glass angling back towards the building, I accept the submission of Mr Jarrett that the matter was not conducted before the Industrial Magistrate on that basis, and that if it had G James Glass & Aluminium Pty Ltd would have wished to give evidence about the matter. (G James Glass & Aluminium Pty Ltd did not call evidence. The matter was an odd one in which those who might otherwise have been expected to give expert evidence for G James Glass & Aluminium Pty Ltd were called as witnesses by the now appellant. I rather suspect that what Mr Jarrett means is that those witnesses would have been cross-examined about the allegation of “angling back”, and any suggestion that a risk of fall arose from that angling.)

The insuperable obstacle facing G James Glass & Aluminium Pty Ltd is that, if persons work at a height in excess of five metres upon a work platform which not equipped with edge protection systems, it is self evident that there is a risk that those persons may fall. If no travel restriction systems are in place, there is a risk that person will fall to the ground. I note the evidence to which counsel for G James Glass & Aluminium Pty Ltd draws attention that work at the edge of the glass awning was performed from below by means of a movable scaffold, that employees on top of the glass awning were in a kneeling position whilst working upon the glass and moved backwards from the edge of the glass. That evidence is evidence that G James Glass & Aluminium Pty Ltd has developed a system of work which, if observed, secures its employees from the risk of fall from the awning, but which does not secure the company’s employees against the risks posed by human frailty and laxity.

In the premises the appeal must be allowed. The decision of the Industrial Magistrate dismissing the complaint is set aside. There is no utility in remitting the matter to an Industrial Magistrate who last dealt with the matter this time last year. My associate will contact the representatives of the parties to arrange a time for the hearing of submissions upon whether a conviction should be recorded and what (if any) penalty should be imposed.

Dated this sixth day of September, 2000.

D.R. HALL, President.

Released: 6 September 2000

*Appearances:-*

Ms M. Maloney (instructed by Crown Law) on behalf of the appellant.

Mr M. Jarrett (instructed by Mr S. Keune) in-house counsel of the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

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

**Nijel Vidler AND Education Queensland (No. C24 of 2000)**

PRESIDENT HALL

7 September 2000

DECISION

Nijel Lyle Vidler was appointed as a teacher on probation from 3 March 1999. The appointment was made pursuant to s. 73 of the *Public Service Act 1996*. Section 73 provides as follows:-

- “(1) If a person who is not already an officer is appointed as an officer on tenure, the person’s chief executive may decide that the person be appointed on probation for not less than 6 months.
- (2) The person’s chief executive may –
- (a) by signed notice given to the person, terminate the person’s employment at any time during the period of probation; or
- (b) at the end of the period of probation –
- (i) confirm the appointment; or
- (ii) extend the period of probation; or
- (iii) by signed notice given to the person, terminate the person’s employment.
- (3) If, within 13 months after the person’s appointment, the appointment is not confirmed and the employment is not terminated, the person’s appointment is taken to have been confirmed at the end of the 13 months.”.

In my view s. 73(3) does not operate as a cap upon what may be done pursuant to s. 73(2)(b)(ii). The verb used at s. 73(2) is “may”. “May” is defined at s. 32 CA of the *Acts Interpretation Act 1954*. It is given an entirely facultative meaning. It seems to me that the end of the period of probation set pursuant to s. 73(1) the chief executive officer may confirm the appointment, extend the appointment or dismiss the probationer. The chief executive officer may also fail to take any step at all. In such a case once the sum of the period of probation set pursuant to s. 73(1) and the period of inaction totals thirteen months, by s. 73(3) the probation as appointment is taken to be confirmed. Compare *Sandra Fox-Spencer v. Education Queensland* 164 QGIG 119.

In Mr Vidler’s case the period of probation set pursuant to s. 73(1) was eight months. At the time of being made aware that the period of probation was eight months Mr Vidler was also made aware that the period had been set at eight months because the Director-General of Education Queensland had determined that the length of probation for teachers would be eight months. Mr Vidler was also informed that the Director-General of Education had determined that the possible maximum extension pursuant to s. 73(2)(b)(ii) was four months.

Mr Vidler’s employment was terminated on 10 January 2000. He sought relief under Chapter 3 of the *Industrial Relations Act 1999*. It is the submission of the Crown that he was not entitled to do so. He is said not to be entitled to do so because he is excluded from the benefit of the relevant part of Chapter 3, viz Part 2, by s. 72(1). It is convenient to set forth the terms of s. 72(1).

**“Who this chapter does not apply to**

**72.(1)** Part 2 does not apply to –

- (a) an employee during the first 3 months of employment with an employer (the “**probationary period**”), if the dismissal is for a reason other than an invalid reason, unless the employee and employer agree in writing that the employee serve –
- (i) a shorter probationary period; or
- (ii) no probationary period; or
- (b) an employee serving a longer probationary period, if –
- (i) the period decided, by written agreement between the employee and employer, before the employment started is a reasonable period having regard to the nature and circumstances of the employment; and
- (ii) the dismissal is for a reason other than an invalid reason; or
- (c) a short term casual employee; or
- (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; or

- (e) an employee –
  - (i) who is not employed under an industrial instrument; and
  - (ii) who is not a public service officer employed on tenure under the *Public Service Act 1996*; and
  - (iii) whose annual wages immediately before the dismissal are more than \$68 000 or a greater amount stated, or worked out in a way prescribed under a regulation.”.

The relevant paragraph of s. 72(1) was said to be s. 72(1)(b).

As a matter of first impression Mr Vidler’s engagement does not fall within s. 72(1)(b). The period of his probationary engagement had not been decided by agreement. It had been determined, perfectly lawfully, by the exercise of statutory power by the chief executive officer. Additionally, Mr Vidler’s probationary period was not “decided” before his employment started. At the time that Mr Vidler’s employment started it was known that his period of probation would be no less than eight months. It was known that at the end of the probationary period his employment might be terminated. It was known that at the end of the eighth month probationary period his employment might be confirmed. It was known that at the end of the eighth month probationary period his probationary status might be continued for an indeterminate period up to four months. It was known also, that if no action whatever were taken at the end of the eighth month period following the end of the eighth month period, Mr Vidler’s probationary engagement would linger on for a further five months at the end of which time his employment would be confirmed by the operation of s. 73(3). So far from being “decided” before Mr Vidler’s employment commenced, at the commencement of his employment the probationary period which he faced was entirely uncertain.

