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No. 6

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
CA410/00	Warrina Innisfail Nursing Home Care Employees – Certified Agreement 2000	29/8/00	
CA434/00	Nationwide Oil Pty Ltd - Process Operators' - Certified Agreement	29/8/00	
CA378/00	Australian Sheet Piling Pty Ltd - Certified Agreement	4/9/00	CA557/98
CA405/00	Elite Design & Shopfitting - Certified Agreement 2000	4/9/00	
CA406/00	Glentone Shopfitters - Certified Agreement 2000	4/9/00	CA95/96
CA407/00	Active Shopfitters Pty Ltd - Certified Agreement 2000	4/9/00	
CA408/00	KDH Design - Certified Agreement 2000	4/9/00	CA438/99
CA409/00	Budget Shopfitters Pty Ltd - Certified Agreement 2000	4/9/00	CA263/97
CA411/00	Mobile Concrete Pty Ltd - Certified Agreement	4/9/00	
CA412/00	The Graham Family Trust t/a L&J Concrete Pumping – Certified Agreement	4/9/00	CA441/96
CA413/00	John Hill t/as JB & BJ Hill - Certified Agreement	4/9/00	CA279/98
CA414/00	R Rossi T/a R Rossi Bricklaying - Certified Agreement	4/9/00	
CA415/00	Waco Kwikform Ltd - Certified Agreement	4/9/00	CA567/97
CA416/00	Rowland Allen t/a Northside Builders Hire Service - Certified Agreement	4/9/00	
CA437/00	Condriil Services Pty Ltd - Certified Agreement	4/9/00	CA576/95
CA438/00	RJ & RG Rankine t/a R & R Reinforcing - Certified Agreement	4/9/00	
CA439/00	Wagstaff Piling Pty Ltd - Certified Agreement	4/9/00	CA397/97
CA440/00	Tom Pearson Services Pty Ltd t/a Pearson Concrete & Asphalt Sawing & Drilling - Certified Agreement	4/9/00	CA257/96

The following Agreements have been certified by the Commission:-

No/s	Title	Date certified	Cancelling
CA441/00	Prestige Contract Fitters Pty Ltd - Certified Agreement	4/9/00	
CA442/00	Tatler Family Discretionary Trust t/a Tazco Constructions Qld – Certified Agreement	4/9/00	CA211/97
CA363/00	Openbrook Pty Ltd T/As Regional Workshop - Certified Agreement	8/9/00	CA194/96
CA364/00	Aroundale Interiors Pty Ltd - Certified Agreement	8/9/00	CA254/95
CA365/00	Value Shopfitting & Cabinet Making Pty Ltd - Certified Agreement	8/9/00	CA133/96
CA366/00	PC Installations Pty Ltd - Certified Agreement	8/9/00	
CA367/00	Laurie Plumb t/a Plumb Glazing & Maintenance - Certified Agreement	8/9/00	CA391/99
CA368/00	Charnelle Home & Office Pty Ltd - Certified Agreement	8/9/00	
CA369/00	Ian Butterworth t/a I & J Butterworth Shopfitters - Certified Agreement	8/9/00	CA491/96
CA370/00	Tony Melenewycz t/a Melco Shopfitters - Certified Agreement	8/9/00	CA390/99
CA458/00	Bartter Enterprises - Ipswich Engineering Maintenance – Certified Agreement 2000	13/9/00	
CA465/00	Wesfarmers Kleenheat Gas Pty Ltd Terminal Operators (Pinkenba) – Certified Agreement 2000	13/9/00	CA108/98
CA453/00	Austin Australia Pty Ltd - Certified Agreement	14/9/00	
CA456/00	Costless Glass & Mirrors - Certified Agreement 2000	14/9/00	
CA457/00	Thomas Brown Shopfitters - Certified Agreement 2000	14/9/00	CA310/94
CA450/00	BHP Cannington Port Operations - Certified Agreement 2000	15/9/00	CA427/97
CA454/00	QNI Yabulu Refinery - Certified Agreement	18/9/00	CA192/98
CA480/00	Western Suburbs Workers Club Inc - Certified Agreement	19/9/00	

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

Workers' Compensation Act 1990 – s. 105 – appeal against decision of Industrial Magistrate

Thorsten Groos AND WorkCover Queensland (No. C43 of 2000)

PRESIDENT HALL

21 September 2000

DECISION

On 14 January 1997 the appellant threw himself backwards off the trailer of a truck to avoid being struck by a very heavy steel girder. The girder, so the appellant tells me, fell to the ground adjacent to the position to which the appellant fell. It was a life threatening incident. In falling to the ground the appellant suffered a comminuted fracture of his left distal humerus and a fracture of the left neck of the femur. He was hospitalised for some seven days whilst his injuries were pinned internally. During the period of his stay in hospital he experienced difficulty in sleeping and suffered nightmares in which he re-lived the incident.

WorkCover Queensland does not dispute that the injuries previously described were injuries within the meaning of the *Workers' Compensation Act 1990*. WorkCover Queensland does dispute that in consequence of the incident of 14 January 1997 the appellant suffered an injury of a psychological nature within the meaning of the *Workers' Compensation Act 1990*. WorkCover Queensland having refused an unconditional damages certificate under s. 182(D)(6) of the *Workers' Compensation Act 1990*, the appellant instituted proceedings in the Industrial Magistrates Court. He was unsuccessful. His Worship was satisfied that the appellant was suffering from a psychiatric and/or psychological condition which constituted an "injury" for the purpose of the *Workers' Compensation Act 1990*, but was not satisfied that the injury arose out of the appellant's employment. From that decision the appellant sought a re-hearing on the record pursuant to s. 105 of the *Workers' Compensation Act 1990*. The appellant seeks to set aside the Industrial Magistrate's conclusion that the injury did not arise out of the appellant's employment, to substitute a decision that the injury did arise out of his employment, and to persuade this Court to determine favourably to him the issue which the Industrial Magistrate had left untouched, viz whether the employment was a significant contributing factor to the injury.

WorkCover Queensland joins issue with the appellant on all points and raises two additional points of its own. First, it is said that the Industrial Magistrate was wrong to hold that the condition from which the appellant was suffering was an "injury" within the meaning of the *Workers' Compensation Act 1990*. That issue was squarely raised before the Industrial Magistrates Court and WorkCover Queensland was entitled to re-agitate the matter on the appeal. Second, it was said that any condition from which the appellant suffered arose after the commencement of the *WorkCover Queensland Act 1996*. That Act, of course, repealed and replaced the *Workers' Compensation Act 1990*. Materially, as from 1 February 1997 the particle "the" was substituted for the particle "a" in the definition of injury and the adjective "major" was inserted immediately before "significant". Henceforth, the definition which was to apply was "an 'injury' is a personal injury arising out of, or in the course of, employment if the employment is the major

significant factor causing the injury". That contention gave rise to great difficulty. It gave rise to great difficulty because the proceedings before the Industrial Magistrate had been conducted on a common understanding that the relevant definition was that contained in the *Workers' Compensation Act 1990* in the form which it took after the amendment of December 1994, ie on the understanding that the definition of "injury" was "personal injury arising out of, or in the course of, employment if the employment was the significant contributing factor to the injury". The proceedings in the Industrial Magistrates Court being conducted on that basis, the appellant attached no particular significance to "when" the condition first arose. Any evidence on the point was put in incidentally to dealing with some other issue. Similarly, the appellant made no submissions about whether the employment was the "major significant factor causing the injury" and led no evidence going directly to that matter. My original inclination was to rule that WorkCover Queensland was bound by the way in which it had conducted the litigation before the Industrial Magistrate. However, proceedings relating to the incident of 14 January 1997 will not finish with this appeal. Given that there is power to allow fresh evidence to be given on the re-hearing, I ultimately took the view that it was more prudent to allow WorkCover Queensland to put the submission that the post 1 February 1997 definition applied but to allow the appellant to give evidence about when symptoms first arose, and to allow the appellant to re-call Dr Mulholland, the psychiatrist upon whose evidence the appellant relied before the Industrial Magistrate (and whose evidence was accepted by the Industrial Magistrate) to express a view about the time of onset of the condition and about whether the employment, which Dr Mulholland had already said was a significant contributing factor, was the major significant factor causing the injury.