It is contended for Education Queensland that (1) the *Industrial Relations Act 1997* insofar as it relates to the matter of dismissal is a general act, (2) s. 73 of the *Public Service Act 1996* is a special statutory provision and (3) that it follows that s. 72(1) of the *Industrial Relations Act 1999* yields to s. 73 of the *Public Service Act 1996*. For the purpose of the argument but without deciding the point, I am prepared to accept that s. 73 of the *Public Service Act 1996* is a special statutory provision about probation and that Chapter 3 of the *Industrial Relations Act 1999* is a general statutory provision about dismissal. On that analysis Chapter 3, Part 2 of the *Industrial Relations Act 1999* might not be prayed in aid by a probationer appointed pursuant to s. 73 of the *Public Service Act 1996*. Compare *Goodwin v. Phillips* (1908) 7 CLR 1 at 14 per O’Connor, J “Where there is a general provision which, if applied in its entirety, would neutralise a special provision dealing with the same subject matter, the special provision must be read as a proviso to the general provision, and the general provision, insofar as it is inconsistent with the special provision, must be deemed not to apply.”. The consequence would be that a probationer appointed under s. 73 and dismissed for an “invalid reason” as defined at s. 73(2) of the *Industrial Relations Act 1997* would have no remedy. Such an outcome would be entirely startling and, indeed, Education Queensland does not go so far. The contention rather, as I understand it, is that a probationer appointed for a reasonable period under s. 73 of the *Public Service Act 1996* is to be treated in the same way as a probationer outside the public sector appointed in circumstances described at s. 72(1)(b), for a reasonable period, who of course at all times has a remedy in respect of a dismissal for an invalid reason. That submission, with respect, does not contend for an interpretation of s. 72(1)(b) of the *Industrial Relations Act 1997*. It contends for a remaking of the provision. I am not prepared to take that step.

It is contended in the alternative that by s. 20(1)(c) of the *Acts Interpretation Act 1954* Education Queensland had an accrued right to defend the proceedings commenced by Mr Vidler on the basis of s. 34(2) of the *Workplace Relations Regulation 1997*. I rather doubt that Chapters 18 and 19 of the *Industrial Relations Act 1999* leave room for the operation of the general transitional rules at s. 20 of the *Acts Interpretation Act 1954*. It appears to be preferable to proceed on the view that pursuant to s. 720 the *Workplace Relations Act 1997* Chapter 5, Part 2 continues to apply to a dismissal within the meaning of that part that happened before the commencement of s. 20 (1 July 1999) and the subsequent dismissals are governed by Chapter 3, Part 2 of the *Industrial Relations Act 1999*. In any event s. 34(2) does not assist the respondent. It provided as follows:–

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

- (a) an employee serving a probation period, if the period determined before the employment commenced –
  - (i) is 3 months or less; or
  - (ii) is more than 3 months but is a reasonable period, having regard to the nature and circumstances of the employment; or
- (b) an employee –
  - (i) who is not employed under an industrial instrument, industrial agreement or EFA; and
  - (ii) who is not a public service officer employed on tenure under the *Public Service Act 1996*; and
  - (iii) whose annual remuneration immediately before the dismissal is more than \$64 000.”.

For reasons already given the duration of Mr Vidler’s probationary period had not been “determined” before the employment commenced. [For the sake of completeness I note that by s. 213 of the *Workplace Relations Act 1997* it was an object of Parts 2 and 3 of Chapter 5 to give effect to the Termination of Employment Convention, 1982. On the assertion that s. 73 of the *Public Service Act 1996* overrides regulation 32 of the *Workplace Relations Act 1997*, additionally to the considerations discussed above, it is to be noted that:–

“It has been recognized that a national court, in the interests of uniformity, should construe rules formulated by an international convention, especially rules formulated for the purpose of governing international transactions such as the carriage of goods by sea, ‘in a normal manner, appropriate for the interpretation of an international convention, unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance’, to repeat the words of Lord Wilberforce in *James Buchanan & Co Ltd v. Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141 at 152; see also *Stag Line Ltd v. Foscolo, Mango & Co Ltd* [1932] AC 328 at 350.”.

*Shipping Corporation of India Ltd v. Gamlen Chemical Co. (Australasia) Pty Ltd* (1980) 147 CLR 142 at 159 per Mason and Wilson JJ (with whose judgment Gibbs and Aicken JJ agreed).].

In the circumstances I set aside the decision of the Vice President of 5 May 2000 striking out Mr Vidler’s application for relief pursuant to Chapter 3 of the *Industrial Relations Act 1999* on the ground that Mr Vidler was an excluded employee.

The Vice President also struck out two paragraphs, paragraphs 13 and 14, of the dismissal application on the ground that the invalid reasons there alleged could not be made out. The Vice President’s decision was plainly correct. The allegations were (1) that Mr Vidler had been dismissed for an invalid

reason in that he had been dismissed for making a complaint under a statute which commenced some months after his dismissal and (2) that he had been dismissed for an invalid reason in that he had been dismissed for making a complaint which in fact was made after his dismissal. With respect to the appellant his rather lengthy arguments on this aspect of the appeal are arguments going to the issue whether he should be permitted to amend his application rather than arguments going to want or excess of jurisdiction or error of law in the decision to strike out paragraphs 13 and 14.

The matter is remitted to the Vice President in order that it may be allocated at a call-over and heard and determined according to law.

Dated this seventh day of September, 2000.

D.R. HALL, President.

*Appearances:-*

The appellant in person.

Mr R. Bain QC and with him Mr C. Murdoch of Crown Law for the respondent.