Having been told of the appellant's account of sleeplessness and nightmares whilst hospitalised, Dr Mulholland was confident that the condition from which the appellant suffered on 27 September 1999 when Dr Mulholland interviewed and examined him in his rooms, was a condition which was present during the period of hospitalisation. Dr Mulholland did not suggest that the condition then took the form which it presently does. Dr Mulholland's evidence was that at that time, as might have been expected, the appellant was showing the initial signs of a stress disorder which over time had settled down and become mild whilst other factors, eg anxiety and frustration, had developed over time as the appellant became aware he had no prospect of rapid recovery and no prospect of a full recovery. Dr Mulholland was quite clear on the point that, although the condition had varied over time, the appellant suffered a changing and fluctuating condition not a number of psychological conditions. There is no medical evidence to the contrary. I propose to act on Dr Mulholland's evidence. Since the period of hospitalisation preceded 1 February 1997, it is the pre-1 February 1997 definition of "injury" which is relevant. I turn then to the submission that the appellant did not suffer from a psychiatric disorder or psychological injury.

It may be conceded that each of the two psychiatrists, Dr Chalk, who had been called by WorkCover Queensland, and Dr Mulholland, who had been called by the appellant, declined to diagnose the appellant as suffering from a psychiatric disorder or a psychological injury. One can understand why. The appellant did not reach the threshold on the diagnostic standard, DSM 4, used by those who practice as specialist psychiatrists. However, that is not the end of the matter. There is clear evidence by Dr Mulholland, who unlike Dr Chalk did not consider it unnecessary to go beyond the DSM 4, that the appellant was suffering "emotional problems" and that his disorder was probably "best regarded as a non-psychopathological dysphoric reaction to bio-psychosocial stress which is all readily understandable given the circumstances of his life". The question whether an applicant for compensation has suffered an "injury" within the meaning of the *Workers' Compensation Act 1990* is a question of mixed fact and law on which medical evidence is often helpful, but necessarily not decisive. If the legislature had wished to confine relief to cases in which a condition answered the criteria of DSM 4, the legislature might have said so. By way of example, s. 214 of the *Workplace Relations Act 1997* (now repealed) provided "If an expression used in this chapter is also used in the *Termination of Employment Convention 1982*, it has the same meaning as in the convention". It is difficult to accept that a diagnostic standard developed to ensure that psychiatrists from different backgrounds diagnose on the basis of a common international standard is an appropriate mechanism to use in assessing whether a worker suffering impairment arising out of the course of his employment and to which his employment was a significant contributing factor, is entitled to assert entitlement to compensation for the impairment because he has suffered an "injury" within the meaning of the *Workers' Compensation Act 1990*. One cannot resist adding that the diagnostic standard is in terms about "illness" rather than "injury". Noticing that where an injury is shown, "impairment" as defined at s. 39, is by s. 43 of the *Workers' Compensation Regulation 1992* assessed by using the AMA Guide, Dr Mulholland has worked backwards assessing the degree of impairment, noticing the causal nexus with the incident of 14 January 1997, and concluding that the appellant was "injured" by the incident. It may be conceded that that process of reasoning is a process of reasoning which the Act does not require. I note the submission of WorkCover Queensland that the *WorkCover Queensland Regulation 1997*, s. 55(2) uses the verb "must" in requiring reference to be had to the AMA standard in assessing impairment. It may be conceded that neither in the *Workers' Compensation Act 1990* nor in the *Workers' Compensation Regulation 1992* is an obligation to be found to use of the AMA standard to determine whether the worker has suffered an injury. Frankly, if the intention had been to impose an obligation to determine the existence of an injury by assessing impairment under the AMA standard I should have expected to find an express provision. But it has not been put that the existence of an injury must be determined in that way. What is put, and put correctly, is that in the case where there is no evidence to the contrary, the existence of the injury may be inferred from the existence of the impairment. In my view the Industrial Magistrate did not err in finding that the appellant had suffered an "injury" within the meaning of the *Workers' Compensation Act 1990*.

Where the Industrial Magistrate did err was in finding that the injury did not arise out of the course of the appellant's employment.

The Industrial Magistrate seems rather to have been of the view that the appellant's condition arose out of events, in particular the appellant's inability to find employment, which occurred after his employment had come to an end. The shortcoming in that approach is that it omits to take into account that every post-employment factor to which one might legitimately refer, is linked to the incident of 14 January 1997. The appellant lost his employment because he returned to work too early and could not cope. He could not cope because he was not fully recovered from the incident of 14 January 1997. He has not been able to obtain alternative employment because, in consequence of the physical injuries of 14 January 1997, he can no longer perform the work which he is trained to perform. The appellant becomes bored, frustrated and anxious because he has nothing to do. He has nothing to do because of the unemployment which, as previously noted is linked back to the injuries of 14 January 1997. He drinks to relieve that boredom and he drinks to relieve the continuing pain of the physical injuries of 14 January 1997. The appellant is certainly depressed by his inability to return to his previous occupation. But that inability itself arises out of the injury of 14 January 1997. I gave my view of the meaning of "arising out of the employment" in *Lackey v WorkCover Queensland* 164 QGIG 22 at 22. There is no utility in quoting the passage here. It is sufficient to say that every consideration of cause and consequence links the appellant's current condition to the dreadful incident of 14 January 1997.

I note that, swearing to the issue, Dr Mulholland was of the view that the incident of 14 January 1997 was a significant contributing factor to the appellant's condition. That medical opinion is not of course conclusive. However, since much of the evidence about the appellant's condition at the time of the hearing in the Industrial Magistrates Court comes from Dr Mulholland, it is comforting to know that he takes that view. For myself, I have not the least difficulty in characterising the incident of 14 January 1997 as "a significant contributing factor". The tendrils of cause and consequence link the appellant's condition and the factors currently influencing his condition to the evasive action, physical injury and fright of the incident of 14 January 1997.

I allow the appeal. I set aside the decision of the Industrial Magistrate dismissing the appeal. In lieu thereof I order that WorkCover Queensland remit the matter for proper assessment of the injury pursuant to s. 130(A) of the *Workers' Compensation Act 1990*. I order WorkCover Queensland to pay the appellant's costs of and incidental to this appeal, assessed as costs are assessed in a Supreme Court matter. With respect to the appeal to the Industrial Magistrates Court I certify the attendance of both counsel and solicitor was necessary and that an additional witness allowance is reasonable because of the special circumstance of the doctor called being a specialist under the *Medical Act 1939*. Taking into account the complex nature of the issues it seems to me that costs should be allowed at 1.5 times what would otherwise be the appropriate rate. I therefore order that WorkCover Queensland pay to the appellant the sum of \$6,893.50 in respect of the appeal to the Industrial Magistrate.

Dated this twenty-first day of September, 2000.

D.R. HALL, President.

Released: 21 September 2000

Appearances:-

Mr C. Newton instructed by Carter Capner Lawyers for the appellant.

Mr R. J. Neate instructed by WorkCover Queensland for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

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

William Eric Yabsley AND WorkCover Queensland (No. C44 of 2000)

PRESIDENT HALL

25 September 2000

DECISION

By an application dated 25 September 1998 and received by WorkCover on 11 October 1998, the appellant sought compensation under the *WorkCover Queensland Act 1996*. By a letter dated 11 May 1999 his application was rejected. The applicant sought a Review. By letter dated 8 July 1999 the Statutory Review Unit rejected the Application for Review. The applicant then appealed to the Industrial Magistrates Court. After a three-day hearing and by a lengthy and careful decision dated 22 March 2000, the Industrial Magistrates Court dismissed the appeal.

Materially, the Industrial Magistrate found –

- (a) the applicant suffered from a major depressive disorder;
- (b) the appellant had a pre-existing disposition to psychological decomposition at the time that his employment commenced;
- (c) the appellant's condition arose in the course of his employment;
- (d) the condition suffered by the appellant was not withdrawn from the definition of "injury" at s. 34 of the *WorkCover Queensland Act 1996* by the operation of s. 34(a) in that the action or actions taken by the appellant's employer were not reasonable management action taken in a reasonable way;
- (e) the condition suffered by the appellant was withdrawn from the definition of "injury" at s. 34 of the *WorkCover Queensland Act 1996* by s. 34(4)(d) in that being a psychiatric or psychological disorder it arose out of or in the course of circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury.

In light of finding (d) His Worship did not find it necessary to consider whether the appellant's employment was "the major significant factor causing the injury" for the purposes of s. 34(1) of the *WorkCover Queensland Act 1996*. (I am told by counsel and accept that it is common ground that an affirmative answer should have been given)

It is finding (d) which has been attacked on the appeal. The submission is that the Industrial Magistrate misunderstood the concept of "reasonable person" at s. 34(4)(d). The submission is that s. 34(4)(d) focuses on the concept of "same employment", not the concept of "same position", ie the reasonable teacher is the equivalent of the man on the Clapham omnibus. The Industrial Magistrate had not, of course, adopted that approach. Rather than look at a "reasonable teacher" in a vacuum, he looked at the reaction to events of a "reasonable teacher" in the situation in which the appellant found himself. In my view, the Industrial Magistrate was entirely correct. Indeed, any other approach would have been unfair to the appellant. The Industrial Magistrate had made findings of primary fact which amply supported His Worship's conclusion that the working environment at the school at which the appellant was employed, viz St Michael's School, Palm Island, and the environment in which the locality of the school required that the appellant reside, were quite atypically stressful. It must be conceded that in attempting to define the concept of "reasonable person" His Worship observed:

"I take the view that in determining who is "the reasonable person" referred to in section 34(4)(d), I must consider that person to be a teacher at St Michael's living and working on Palm Island, or a teacher who had experienced the life and conditions there."

I must confess that I am at a loss to understand what His Worship had in mind by the words "or a teacher who had experienced the life and conditions there". Perhaps His Worship had in mind onset of a condition after the Palm Island service had ceased. However, the rest of the passage is unexceptional enough, and in any event the correct test was applied. In those circumstances, I am not disposed to reverse His Worship's decision on the basis of what is at worst an infelicitous and inconsequential turn of phrase.

I dismiss the appeal.

The appellant is to pay the costs of the respondent of and incidental to the appeal assessed as they would be assessed if this had been a Supreme Court matter.

Dated this twenty-fifth day of September, 2000.

D.R. HALL, President.

Released: 25 September 2000

Appearances:-

Mr M.E. Pope, instructed by Connolly Suthers, Solicitors for the appellant.

Mr S.P. Sapsford instructed by WorkCover Queensland for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(i) – appeal against decision of industrial commission

**Warner World Australia Pty Ltd and Kirkby Banner Pty Ltd trading as
Warner Bros Movie World Enterprises AND Treve Lewis (No. C46 of 2000)**

PRESIDENT HALL

27 September 2000

DECISION

The respondent commenced employment with the appellant at Sea World. She commenced as a payroll clerk. In May 1991 she became payroll supervisor for Warner Bros Movie World Theme Park. By 24 December 1999 she had become the payroll administrator, managing all payroll functions for each of two theme parks operated by the appellant, viz Movie World and Wet and Wild, and the administration payroll of the Movie World studios. On that day she received a letter confirming the termination of her employment.

The termination of the respondent’s employment followed upon an investigation into two quite serious allegations of misconduct which had been made against her by other employees of the appellant. The first allegation was that the respondent has misused her position to grant herself leave by way of time in lieu to which she was not entitled. The second allegation was that she had counselled and procured her daughter, who was also employed by the appellant, to misrepresent her age in order that she would be entitled to payment at a higher rate under the certified agreement governing her employment. The outcome of the investigation was that the appellant decided to terminate the respondent’s employment. The appellant chose not to dismiss the respondent for misconduct. Instead, the appellant chose to give the respondent the five week’s period of notice to which she was entitled under the *Industrial Relations Act 1999*. The appellant chose also not to require the respondent to work through the period of notice and made payment in lieu of notice. Consistently with the decision not to terminate the respondent for misconduct, the appellant paid the respondent the money equivalent of her accrued and proportionate long service leave.

The respondent sought relief pursuant to s. 74 of the *Industrial Relations Act 1999*. On 17 July 2000 by a decision now reported at 164 QGIG 326 the Queensland Industrial Relations Commission dismissed the respondent’s application for reinstatement but ordered the appellant to pay an amount equal to 8 week’s pay by way of compensation. The decision is impossible to support.

The Commission found that on the view of the evidence most favourable to the respondent, it was entirely fair and reasonable for the appellant to terminate her employment on 5 week’s notice. The Commission also found that it was appropriate for the appellant to make payment in lieu to the respondent rather than require/permit her to work during that 5 week period. Mr French who appears for the respondent on the appeal does not challenge that finding. Indeed, on behalf of the respondent, he accepts the finding.

That finding should have been the end of the matter. That was what had occurred. However the Commission went on to observe:-

“While the respondent was under no obligation to make the applicant an offer allowing her to resign, once it had been made it was obliged to act reasonably in relation to the offer. I find that it did not. I therefore find that the manner of the dismissal including the termination payment harsh, unjust and unreasonable in the circumstances and therefore in breach of s. 77(d) of the *Industrial Relations Act 1999*.”

The reference to the option of resignation is a reference to a discussion which occurred between the appellant’s agent and the respondent on 23 December 1999. It is plain that the agent, acting within the scope of his authority, gave the respondent the opportunity to resign. The respondent did not take that opportunity. By a telephone call at or about 4 pm on 24 December 1999 the agent made a further inquiry as to whether the respondent wished to take the opportunity to resign. The respondent indicated that she was not ready to make a decision. The dismissal, of which she had been informed prior to the grant of the opportunity to resign, was then confirmed.