Released: 7 September 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Trading (Allowable Hours) Act 1990* – s. 21 – application for variation of trading hours order

**Retailers’ Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (No. B852 of 2000)**

PRESIDENT HALL  
COMMISSIONER SWAN  
COMMISSIONER BLADES

5 September 2000

**TRADING HOURS ORDER – NON-EXEMPT SHOPS TRADING BY RETAIL – STATE**

Application for Extension of Trading Hours a Non-Exempt Shop – Weekends and Public Holidays – Evidence about one supermarket only – Supermarket not pitched at Tourists – Needs/Convenience of employees in Tourist Industry – Opinion of Shire Council – Application refused.

DECISION

By an application as amended filed 7 September 1999 the Retailers’ Association of Queensland Limited, Union of Employers (RAQ) sought an amendment of the *Trading Hours Order – Non-Exempt Shops Trading by Retail – State:-*

“1. By adding to Sec. 3.2 of the *Trading Hours Order – Non-Exempt Shops Trading by Retail – State* the following:

‘(h) Douglas Shire Tourist Area:-

	Opening Time	Closing Time
Monday to Friday	8.00 am	9.00 pm
Saturday	8.00 am	7.00 pm
Sundays	9.00 am	6.00 pm
<b>Public Holidays (as defined) (excluding the twenty-fifth Day of December, Good Friday, the twenty-fifth day of April and Labour Day</b>	<b>hours consistent with the day of the week Upon which the public holidays falls, that is</b>	
Monday to Friday	8.00 am	9.00 pm
Saturday	8.00 am	7.00 pm
Sundays	9.00 am	6.00 pm

2. By adding to Schedule 1 – Definitions of the *Trading Hours Order – Non-Exempt Shops Trading by Retail – State* the following:-

‘(21) Douglas Shire Tourist Area – The Area of Douglas Shire (map LGB45 Edition 1) as set out by the *Local Government (Areas) Regulation 1995’.*”.

The application was only partially successful. By a decision of 23 November 1999, released the same date, a Full Bench of the Commission (composed as presently) released a decision rejecting the application insofar as it applied to any part of the Douglas Shire outside what might fairly be described as the Port Douglas CBD, i.e. an area bordered by the sea and by Port Street running from the Marina Mirage to the intersection with Port Douglas Road and from that intersection to Four Mile Beach bounded by the Eastern Boundary of the Golf Course. In particular, the Commission declined to deal with the application insofar as it related to a proposed supermarket, the construction of which had not commenced, to be situated at the corner of the Captain Cook Highway and Port Douglas Road and bounded by an attraction named the Rainforest Habitat.

On 23 June 2000 RAQ filed an application by which it sought to revisit the matter of that supermarket. The change of circumstance was that construction of the supermarket had been completed. Indeed, by the time the matter was heard on 31 August 2000 the supermarket had commenced trade (on 3 July 2000). Understandably, RAQ sought to rely on evidence and inspections in the earlier proceedings. In our view RAQ is entitled to do so. By s. 24 of the *Trading (Allowable Hours) Act 1990* applications under s. 21 are to be dealt with as quickly and with as little formality and technicality as is consistent with a fair and proper hearing of the issues. Further by s. 43(4) the provisions of the *Industrial Relations Act 1999* that govern proceedings in the Industrial Commission apply, as far as may be, any necessary adaptations, and subject to the provisions of the *Trading (Allowable Hours) Act 1990*, in relation to the exercise of jurisdiction under the *Trading (Allowable Hours) Act 1990*. By s. 320(2)(b) of the *Industrial Relations Act 1997* the Commission may inform itself on a matter in the way it considers appropriate and by s. 329(c) may hear and decide a matter in a way that appears best suited for that purpose. Indeed, RAQ’s submission that regard should be had to the evidence and inspections in the earlier proceedings is not opposed. It must be stressed, however, that having regard to the evidence in the earlier proceedings is not to be equated with reopening the earlier proceedings. That is of some moment here. The earlier proceedings related to the whole of the Douglas Shire. The Commission might have extended trading hours over the whole of the Douglas Shire. It might have granted the application with respect to the whole of the Douglas Shire between the Cook Highway and the

sea. It might, as it did, grant the application with respect to what is colloquially described as the Port Douglas CBD. In the current proceeding trading hours may be extended only at the site of the Franklins supermarket situated on the corner of the Captain Cook Highway and Port Douglas Road as bounded by the Rainforest Habitat, and being lots 1, 9 and 3, RP 747071, county of Solander, parish of Salisbury. It is not a matter of pleading. There is an obligation to advertise, s. 24(3). The advertisements (and notices) which preceded the current proceedings would not have alerted any interested party that the decision of November 1999 was to be revisited in relation to those parts of the Shire outside the Port Douglas CBD or perhaps those parts of the Shire east of the Cook Highway but outside the CBD. In the circumstances, we have confined ourselves to consideration of the Franklins supermarket previously described.

Whilst a goodly number of tourists (about 15% of customers) shop at the Franklins store, the store focuses on the residents rather than tourists as a target market. To gain the benefit of ss. 3(e) and 26(b) and (c) of the *Trading (Allowable Hours) Act 1990* the RAQ relies on the needs of employees in the tourist industry who, on the evidence taken last year, do not work regular and "normal" hours. It may be conceded that employees in the tourist industry in the Douglas Shire work irregular and unusual hours. Because of the profile of the tourist industry as an employer in the Douglas Shire the residents in the target market are likely to work within the tourist industry. For all that, the claim that those residents "need" access to the Franklins supermarket on a Sunday strains credulity. This time last year there was one independent supermarket (of smallish size) in the Port Douglas CBD and a small Woolworths supermarket in Mossman. Since that time a Coles supermarket has commenced trade in the Port Douglas CBD on the basis that its allowable hours are 8.00 am to 9.00 pm Monday to Friday, 8.00 am to 5.30 pm on Saturday and 10.30 am to 4.00 pm on Sunday. The Franklins supermarket trades on the basis that its allowable hours are 8.00 am to 9.00 pm Monday to Friday and 8.00 am to 5.00 pm on Saturday. On the evidence, the present population would have swelled by no more than 4% over that period. We can see no pressing "need" to permit the Franklins supermarket to open on Sunday. Convenience is of course another matter. The first thing to say about convenience is that convenience of residents, in itself and without more, has not traditionally been treated by the Queensland Industrial Relations Commission as a ground for permitting non-exempt stores to trade on Sunday. The second thing to be said about convenience is that it is the evidence of Franklins store development and property manager (northern division) that if the Franklins supermarket is not permitted to open on a Sunday the residents (presumably employees in the tourist industry) will shop at the Coles store in the Port Douglas CBD and may develop a loyalty to that store. The corollary is of course that those residents may shop at the Coles store without inconvenience.