It is conceded by the respondent, and indeed was found by the Commission, that the appellant had no obligation to grant the respondent the opportunity to resign. The view taken by the Commission and propounded on the appeal on behalf of the respondent was that once the opportunity to resign was granted it might not be unreasonably withdrawn. To that one might fairly respond “why ever not?”

Assuming that a promise that the opportunity would remain open for a reasonable time may be read into what was said by the appellant’s agent – an assumption which it is difficult to make – the promise was not supported by a consideration. The elements of promissory estoppel are not made out. On the evidence the respondent took no action whatever in reliance upon the alleged implied promise. On the evidence the respondent did not suffer a detriment in that upon withdrawal of the opportunity to resign her position was exactly the same as it had been before the opportunity had been granted. There is no special industrial feature to this case. It is civil litigation. It is impossible to suppose unconscionability, which on the more recent authorities is the basis of the doctrine of promissory estoppel, has a content in proceedings under the *Industrial Relations Act 1999* which it does not have in the other courts of Australia. The appellant was entitled to withdraw the opportunity to resign.

The reference to “the termination payment” is impossible to understand. It may be that the Commission overlooked the evidence that the appellant had paid to the respondent the sum of 5 week’s pay in lieu of notice which the Commission had previously found to be fair and reasonable. There is a subsequent passage which indicates that the Commission mistakenly thought that the respondent had been denied payment in respect of proportionate long service leave. As previously pointed out, the respondent had received that payment.

The reference to breach of s. 77(d) of the *Industrial Relations Act 1999* is also difficult to understand. Section 77(d) does not impose an obligation.

I am satisfied that the Commission erred in law.

I allow the appeal. I set aside the decision and the Orders of the Queensland Industrial Relations Commission in Case No B66 of 2000. I order that the respondent’s application for reinstatement and/or compensation be dismissed. There is no application for costs.

Dated this twenty-seventh day of September, 2000.

D.R. HALL, President.

Released: 27 September 2000

Appearances:-
Mr A.K. Herbert instructed by Livingstones Australia for the appellant.
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

Queensland Teachers Union of Employees AND Department of Education (No. B151 of 2000)

COMMISSIONER BROWN

25 September 2000

DECISION

On 3 February 2000 the Queensland Teachers Union of Employees (QTU) lodged an application for the reinstatement of Jurgen Peterfeld (Peterfeld) to his former position as teacher with the Department of Education (EdQ). Peterfeld was dismissed for distributing material during his campaign for election as QTU president, some of which had previously been the subject of disciplinary action against him.

At the outset Mr C. Murdoch on behalf of EdQ sought leave for EdQ to be legally represented. Such leave was opposed by Mr Bates of the QTU.

After hearing argument, the Commission granted the leave sought and extended the opportunity to the QTU to elect to be similarly represented. The QTU chose to continue the hearing with Mr Bates as representative.

The QTU called Graham Moloney (Deputy General Secretary, QTU) and Jurgen Peterfeld to give evidence.

Mr Murdoch called Raymond John Kelly (Senior Industrial Officer, Employee Relations Unit, Human Resources Branch) for EdQ.

The material distributed by Peterfeld is known as E-mails 1 and 2. E-mail 1 which contained material critical of aspects of school and teacher administration and E-mail 2 which was an extract from the works of James B. Caball called the "Judging of Jurgen" and used by Peterfeld to depict aspects of his relationship with EdQ.

Graham Moloney gave evidence of his responsibilities which included applying for and coordinating election for offices within the QTU. The Electoral Commission of Queensland conducted the elections. He stated that under the Constitution and Rules of the QTU, the General Secretary and Deputy General Secretary have particular responsibility to ensure the rights and privileges of members are defended. He indicated Jurgen Peterfeld was a candidate in the 1999 presidential elections and that Jurgen Peterfeld had been a candidate in QTU presidential elections on previous occasions.

Moloney in his evidence made the following points:-

- The QTU received one letter of complaint and a small number of telephone calls arising from the material distributed by Jurgen Peterfeld;
- Peterfeld was allowed 2 advertisements in the QTU journal, one on 2 September 1999, the other on 14 October 1999. These received no letters in response;
- The QTU reserves the right not to publish defamatory material;
- The advertisements of Jurgen Peterfeld were placed without alteration;
- The QTU has concerns that Peterfeld's dismissal could have a negative impact on other employees considering nominating for office of the QTU in future. Elected Officers are technically on leave from EdQ and may feel reluctant to express criticism of EdQ;
- Peterfeld's earlier election campaigns in 1981 and 1983 were based on issues such as lower union dues, an incentive transfer scheme, improved superannuation for women members, the relationship between QTU and EdQ and in 1993 his focus was award breaches with respect to meal breaks;
- QTU President is the premier elected position and campaigns for election to this position shouldn't be constrained unless the material distributed is defamatory or discriminatory;
- Supervision of teachers and the role of Principals have been the subject of legitimate debate within the QTU for some decades;
- In that Peterfeld's election activities were conducted in a private capacity, EdQ may seek to take disciplinary action in connection with other employees over private matters;
- Moloney acknowledged there are some private issues that are legitimately the province of EdQ, such as an offence relating to the interaction with children;
- It may be appropriate in certain circumstances for EdQ to take action over election material eg. Pornographic material. EdQ has a policy on pornography;
- Election material should contain fair comment. Unfairness is a matter of personal assessment. Election material can contain material which some might find insulting. Whilst not preferable, dishonesty has been known in election campaigns;
- Peterfeld's election material did not put a respectful view of others;
- Members would not be aware that Peterfeld had been disciplined previously over E-mail 1;
- E-mail 3 was similar to the journal advertisements;
- E-mail 4 was about the disciplinary investigation over E-mails 1 and 2;
- E-mail 1 was a different yet serious method of conveying a message;
- E-mail 2 "Judging of Jurgen" is satirical comment relevant to members when determining their vote. It criticised tendencies to homogenise the process of education and stifle creative and distinctive thought;
- Other candidates used conventional methods of communication and did not use E-mail;
- It was the practice that Union related mail be addressed to the Union rep or failing the presence of a union rep to the "Principal and staff" for distribution. The majority of schools have union reps;
- Peterfeld's E-mails looked at the role of Principals both within the union and in connection with professional trust and workplace bullying; and
- Approximately 95% of principals are union members.

Jurgen Peterfeld in evidence stated:-

- He was employed as a teacher by EdQ from January 1978 until his dismissal in January 2000. He spent the last 4 years as a LOTE (Language other than English) German teacher at schools including Boondall State School;
- He was an unsuccessful candidate in the QTU presidential election of 1999 and previously in 1981, 1983 and 1993;
- He was motivated by a desire to influence union direction and out of frustration with his dealing with EdQ (T. p 38);
- His campaign theme in 1999 was - Lets Rebuild Professional Trust - this slogan appeared on his election material. E-mail 1 and 2 and both of the advertisements which appeared in the QTU journal;
- He perceived as inappropriate school administration, the act of QTU members, conducting investigations and inspections of other QTU members;
- He was dismissed following a finding by EdQ that he had distributed material by E-mail which adversely and inappropriately depicted principals and EdQ;
- E-mail 1 was a refined version of satirical comment written in response to personal experiences during his employment with EdQ. This E-mail was not sent by Peterfeld to officers of EdQ (Ashford or Emery). Exhibit 3 confirmed that Peterfeld's home computer was not used in sending this material to Ashford or Emery;
- Circumstances surrounding Peterfeld's experiences and the writing of E-mail 1 known as the Eight Lessons in Professional Trust were the subject of a Departmental investigation, the outcome of which was disciplinary action which is the subject of an as yet unresolved appeal;

- In response to the investigation and report known as the “Bookallil and Grayson Report”, Peterfeld provided a 138 page document known as the “PRELIMINARY RESPONSE to the Contents of the ‘Report on the Investigation into a Series of Informal Complaints by Mr C Campanaris (whilst expressly ignoring a series of Formal Complaints lodged much earlier by Mr J Peterfeld) and Any Related Matters of Concern that Might Come in Handy to have a Go at Mr J Peterfeld’ ”;
- He stated that E-mails 1 and 2 commenced with a header describing the material as election material not necessarily the views of the Union and addressed to the “QTU representative at your school”. They both contain an opening explanation that Jurgen Peterfeld is running for President of the QTU and requesting reps to distribute the material to union members and further a disclaimer stating that “Any similarity between the fictional characters in the material to persons is coincidental and unintentional;
- He conceded that the material may have caused insult to some individuals;
- He was never informed by anyone other than the investigating officers that the material was offensive;
- E-mails were delivered to schools via the address “the principal @qld.edu.au”, this was unavoidable and not meant to target Principals;
- He was unaware of any EdQ E-mail usage policy or that delivery of E-mails to Schools from his home computer was prohibited. He believed it to be a legitimate method of communication;
- Some negative responses were received (Annexure 5 of Peterfeld’s statement);
- No EdQ resources were used to prepare or send the E-mails;
- E-mail 2 “Judging of Jurgen” was sent on or about 14 October 1999 (Annexure 8 of Peterfeld’s statement) and was the second in the series of E-mails which formed a major part of his election campaign;
- “Judging of Jurgen” is an extract from writings of James Branch Cabell, published in 1919 and he maintained that any association between E-mail 2 and departmental officers was at their own instigation;
- He stated that this is not the first time he has used that passage to illustrate his interactions with EdQ;
- E-mail 3 refers to EdQ as the “tumblebug” (T. p 44 and 45);
- The contents of E-mail 3 were not a matter considered in Peterfeld’s dismissal of 11 January 2000;
- E-mail 3 provided a context and perspective for E-mails 1 and 2;
- The message in E-mail 3 is moderate and outlines issues Peterfeld had with certain types of school administration;
- Peterfeld was a serious candidate in the 1999 QTU presidential election;
- E-mail 4 was a copy of the letter from EdQ regarding disciplinary action and was distributed on or about 6 November 1999 and produced by Peterfeld privately to advise voting members that he was being set up for disciplinary action over election material;
- Peterfeld took exception in February 1998 to the proposed Professional Development and Supervisory policy at Boondall State School;
- This appeared to be the start of the deterioration of the relationship between Peterfeld and Campanaris, his Principal at Boondall;
- In May 1998, he informed Tom Mould, Geebung District Director, of his case of workplace harassment by letter;
- EdQ left the investigation with Tom Mould, District Director;
- The Bookallil/Grayson investigation commenced around September 1998;
- Peterfeld’s allegations of workplace harassment were to be investigated following the Bookallil/Grayson review;
- Peterfeld objected to this and this was one of the reasons for his declining to be involved in the Bookallil/Grayson review;
- Peterfeld had never agreed with the Bookallil/Grayson process or conclusions;
- Communication with EdQ officers Ashford, Kelly and McKay regarding his dissatisfaction were ignored;
- Peterfeld told McKay that he had lost all trust in the ability of EdQ to conduct a fair and unbiased investigation as requested by Peterfeld;
- Peterfeld claimed that the transcript of interviews conducted by Bookallil/Grayson were at odds with the report;
- Peterfeld’s response to the Bookallil/Grayson Report was in part flippant;
- “Eight lessons in Professional Trust” was originally written because of circumstances surrounding the Professional development and Supervision policy. He saw it as a sort of a cartoon in words. Peterfeld had used cartoons to convey messages previously;
- E-mail 1 contained adverse comments regarding Principals;
- Peterfeld does not know all Queensland Principals but among those he does know is Mr Campanaris, the Principal of Boondall State School;
- The title of Peterfeld’s response to the Bookallil/Grayson report did not show respect to EdQ as they had shown no respect to him;
- References in his response are the way he likes to express himself, that is having independent ideas and expressing them (T. p 52);
- Initially the “Eight Lessons in Professional Trust” were placed randomly in Boondall State School teachers’ pigeon holes as a response to problems arising from the issues surrounding the Professional Development and Supervision policy at Boondall;
- The material made fun of Principals in general not a Principal in particular;
- Peterfeld advised Mr Campanaris he refused to perform certain functions because of the offence taken at the decision of Campanaris to review the LOTE program, namely – Resign immediately from the LOTE Committee; Cease using the internet; Cease participation in German verse speaking; Not co-operate with the LOTE review. In addition he would produce a minority report reflecting the real state of LOTE in Queensland and in particular Boondall State School rather than the sanitised bullshit;
- Peterfeld felt that the LOTE survey proposed was offensive in that, because he was German born, anti German sentiment may have been present in the survey responses;
- In his response to the Bookallil/Grayson report at page 25 Peterfeld claims that he considered the 15 June 1998 Boondall State School Newsletter as a direct attack on him;
- Peterfeld acknowledged that the Newsletter did not refer to him either overtly or covertly (T. p 59);
- The cartoon “Know Your Barbarians” was placed on the noticeboard and given to Mr Campanaris to “have a go” at the 15 June 1998 Newsletter written by Mr Campanaris (T. p 59);
- Peterfeld maintained he was justified in producing the cartoon because of the “new performance culture”;
- The LOTE review issue led to the 17 May 1998 claim of workplace harassment as he felt it was race based (T. p 61) and an individual witch hunt;
- Reviews should be conducted by experts not lay persons or persons with no experience with LOTE;
- Peterfeld was unaware of a LOTE cyclic review being conducted at any other school and cyclic reviews have since been abandoned;
- Peterfeld does not have a high opinion of T. Mould;
- His comments towards staff at the Geebung District Office were not respectful;
- It was appropriate for Peterfeld to liken the conduct of staff of the Geebung District Office to Gestapo methods and the East German Stasi;
- The relationship between Campanaris and Peterfeld suffered subsequent to the publishing of a letter to the editor regarding leading schools and not because he (Peterfeld) was German;
- He maintained the tone in the response to the Bookallil/Grayson report was borne of frustration (T. p 78);
- Peterfeld acknowledged producing the cartoons attached to Kelly’s affidavit;
- The cartoons were not placed into pigeon holes or posted on Notice Boards except No 5. The cartoon depicted Principals as Court Jesters;
- The cartoons were considered when determining the initial disciplinary action against Peterfeld;