The Shire Council opposes the application. Assertions have been made from the bar table and, indeed, in the case of the store development and property manager (northern region) from the witness box, that the Council and in particular the Mayor oppose the extension of trading hours because they oppose the development and were frustrated when Franklins established an as of right use. The allegations were put to the Mayor in a lengthy and tenacious cross-examination. The Mayor, who although heard on the telephone rather impressed us as a witness, resisted the allegations and maintained that he and the Council were capable of distinguishing the issues and had done so. The Queensland Industrial Relations Commission has, in other cases, given weight to the view of the relevant local authority. We consider that the Commission should continue to do so. We note the opinion of Port Douglas – Daintree Tourism, which favours the application. It has less weight. Port Douglas – Daintree Tourism is not elected by the population at large.

Finally, RAQ faces the difficulty that the application is concerned with a store. There has not, in these proceedings been any argument upon the question whether "a store" may be said to be a "part of a locality" for the purposes of s. 21(2)(c)(ii) of the *Trading (Allowable Hours) Act 1990*. Neither have the parties agitated the question whether s. 21(2)(c) elaborates upon or limits the power at s. 21(1). Those issues may be critical in other proceedings. In the absence of argument, we deliberately refrain from commenting upon the issues. Policy is another matter. Save in very special circumstances, the Queensland Industrial Relations Commission has refrained from granting applications in respect of single stores. We hasten to add, that we do not seek to encourage RAQ to return with an application of greater scope. Plainly, if RAQ does return on such an application, we shall hear it on the merits. One of the issues would be whether the presence of one non-exempt supermarket between the Cook Highway and the Port Douglas CBD would warrant extension of the existing Sunday trading precinct. We cannot and of course do not determine that issue now. We mention the matter lest it be thought there is implicit in our reasoning that an application of greater scope than the present application would be granted.

This matter is not like the *Sands Merchants Association v. Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Others* 145 QGIG 627 and 147 QGIG 1105. In that matter there were not two proceedings. By the decision at 145 QGIG 627 the Full Bench accepted evidence which had been put before it and concluded, subject to a particular shop being completed in accordance with the evidence previously outlined to the Commission the application would be granted. By the decision of 147 QGIG 1105 the Full Bench found that such completion had occurred and made the order granting the application. Here, the decision of November 1999 expressed no view about what would happen should the proposed supermarket be built and an application to Sunday trading be made. The decision of November 1999 simply put the matter aside.

The Coles supermarket will enjoy a trading advantage. The Franklins supermarket was constructed adjacent to but outside a Sunday trading precinct. Shopkeepers cannot expect that the boundaries of Sunday trading precincts, set for good reason will be abandoned or modified where such locations are chosen.

For the above reasons, we dismiss the application.

Dated this fifth day of September, 2000.

D.R. HALL, President.

D.A. SWAN, Commissioner.

B.J. BLADES, Commissioner.

Released: 5 September 2000

*Appearances:-*

Ms P. Spencer for the Retailers' Association of Queensland Limited, Union of Employers.

Mr D. Pratt for the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement*  
*Industrial Relations Act 1999 – s. 74(2)(b) – application for extension of time*

**Shane Victor Butler AND Docklea Combined Services (No. B873 of 2000)**

COMMISSIONER BLOOMFIELD

5 September 2000

Reinstatement – Extension of Time – Security Officer – Arbitrated Matter – Commission found there was no termination of employment by Respondent or constructive dismissal – Applicant had resigned – Extension of time refused – Application dismissed – Costs awarded.

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## DECISION

Mr Shane Butler has sought an extension of time within which to lodge his application for relief following an alleged unfair dismissal by Docklea Combined Services. I say "alleged dismissal" because it is common ground that Mr Butler resigned his employment on 2 May 2000 (effective 7 May 2000) by letter faxed to a senior company representative in Sydney on that date.

The letter sent to Mr Testa, the company's General Manager, was in the following terms:-

"Attn. A. Testa

Andy I'm writing this letter to inform you of my intention to resign from my employment with Docklea Comb. Services. This decision has not been made hastily as I felt you gave me no other choice. I thank you and Simon for giving me the opportunity of working with Docklea Comb. Services. I wish you both the best in the future. My last day of work will be 7th May 2000. If all monies owing, including all lieu days for the past year, excluding the 6 lieu days I took in January, four weeks holiday, loading etc.. Ready for collection on Monday 8th, at this time I will return all Docklea Comb. Services property to the office.

Again Thank You  
Shane Victor Butler  
Dated 2 May, 2000".

Mr Butler's evidence was that he had been forced to resign his employment following Mr Testa's decision not to approve a written application for leave between 8 May and 24 May inclusive. Mr Butler claimed that he had been verbally advised by Mr Testa and the State Operations Manager, Mr Dutton, as early as February 2000 that the leave had been approved and on this basis had booked tickets to Western Australia. He said that the employer's alleged late decision to formally advise him that the leave request had been cancelled left him with a choice of either cancelling his intended holiday, and losing over \$5,000 expended on the holiday, or resigning his employment.