- Cartoon No 7 expressed Peterfeld's view of the imbalance between male and female teachers in Primary Schools and the resultant adverse effects on male students;
- Cartoon No 10 was based on the view that feminists have taken over the education agenda and male teachers have become more irrelevant;
- Peterfeld provided a LOTE Report;
- The interim LOTE Report by Peterfeld could not be used by the principal in the form provided;
- The reason stated for the format of the report was the break down of the relationship between Peterfeld and Principal Campanaris;
- He had significant time off through illness during the period covered by the interim LOTE Report, that he was not trained in report writing and did not see writing LOTE Reports as his responsibility as he was concerned as to the future possible use in reviewing teachers;
- Interim Reports are required from all key learning areas – not just LOTE;
- He maintained that if workplace circumstances were better every effort would have been made to find the relevant information to provide the report;
- Regarding the Bookallil/Grayson Report – Peterfeld questioned the choice of the investigators including race, and status and was suspicious of the process, maintaining this was one reason for refusing to be interviewed and that another was that he felt he had been lied to by Bookallil over whether or not the Interim LOTE Report was an issue worthy of investigation;
- Peter McKay of EdQ contacted Peterfeld regarding investigating his claims of workplace harassment. Peterfeld did not co-operate because of concerns that EdQ could not be trusted to produce an unbiased report;
- Peterfeld made various entries in the Dairy used for staff communication at the Boondall State School including his opposition to and views on the LOTE review;
- The letters "KKK" were written in the Dairy by Peterfeld because he felt racism was starting to become an element and that the first 2 "K"s referred to the LOTE Committee as a Kangaroo Court;
- Peterfeld admitted that referring to colleagues as "KKK" was not conducive to team work;
- The letter to Paul Casey, an officer of EdQ, dated 17 June 1999 was intended to make him feel embarrassed so that he could understand how Peterfeld had felt over earlier incidents. Comparing Slobodan Milosevic with officers of EdQ was a result of how Peterfeld felt at the time;
- Peterfeld's letter to Ashford dated 30 July 1999 was his response to EdQ letters to him from Ashford inviting him to show cause why disciplinary action should not be taken. That the letter was signed King Jurgen was an expression that Peterfeld used to link himself to the character in the "Judging of Jurgen";
- Peterfeld was aware from the EdQ letter of 6 August 1999 that EdQ considered the preparation and distribution of the "Eight Lessons in Professional Trust" as inappropriate;
- Peterfeld immediately appealed the decision to discipline him;
- Alternatives to E-mail were financially prohibitive;
- E-mail 1 contained a disclaimer with respect to individuals, however a group of people within EdQ are referred to, that being Principals;
- E-mail 1 was not intended to offend anyone, was part of a *bona fide* election campaign (T. p 35, 26 and 33);
- E-mail 1 suggests through satire that Principals are out of touch with teaching staff and do not communicate effectively with teaching staff;
- Peterfeld denied that E-mail 1 depicted Principals as ignorant;
- The "Eight Lessons in Professional Trust" could offend readers and some Principals. It was aimed at School Administration style not administrators;
- Peterfeld did not seek use of the QTU web site or extra journal space to distribute literature;
- Election strategy targeted teachers not Principals. E-mails 1 and 2 were part of that strategy;
- Peterfeld fell ill as a result of an accumulation of circumstances. Peterfeld's illness resulted in 40 days absence; and
- Because EdQ's finding in relation to the material in E-mails 1 and 2 was still subject to appeal, Peterfeld did not consider it inappropriate to use such material in his election campaign. In any event he considered the material appropriate in that it was already in existence and it suited the campaign strategy i.e. to create controversy.

In the evidence of Raymond John Kelly of EdQ, the following matters were forthcoming:--

- Raymond Kelly had been Senior Industrial Officer with EdQ since November 1997;
- Kelly was involved in both disciplinary matters involving Peterfeld;
- The Director, Human Resources, had delegated responsibility to Kelly for taking disciplinary action and managing disciplinary matters in line with s. 87 and 88 of the *Public Service Act 1996* (Part 6 Disciplinary Action);
- Kelly was responsible for reviewing material provided to the Director when disciplinary action was being considered and further more providing draft correspondence for the Director's signature as part of that process;
- The first disciplinary action in August resulted in 14 of the 15 allegations being found proven;
- The 15 allegations arose either from the Bookallil/Grayson Report or correspondence from T. Mould, District Director to S. Rankin of EdQ;
- Following Peterfeld's appeal, no change was made to Peterfeld's circumstances;
- Preliminary hearings at the initiative of the Public Service Commissioner to disciplinary matters are not unusual where an appeal was lodged;
- EdQ would have to await the outcome of an appeal before a decision regarding disciplinary action could be implemented;
- The issues considered in relation to the dismissal were set out in a letter to Peterfeld dated 26 November 1999 and the issues considered did not include the manner in which E-mails 1 and 2 were addressed on the copies of the documents in Kelly's possession;
- Kelly gave evidence as to the decision making process following the Bookallil/Grayson Report;
- Peterfeld's appeal was initially set for 18 November 1999;
- A letter from EdQ to the Office of the Public Service Commissioner advised that a further disciplinary process was underway with respect to Peterfeld. The letter enclosed the show cause letter to Peterfeld dated 25 October 1999, E-mails 3 and 4 and stated that "the information is provided as a courtesy and for consideration as to whether the tribunal may wish to re-consider the timing of the appeal";
- Kelly was unsure whether teachers reading the "Judging of Jurgen" in E-mail 2 would have drawn the same conclusion as EdQ;
- Documents forwarded to EdQ by Peterfeld in response to the show cause were considered in determining Peterfeld's fate;
- Kelly drafted the letter to Peterfeld dated 11 January 2000 and signed by the Acting Director of Human Resources responding to issues raised and confirming that Peterfeld was liable to disciplinary action and pointing out that Peterfeld had contravened Ethics Principals 2 and 5;
- EdQ's E-mail and Internet Use Policy was distributed to school staff (Ex 7); and
- The cost to EdQ of receiving election material was not a substantial issue.

Submissions

Mr Bates for the QTU in his submission stated that Peterfeld's dismissal was not consistent with the objects of the Act and that had the potential to improperly restrict candidates in the QTU's election process and stifle debate.

He submitted workers often carried messages, in an industrial context, not to the liking of the Employer and cited examples.

He submitted that International Labour Organisation Freedom of Association Standards had been breached.

Mr Bates said the deterioration of the relationship between Mr Campanaris and Peterfeld commenced early in 1998 when Peterfeld challenged the Professional Development and Supervision Policy proposed by Principal Campanaris. This deterioration continued unmanaged by EdQ for 18 months. A cycle of conflict had commenced. EdQ failed to act thereby failing to provide Peterfeld with a safe, healthy working environment.

Mr Bates submitted that the dismissal was unfair in the context of s. 73 (1)(b) in that it was for "invalid reasons" contained in s. 73(2)(b),(c) and (k) being:-

- “(b) seeking office as, or acting or having acted in the capacity of, an employees’ representative;
- (c) membership of an employee organisation or participation in the organisation’s activities outside working hours or, with the employer’s consent, during working hours; and
- ...
- (k) discrimination.”.

He submitted that Peterfeld was a serious candidate for election and that Peterfeld had used a plausible election strategy executed in his own time and at his own expense.

He argued that had Peterfeld not been a candidate for election then the material in question would not have been distributed. This, he claimed, inextricably linked the dismissal to the actions of Peterfeld in seeking election to the QTU presidency and participating in union activity.

Peterfeld was never made aware of EdQ’s E-Mail Policy (Ex 7).

Mr Bates submitted that EdQ’s decision making process was flawed in that they took into their consideration previous disciplinary action which was subject to an appeal.

Mr Bates argued that the initial disciplinary action was stayed as a result of Peterfeld’s appeal and therefore should have been removed from the issues considered by EdQ.

He contended that EdQ failed on the balance of probabilities to prove that E-mails 1 and 2 inappropriately and adversely depicted employees of EdQ and that no proper investigation among employees and EdQ took place. He maintained that only officers who had dealt previously with Peterfeld considered the material.

Mr Bates submitted that the nature of the penalty was severe, harsh, unjust and unreasonable and the punishment was out of proportion with the nature of the allegations.

He submitted that EdQ breached s. 7(1)(k) of the *Anti-Discrimination Act 1991* which prohibits discrimination on the basis of trade union activity. Mr Bates also referred to s. 9 of that Act which prohibited either Direct or Indirect discrimination and to s. 15 Discrimination in a work area.

Mr Bates stated that the above was linked to s. 73(2)(k) of the *Industrial Relations Act 1999* which lists discrimination as an invalid reason for dismissal.

Mr Bates submitted the EdQ Code of Conduct which at 4.17 and 4.19 of Ethics Principle 3 allows and protects the type of conduct Peterfeld was dismissed for.

Mr Bates cited a decision of Finn J. in the Full Court of Australia of *Graham George Clive McMannus v. Robin Scott Charlton* (1996) 904 FCA (15/10/96) which, he submitted, was relevant to the issue of Employer control over an Employee’s private activities in which Finn J. stated:-

“I am mindful of the caution that should be exercised when any extension is made to the supervision allowed an employer over the private activities of an employee. It needs to be carefully contained and fully justified. Nonetheless I am prepared to conclude that circumstances may exist which would justify an employer direction proscribing the private sexual harassment of an employee by a co-employee. In my view, an amalgam of the various matters to which I have been referring provide both appropriate justification for, and limitations upon, giving such direction.”.

He also cited parts of a decision of Marshall J. *AMACSU v. Ansett Aust Ltd*, Melbourne 7/4/00 FCA 441, dealing with the issue of distribution of material by E-mail by a union delegate which was uncomplimentary of the Employer.

Mr Bates sought the maximum 6 months pay for compensation in the event that the Commission found in favour of Peterfeld but saw compensation as preferable to reinstatement.

Mr Murdoch for EdQ submitted that Peterfeld was dismissed for distributing inappropriate material despite having been previously disciplined, namely E-mails 1 and 2. There was no evidence suggesting that Peterfeld’s dismissal was connected to trade union activity or for seeking office in the QTU elections.

E-mail 1 was identical to the material contained in one of the 14 matters considered in the initial disciplinary procedure.

EdQ were entitled to form the view that Peterfeld’s actions amounted to misconduct in that Peterfeld was aware, as early as February 1999, that the content of E-mails 1 and 2 were capable of causing offence and despite previous disciplinary action showed a total disregard for previous directions of EdQ as well as for teachers and Principals.

Mr Murdoch submitted that E-mail 2 was also inappropriate and the evidence supported that Peterfeld used it to depict his view of his relationship with EdQ. Accordingly, it was open to EdQ to find as they did. Peterfeld’s actions in relation to E-mails 1 and 2 breached Part 3 of EdQ’s Code of Conduct and showed a lack of respect for the “spirit and intention of the previous disciplinary process”.

Mr Murdoch submitted the fact that Peterfeld had an outstanding appeal in relation to the previous disciplinary process was no excuse for his continuation of the types of behaviour for which he was disciplined in that previous process. The lodging of an appeal only stays the disciplinary action (ie. the operation of the penalty imposed) and cannot question, and especially not obliterate, the findings upon which that disciplinary action was based. Until overturned by an appeal tribunal, those findings stand and must be respected. It follows that the previous disciplinary process was a very clear warning to Peterfeld of the importance of behaving in a manner that showed proper respect for EdQ, Principal and his teaching colleagues.

Mr Murdoch contended Peterfeld was afforded every opportunity to respond to allegations.

Mr Murdoch submitted that the Commission was entitled to consider the nature of the matters in the first disciplinary process when deciding the dismissal issue.

He maintained the dismissal was not harsh, unjust or unreasonable nor was it for an invalid reason.

Mr Murdoch cited a decision of the then President de Jersey J. in *Skeeta Pty Ltd trading as Richlands Tavern v. Linda Mary Ralph* (1997) 155 QGIG 123 as helpful in determining the reason for dismissal.

He stated that Peterfeld failed to prove a relationship of cause and effect between trade union activity and his treatment by EdQ. The disciplinary action was as a direct result of his actions in distributing inappropriate and offensive material to schools and principals including Boondall State School and its Principal. EdQ's action was not in contravention of the *Anti-Discrimination Act 1991* or for an invalid reason. He maintained reinstatement was impracticable in the circumstances. The employment relationship had completely broken down as evidenced by Peterfeld failing to heed previous warnings, the high level of animosity between Peterfeld and EdQ and Peterfeld's inability to work fruitfully with colleagues.

Mr Murdoch cited the decision of Bechly C. in D 43 of 1998 *John Nicol v. Hume Doors & Timbers Pty Ltd* as helpful in assisting in determining the true reasons for dismissal and also pointed to Finn J.'s decision referred to earlier with respect to out of hours conduct of an employee.

Mr Murdoch submitted that Marshal J.'s decision relied on by the QTU was of no assistance to the Commission.

Conclusions

Dealing firstly with the QTU contention that the dismissal was for an invalid reason pursuant to s. 73 of the Act or discriminatory having regard to the *Anti-Discrimination Act 1991*.

Peterfeld had a history of trade union activity spanning 17 years which included the seeking of office within his Union on 4 occasions. There was no evidence that Peterfeld had been disciplined or discriminated against because of this activity in the past.

The activity which gave rise to his dismissal occurred some time after his most recent nomination for office and that activity was the distribution of certain material.

I am satisfied that had the distribution of the material not occurred then no action would have ensued, and more over, I am satisfied that had the distribution occurred unconnected with Peterfeld's campaign, then EdQ would have acted similarly.

Having considered the evidence and material presented I am satisfied that the reasons behind the decision of EdQ were not invalid in that they were not for any of the reasons contained in s. 73(2)(a) to (k) or clause 7 of the *Anti-Discrimination Act 1991*, but were related to the material itself.

However, in determining whether or not the decision of EdQ to dismiss Peterfeld was harsh, unjust or unreasonable in the circumstances, the Commission must consider s. 77 which states:-

“77. In deciding whether a dismissal was harsh, unjust or unreasonable, the commission must consider –

- (a) whether the employee was notified of the reason for dismissal; and
- (b) whether the dismissal related to –
 - (i) the operational requirements of the employer's undertaking, establishment or service; or
 - (ii) the employee's conduct, capacity or performance; and
- (c) if the dismissal relates to the employee's conduct, capacity or performance –
 - (i) whether the employee had been warned about the conduct, capacity or performance; or
 - (ii) whether the employee was given an opportunity to respond to the allegation about the conduct, capacity or performance; and
- (d) any other matters the commission considers relevant.”

After consideration of the evidence and EdQ's submissions, I am satisfied that Peterfeld was given ample opportunity to respond to the allegations surrounding his dismissal and consequently find that the requirements of s. 77(c)(ii) were met by EdQ. However, s. 77(c)(i) and (d) need further examination.

EdQ took disciplinary action against Peterfeld in August 1999 under the *Public Service Act 1996* over 14 allegations which were found by EdQ to be substantiated.