Under cross-examination Mr Butler stated that he had been told by Mr Dutton a few days before 12 April that his application for leave should not be a problem but that he should put his application forms in. That discussion arose when Mr Dutton spoke to him about his own leave which was to start a few days later. Mr Butler said he had told Mr Dutton that it was good that he had mentioned his leave intention because he (Mr Butler) was looking at possibly taking leave at around the same time.

He also agreed that he had raised the matter with Mr Testa on or around 15 April when Mr Testa had also said words to the effect that it shouldn't be a problem but had also said "put the forms in and we'll sort it out".

However, it took Mr Butler until Easter Monday 24 April before he submitted his written application. Under cross-examination it was suggested that Mr Testa had not seen the application until his return to work on 26 April i.e. the day after the Easter/Anzac Day holiday. Mr Butler then was absent on leave to attend a court hearing in Sydney over the balance of that week and returned to the office on Tuesday 2 May. On that day he was informed by Mr Dutton that there was a problem with the leave request and that he would need to take it at the end of June.

Mr Butler's evidence was that he "said nothing" to Mr Dutton and that he took the news "on the chin". After he went home that afternoon and thought about the matter he felt that he had no choice except to resign. He then wrote the letter (above) to Mr Testa and faxed it to him. That was some six days before his leave request was due to take effect. There was no evidence to suggest that Mr Butler told either Mr Dutton or Mr Testa, during his notice period, that his decision to resign had been based on the company's rejection of his written leave request.

During his time in Western Australia between 8 and 24 May the applicant phoned the Registry of the Queensland Industrial Relations Commission to make enquiries about pursuing an unfair dismissal application. He arranged for information about unfair dismissals, and an application form, to be mailed to him at his home address so that he could read it upon his return on 24 May. He claimed that during his discussion with the Registry staff no mention was made of the twenty-one day time limit.

Under cross-examination Mr Butler stated that the application form was available immediately upon his return from Western Australia. He also stated that he made a conscious decision not to pursue an unfair dismissal application at that time because he was attempting to contact the employer about payments which he believed he was still owed in respect of his period of employment. He also stated that he was not seeking reinstatement to his former position because it would be an unfavourable environment.

He said that the unfair dismissal application had only been lodged after he failed to receive satisfaction in respect of his attempts to recover what he believed to be underpayments in respect of his period of employment.

Importantly - having regard to the fact that his application sought an extension of time within which to lodge his application - he did not provide any further explanation for the time gap between Monday 28 May (the last day for lodgement within the twenty-one day period) and the actual lodgement date of 22 June 2000.

### Conclusion

This application is one which falls outside the rule established by Hall President in *Savage v Woolworths (Queensland) Pty Ltd* ([1999] 162 QGIG 353). This is because the Commission lacks jurisdiction to consider Mr Butler's application. The evidence clearly shows that Mr Butler was not dismissed either directly or constructively. Accordingly, the application for an extension of time cannot succeed.

Mr Butler claimed that he had received verbal approval in around February 2000 that he could take his annual leave between 8 and 24 May 2000. On that basis he allegedly went ahead and purchased tickets to Western Australia on 3 April 2000.

However, the evidence disclosed that any discussion about Mr Dutton's leave intentions before 3 April was, at best, very general. Before Mr Butler purchased the tickets he should have established that the leave was approved by sending the forms to Sydney. It is also a little strange, if Mr Butler thought that leave had been approved, for him to have taken the matter up with Mr Testa on or around 15 April without mentioning that he thought the leave had already been approved and without mentioning that he had already purchased tickets.

Under re-examination Mr Butler indicated that he had previously been permitted to take leave in January with verbal approval only. Even if that be so, and Mr Butler was relying on past practice, it is clear on his own evidence that he did not directly raise with the employer between 2 May (when he resigned) and 7 May (when he left) that he had booked non-refundable flights to Perth based on past practice. Nor did he seek to persuade the employer to change its decision because of those circumstances. He simply went ahead, without any discussion about the reasons, and resigned his employment.

In my considered view he was not forced to take that position. There were a number of other options open to him, including the most obvious of all viz. taking the matter up with his employer. It was not simply a case where a gun was held to the applicant's head and he was forced to resign. Other options were available. Mr Butler elected not to pursue them.

It was also clear that the decision was not taken rashly. The applicant said during the course of his evidence that he had thought "long and hard" about the whole matter before deciding to resign.

In this regard, Mr Butler's resignation letter to Mr Testa is notably silent on the reason or reasons why he decided to resign his employment. If it had been for the sole reason suggested, one would have thought that that reason would have been mentioned. That it was not, in my view, is significant in the whole scheme of events.

The applicant's reinstatement application indicates that Mr Dutton spoke to him about his performance on 19 April 2000. On that date he was told that Mr Testa was disappointed with some operational issues and his future was discussed. He was subsequently advised that the company would cease to allow him to use the company van from 27 April 2000.

Whether those matters were in the applicant's mind or not when he wrote the resignation letter on 2 May was not put to him under cross-examination. Whether they were or not, the simple fact remains that he was not forced to resign simply because he had been informed that his relatively late formal request for leave had not been approved.

Even if I be wrong about my decision that Mr Butler resigned of his own accord and, instead, was constructively terminated, I would, nonetheless, not exercise my discretion to extend time within which to lodge the application. I make that decision for two reasons.

Firstly, the applicant has not satisfactorily explained – nor attempted to explain – why it took him and his industrial adviser between 28 May and 22 June 2000 to prepare and lodge the application. Apart from claiming that some of that time was spent in trying to contact the employer to talk about alleged underpaid entitlements no attempt was made to explain the balance of the time up to, and including, 22 June 2000.

Secondly, the applicant has made it clear that he is not seeking reinstatement to his former position and that the application was only lodged following his failure to gain satisfaction in respect of the alleged unpaid entitlements. Having regard to the decision of de Jersey President in *Auto Logistics and Auctions Pty Ltd trading as Pacific Auto Auctions v Kovacs* ([1997] 153 QGIG 320) and my own decision in *Opalicki v Queensland Pine Company* ([1996] 153 QGIG 624) it would be inappropriate for me to exercise my discretion to extend time when the applicant is not seeking the remedy provided by the legislation.

For the foregoing reasons I decline to grant Mr Butler an extension of time within which to lodge his application. I also formally dismiss the application.

#### Costs

Ms C. Doyle, of Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI), who represented the respondent employer, wrote to the Commission on 23 August 2000 applying to have the application struck out on the basis that the applicant had failed to provide a statement of grounds and reasons for which an extension of time was sought by the date set out in the Directions Order.

Ms Doyle complained that the applicant, through his representative, had cancelled a conciliation conference before Vice President Linnane on 18 July 2000 at extremely short notice after she and Mr Dutton, who had travelled from the Gold Coast to appear at the conference, were in the Commission. She also complained that the applicant had failed to provide a statement of grounds and reasons as required by an initial Directions Order associated with an earlier (cancelled) extension of time hearing which had been scheduled on 9 August 2000. That hearing had been cancelled the day before because the applicant's representative claimed not to have received notice of it.

In addition to asking that the matter be struck out she also sought costs in respect of the application pursuant to s. 331(c) and s. 335 of the *Industrial Relations Act 1999*. For reasons spelt out in the transcript I declined to strike the matter out as requested and allowed the applicant to present his case for an extension of time.

After considering this matter most carefully I have decided to award an amount of costs to the respondent.

It is clear that the applicant freely chose to resign his employment on 2 May 2000. As explained above, it was not a case where Mr Butler had no other options open to him. The decision to resign, on his own admission, was one that he had thought long and hard about.

The employer should never have been forced to expend money to defend the application.

The applicant never had a chance of succeeding for the dual reasons that the applicant resigned and because there was never any factual base to support the application for an extension of time. Pursuit of the application in such circumstances constitutes an unreasonable act.

The QCCI is to file a statement of the respondent's costs in connection with the defence of the application within 14 days. This is to include expenses associated with travel from the Gold Coast to Brisbane by Mr Dutton on two occasions. After the material is received the Commission shall issue a further decision specifying the amount of costs which it will award.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

#### Appearances:–

Mr M. Heffernan, of Employment Advisers (Aust), for Mr S. Butler the Applicant.

Ms C. Doyle, with Mr M. Smith of the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers, with Mr S. Dutton for Docklea Combined Services.

Released: 5 September 2000

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – application for unpaid wages and superannuation***Yuan-Yin (Vivian) Yang AND Taiwan Investment Management Pty Ltd  
(No. W118 of 2000)**

COMMISSIONER BLOOMFIELD

5 September 2000

Unpaid wages – Unpaid Superannuation – Annual Leave – Petty Cash – Witness evidence – Arbitrated Matter – Order by Commission to pay unpaid amounts of wages, superannuation and annual leave – Recommendation to pay undisputed petty cash.

## DECISION

Ms Yuan-Yin Yang (also known as Vivian Yang) has made application to the Commission seeking an order that Taiwan Investment Management Pty Ltd pay unpaid wages and leave entitlements (\$6,136.40 gross), outstanding superannuation contributions (\$1,375.37) and unpaid petty cash claims (\$948.55) to her.

**BACKGROUND**

The applicant said that she had been employed by the respondent's representative, Mr Raymond Wu, and that she had commenced employment on 1 April 1998. The employment arrangements had allegedly been negotiated during the course of a meal at a Chinese restaurant in Sunnybank. She said that Mr Wu had written out her terms and conditions of employment on a restaurant napkin. This was tabled as an exhibit.

She said Mr Wu had indicated to her that she would be paid \$32,000 per annum, receive one month's paid annual leave, be paid a bonus based upon the company's profits if the company achieved a certain profit level, and be reimbursed for any telephone, entertainment and parking expenses.

Mr Wu disputed that the details written on the restaurant napkin set out the employment arrangements. However, under cross-examination he agreed that the various terms of the alleged agreement had, in fact, been implemented after Ms Yang commenced employment. I will treat the document as representing the agreed terms of employment.

Ms Yang said that she had been paid an amount of \$2,668.00 gross per month each month since she commenced employment. However, she had not been paid any wages for December 1999, January 2000 nor the period between 1 February and 9 February 2000 when her resignation, dated 9 February 2000, had taken effect.

She also said that although she had not been paid wages for December the employer had paid income tax on the wages that she would have been paid for that month as part of the tax instalment which it had remitted to the Australian Taxation Office.

She also said that the employer had not made regular contributions in respect of superannuation as required by legislation. She said that Mr Wu had drawn a cheque for an amount of \$2,700 for the company's superannuation obligations between 1 April 1998 and 30 June 1999 and had given it to her in early July 1999. She had deposited it into her own superannuation account with Colonial First State Investment Managers. She said, and Mr Wu agreed, that no superannuation contributions had been made in respect of the period after 1 July 1999.

In accordance with her contract of employment Ms Yang also sought payment of \$948.55 for unpaid petty cash expenditure in the period between 5 October 1999 and 17 December 1999. During the course of his evidence Mr Wu only disputed an amount of \$27 said to be photocopying costs for plans associated with one of Mr Wu's projects at Indooroopilly. Although Mr Wu attempted to suggest that Ms Yang was over-claiming for some parking expenditure on 1 November 1999, I am satisfied that the applicant only made one claim for parking expenditure on that day and not the several claims that Mr Wu thought were being made.

Ms Yang said that she had been married on 12 December 1999 and had taken the following day off. She said that she had "told" Mr Wu that she was going on leave after 17 December 1999, how long she would be away and on what date she would be returning to work.

She also claimed that she had returned to work on Monday 17 January 2000 and had worked, as previously, performing various tasks and duties as directed by Mr Wu until Friday 28 January. She went on stress leave, on doctor's advice, on 31 January.

On 9 February 2000 she wrote to Mr Wu informing him of her resignation. The resignation letter was in the following terms:-

"During the past two (2) weeks, Taiwan Investment Management (and you as its Managing Director) has treated me disrespectfully and unfairly.

You have not raised any concern whatsoever with respect to my ability to carry out my employment. Your treatment of me is related solely to the Joint Venture arrangement between us, which has nothing to do with my employment.

I feel this is an impossible situation for me to continue in, and to work in such an environment. As you know, I have had to cease work since 31st January, as the work environment is having an affect on my health. I have Medical Certificates to support this.

You have therefore placed me in a position where I cannot continue working for you. As you have not officially terminated my employment, I have no alternative other than to resign from my position with Taiwan Investment Management. I therefore give you notice that I hereby resign."

The letter then set out what she claimed to be the amounts owing to her as wages for December 1999, January 2000 and petty cash in the amount of \$951.25.

Mr Wu said that Ms Yang had told him in November 1999 that she was going to be married on 15 December. She had later changed the date for the convenience of guests. He also said that she had told him that she was going to take leave (he rejected any suggestion that she had asked him for leave) and claimed that she had not told him how long she intended to be away nor the date of her return.

Mr Wu also said that he met with Ms Yang on 17 December, before she commenced her leave, when he had attempted to discuss with her payment of the outstanding petty cash claim as well as her wages for December. He also said that he and Ms Yang had signed contracts on that same day in relation to a joint venture that they were entering into. When he raised the question of payment of the petty cash and wages Ms Yang said that she did not require

payment at that time and that they should sit down after her return from leave and work out what money may have been owing between them taking into account the joint venture arrangement.

Mr Wu said that Ms Yang had phoned him on the evening of 16 January 2000 and had asked could they meet the next day to talk about the joint venture arrangement. On that day he had put several proposals to her which she was not happy with. She took a week to discuss them with her husband and other parties, including a solicitor.

He also said that any work which she did perform during the month of January was absolutely different to any work that she normally performed. It related either to the joint venture or the seeking of independent advice about the joint venture.

## CONCLUSION

### Wages

After listening to the evidence of Ms Yang and Mr Wu and after considering the various documents tabled, I am not satisfied that Ms Yang performed any of her normal duties for Taiwan Investment Management Pty Ltd after her return from leave on 17 January 2000.

In arriving at this decision I have noted Ms Yang's very scant evidence about what she allegedly did upon her alleged return to work on 17 January. I have also noted her evidence that she kept all petty cash vouchers in her possession and that she handed them over once she received payment for the amounts expended. It is particularly noteworthy that she was not able to produce any petty cash vouchers in connection with the work which she alleged she performed during January. Although she claimed that she did have such vouchers she also claimed to have left them at the employer's establishment when she ceased work. I have not accepted that evidence because it is so out of keeping with what she said her usual practice was.

Rather, I have accepted Mr Wu's evidence that the applicant did not perform her normal work after her return on 17 January and that the work that she did perform was related to the joint venture between them or the seeking of independent advice about the joint venture.

That finding leads to the inevitable conclusion that Ms Yang last worked on 17 December 1999 and proceeded on annual leave on the following day.

Accordingly, the wages due and owing for the period 1 December to 17 December 1999 is \$1,490.40 ( $17 \div 365 \times \$32,000$ ).

### Annual Leave

Mr Douglas, who represented Ms Yang, urged me to interpret the parties' agreement about annual leave literally. He suggested that I should find that the applicant was entitled to one calendar month of annual leave as opposed to the "standard" four weeks. After noting that that element of the employment agreement was written in Chinese, and noting the general lack of awareness that Mr Wu seemed to have about employee entitlements, I think it would be unwise for me to interpret that aspect of the agreement as requested.

Rather, I think that the true intention of the parties was that Ms Yang would be entitled to the "normal" paid leave entitlements of the Australian workforce generally – being four weeks of paid leave.

Ms Yang's records show that she had taken 44.5 days of annual leave in the period between 1 April 1998 and 14 January 2000. Seventeen (17) days of this total was represented by the period between 20 December 1999 and 14 January 2000 inclusive. The record was not seriously disputed by the employer.

Accordingly, Ms Yang was entitled to the following annual leave:–

	<u>Days</u>
1 April 1998 – 31 March 1999 (4 weeks @ 5 days)	20.0
Pro rata entitlement 1 April 1999 to 17 December 1999 ( $261 \div 365 \times 20$ )	<u>14.3</u> 34.3
<u>Less:</u> Leave taken to 17 December 1999 (44.5 less 17)	<u>27.5</u>
Leave owing	6.8

In dollar terms this amounts to \$836.90 ( $6.8 \div 260 [52 \text{ weeks @ } 5 \text{ days}] \times \$32,000$ ).

Pursuant to s. 14(3) of the *Industrial Relations Act 1999* Ms Yang is also entitled to payment for the public holidays observed on 27 and 28 December 1999. This amounts to a further \$246.15.

### Superannuation

It was common ground that Taiwan Investment Management Pty Ltd had not made any superannuation contributions for the period 1 July 1999 to 17 December 1999.

Ms Yang's wage entitlements in that period amounted to \$14,830.40 ( $5 \times \$2,668$  plus \$1,490.40).

Superannuation contributions, at the agreed rate of 7%, due on such wages amount to \$1,038.10.

### Petty Cash

Although it does not appear that the Commission is empowered to order an employer to pay petty cash which may be due to an employee (see s. 278(1) and the definition of "wages" in Schedule 5 of the *Industrial Relations Act 1999*) it is noted that Mr Wu only disputes \$27.00 of the total amount claimed of \$948.55.

Accordingly, there would seem to be no impediment to Mr Wu making restitution to Ms Yang for the remaining \$921.55.

**SUMMARY**

It is the Commission's Order that Taiwan Investment Management Pty Ltd pay to Ms Yuan-Yin Yang the amount of \$2,573.45 in respect of unpaid wages and leave entitlements calculated as above. It is the Commission's further Order that Taiwan Investment Management Pty Ltd is to pay into a superannuation fund nominated by Ms Yang unpaid superannuation contributions amounting to \$1,038.10. Such payments are to be made within 22 days of the date of release of this decision.

It is the Commission's recommendation that Taiwan Investment Management Pty Ltd pay non-disputed petty cash claims amounting to \$921.55 within 22 days of the release of this decision.

A.L. BLOOMFIELD, Commissioner.

*Appearances:-*

Mr A. Douglas, of A. Douglas and Associates, for Ms Y. Yang the Applicant.  
Released: 6 September 2000

Mr W. Turner, of Turner IR Qld Pty Ltd, with Mr R. Wu for Taiwan Investment Management Pty Ltd.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Yuan-Yin (Vivian) Yang AND Taiwan Investment Management Pty Ltd  
(No. W118 of 2000)**

COMMISSIONER BLOOMFIELD

5 September 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 24 August 2000, this Commission, after having decided that Yuan-Yin Yang was underpaid wages, annual leave entitlements and superannuation contributions by Taiwan Investment Management Pty Ltd, doth order as follows:-

1. That Taiwan Investment Management Pty Ltd pay to Yuan-Yin Yang the amount of one thousand four hundred and ninety dollars and forty cents (\$1,490.40) in respect of unpaid wages for the period between 1 December 1999 and 17 December 1999.
2. That Taiwan Investment Management Pty Ltd pay to Yuan-Yin Yang the amount of one thousand and eighty-three dollars and five cents (\$1,083.05) in respect of unpaid annual leave and public holidays entitlements for the period between 1 April 1998 and 17 December 1999 as projected pursuant to s. 14(3) of the *Industrial Relations Act 1999*.
3. That Taiwan Investment Management Pty Ltd pay into a superannuation fund nominated by Yuan-Yin Yang the amount of one thousand and thirty-eight dollars and ten cents (\$1,038.10) in respect of unpaid superannuation contributions for the period between 1 July 1999 and 17 December 1999.
4. That the amounts set out in paragraphs 1, 2 and 3 of this Order are to be paid within twenty-two (22) days of the date of release of the decision in this matter.

Dated this fifth day of September, 2000.

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

Operative Date: 5 September 2000  
Order – Unpaid wages and Superannuation  
Released: 6 September 2000

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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  
Wilfox Nominees Pty Ltd (W122 of 2000)**

COMMISSIONER SWAN

5 September 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 5 September 2000, this Commission doth Order as follows:-

1. That Wilfox Nominees Pty Ltd pay to Kerrin Sheedy the amount of \$1,173.33.
2. Payment of the amount in paragraph 1 is to be made within 22 days of the date of the hearing.

Dated this fifth day of September, 2000.

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

Operative Date: 5 September 2000  
Order – Unpaid wages  
Released: 6 September 2000

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999***TRAINING WAGE AWARD – STATE***(Rates of pay varied to accord with the General Ruling Declaration, 8 August, 2000)*

PURSUANT to the Declaration of the Commission as to a General Ruling made on 8 August, 2000, the Award is amended as follows as from 1 September, 2000:

By deleting paragraphs (d), (e), (f) and (g) of subclause (1) of clause 2.4 (Wages) and inserting the following in lieu thereof:–

“(d) **Skill Level A** Where the approved training course and work performed are for the purpose of generating skills which have been defined for work at Skill Level A.

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	147.00 (50%)* 171.00 (33%)	182.00 (33%)* 205.00 (25%)	249.00
plus 1 year out of school	205.00	249.00	290.00
plus 2 years out of school	249.00	290.00	337.00
plus 3 years out of school	290.00	337.00	386.00
plus 4 years out of school	337.00	386.00	
5 years or more out of school	386.00		

(e) **Skill Level B** Where the approved training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level B.

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	147.00 (50%)* 171.00 (33%)	182.00 (33%)* 205.00 (25%)	239.00
plus 1 year out of school	205.00	239.00	275.00
plus 2 years out of school	239.00	275.00	323.00
plus 3 years out of school	275.00	323.00	368.00
plus 4 years out of school	323.00	368.00	
5 years or more out of school	368.00		

(f) **Skill Level C** Where the approved training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level C.

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	147.00 (50%)* 171.00 (33%)	182.00 (33%)* 205.00 (25%)	230.00
plus 1 year out of school	205.00	230.00	258.00
plus 2 years out of school	230.00	258.00	289.00
plus 3 years out of school	258.00	289.00	323.00
plus 4 years out of school	289.00	323.00	
5 years or more out of school	323.00		

\* Figures in brackets indicate the average proportion of time spent in approved training to which the associated wage rate is applicable. Where not specifically indicated the average proportion of time spent in structured training which has been taken into account in setting the rate is 20%.

(g) The rates of pay in this Award are intended to include the arbitrated wage adjustment payable under the 1 September 2000 Declaration of General Ruling and earlier Safety Net Adjustments. [Disputed cases are to be referred to the President.] This arbitrated wage adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award amendments to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Cases or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated wage adjustments.”.

Dated this fourth day of September, 2000.

E. EWALD  
Registrar.

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*Industrial Relations Act 1999 s.580*

*(No. U21 of 2000)*

**NOTICE TO MEMBERS OF**

**Australian Institute of Marine and Power Engineers’ Union of Employees, Queensland District**

(An organisation registered under the Industrial Relations Act 1999 (Qld))

**NOTICE OF APPLICATION FOR INDUSTRIAL ORGANISATION  
FOR EXEMPTION FROM HOLDING AN ELECTION**

NOTICE is hereby given that application has been made by Australian Institute of Marine and Power Engineers’ Union of Employees, Queensland District for an exemption from holding an election for all positions of office because the federal counterpart body has already held an election for such positions.

Members of Australian Institute of Marine and Power Engineers’ Union of Employees, Queensland District may object to the application and may obtain a copy of the application from the applicant.

All Notices of Objection to such application must be filed with the Industrial Registrar within twenty-eight days from the date of the application. Notices of Objection must be received by 3 October 2000.

Dated this seventh day of September, 2000.

E. EWALD  
Industrial Registrar.