The disciplinary action was that Peterfeld be reprimanded and his remuneration be reduced. This was contained in an EdQ letter of 6 August to Peterfeld.

That letter also advised Peterfeld that EdQ considered it unacceptable and improper for employees to engage in conduct that “severely jeopardises the efficient interactions between staff and the effective management of schools.”

That letter required Peterfeld to comply with the EdQ Code of Conduct and advised that “further inappropriate conduct will be viewed extremely seriously and will result in stronger disciplinary action” being taken against Peterfeld.

Peterfeld appealed that decision and following advice from EdQ to the effect that further disciplinary action against Peterfeld was being considered, the Public Service Commissioner deferred the hearing of the appeal. The appeal remains unheard.

At this point Peterfeld was aware that officers of EdQ regarded his actions as unacceptable, however, he clearly disagreed and had sought a review which, through no fault of his own, had not been conducted at the time he distributed E-mails 1 and 2 as part of his campaign for the presidency of the QTU.

I am satisfied that for EdQ to fairly determine whether or not the actions of Peterfeld in distributing E-mails 1 and 2 were actions worthy of dismissal that the initial appeal would have to be finalised. I find it difficult to understand how a further breach of the code of Conduct could be found if the question of whether it had been breached the first time, remains unresolved.

Counsel for EdQ conceded that the appeal's success whilst unlikely was possible.

I believe, as does EdQ, it would also be possible for some of the 14 charges to be upheld and some overturned. That is to say that, had the appeal been allowed to run its course, the outcomes in terms of EdQ's proposed action may well have been the same whilst at the same time finding that EdQ had over reacted to the contents of E-mail 1 meaning that the initial distribution did not offend against EdQ's Code of Conduct.

After consideration of the evidence and material I believe EdQ should have allowed the appeal to be resolved and then, with knowledge of the outcome, made their decision on the events which led to the termination of Peterfeld.

I find that the process adopted by EdQ was inappropriate and in that light I find the dismissal harsh, unjust and unreasonable in the circumstances.

If a subsequent review of this decision should find to the contrary i.e. that the appeal need not have been finalised for the dismissal decision to be made, a close examination of the content of the allegations is needed.

The initial disciplinary action was taken after finding 14 of the 15 allegations against Peterfeld proven. The 14 allegations included:-

- LOTE Report;
- Leading fools material;
- Eight Lessons in Professional Trust;
- Use of loud voice to Principal "This is war" and threat to contact the media;
- Cartoon "Know Your Barbarians";
- Offering to fight Campanaris;
- Failing to properly participate in workshop held 12 June 1998;
- In workshop referred to Principal Campanaris as Campanaris not Mr Campanaris;
- 12 June 1998 meeting with Campanaris used loud voice, pointed finger at Campanaris and again threatened media.
- Provided another inappropriate cartoon The New Performance Culture Etc";
- Withdrew from LOTE Committee;
- By letter of 1 February 1999 contravened a direction to compile a complete curriculum LOTE operational plan for 1999;
- Continued inappropriate interaction with Campanaris; and
- Inappropriate written comments placed by Peterfeld in the staff diary.

E-mail 1 – Eight Lessons in Professional Trust – was only one of the issues resulting in the original disciplinary action. It was not alleged that Peterfeld re-offended on any of the other matters.

E-mail 2 was not the subject of any previous reprimand or caution.

E-mails 1 and 2 whilst containing thinly veiled criticism of both school administration and EdQ were distributed in the context of an election campaign. This is a matter which I believe can be properly considered under s.77(d).

Historically candidates for office in union election have regularly distributed material critical of management and incumbent union officials.

I accept that Peterfeld's candidature was genuine.

Voters in such elections have a right to learn as much as possible about candidates and in this particular instance I believe that it was quite important for voters to know what Peterfeld was capable of. Indeed, it would have bordered on deception had Peterfeld been forced to conform to conventional campaigning methods. The freedom to prepare and distribute material in these circumstances should, in my view, only be restricted by law and not on the basis that some group may take offence.

E-mails 1 and 2 were not distributed in an official capacity on behalf of EdQ and notations to that effect appeared on each.

EdQ's Code of Conduct at 4.17 Public Comment contains:-

"You may make public comment and enter into public debate on political and social issues. Make clear what your personal views are and that they are not official views of the government or the department."

That Peterfeld's views were overwhelmingly rejected by teachers is a matter of record. What is important is that the electors had a clear picture when making their choice.

Whilst Peterfeld produced the material privately I accept the view of the QTU that, in certain circumstances, EdQ may involve themselves in an employee's private matters, an EdQ employee sending material into almost every State school in Queensland about EdQ matters is not a private matter.

The criticism of the issue of Principals reviewing teachers contained in E-mail 1, even if distributed subsequent to a warning, would not, in my view, be serious enough to warrant dismissal considering its content.

E-mail 2, the Judging of Jurgen, was also a comment on Peterfeld's relationship with EdQ and whilst somewhat self centred, neither its content nor its distribution in my view, constitutes a sackable offence.

That these 2 documents were distributed as part of an election campaign strategy only serves to strengthen my view that Peterfeld's actions should not have resulted in dismissal.

Considering all of the evidence and the material, in particular E-mails 1 and 2 and the context within which they were distributed, I am satisfied that the decision to dismiss Peterfeld was harsh, unjust and unreasonable.

With respect to remedy, the evidence clearly shows that the level of trust and confidence between the parties is almost non-existent. An example of Peterfeld's true feelings is to be found in his comment that he could not trust EdQ to produce an unbiased report. This level of suspicion and mistrust was evident throughout the hearing.

I am satisfied that in the absence of mutual trust and co-operation a productive relationship is unlikely to ensue from reinstatement and therefore I am not inclined to order it.

Section 79 of the Act covers the question of compensation and in determining compensation, I have had regard to the length of service of Peterfeld. However, Peterfeld's frustrating method of dealing with EdQ was also considered and in my view contributed in no small way to the breakdown of the employment relationship in my view.

Whilst Peterfeld claimed that he treated people as he felt they had treated him, it is apparent that Peterfeld pushed people to the limits of their patience and tolerance.

Having regard to all of the circumstances I am satisfied that an amount equivalent to 12 weeks salary is appropriate compensation.

I order that within 22 days of the release of this decision that EdQ pay an amount equivalent to 12 weeks salary to Peterfeld, less the appropriate taxation.

I note for the record that during the course of the preliminary hearing to determine the issue of legal representation, EdQ gave an undertaking not to pursue costs.

D. K. BROWN, Commissioner.

Released: 25 September 2000

Appearances:-

Mr K. Bates for the Queensland Teachers Union of Employees.

Mr C. Murdoch (instructed by Crown Law) for Education Queensland.

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Consulting Surveyors Queensland Industrial Organisation of Employers (No. Q34 of 2000)

REGISTRAR EWALD

12 September 2000

Conduct of Election – Prescribed Information – Reason for Election – Electoral Commission to Conduct Election.

DECISION

On 7 and 12 September 2000 the Consulting Surveyors Queensland Industrial Organisation of Employers lodged in the Registry under section 481 of the *Industrial Relations Act 1999*, the information as prescribed in section 53 of the *Industrial Organisations Regulation 1997* in relation to the conduct of an election by the Electoral Commission of Queensland for the following positions of office:-

Office	Number of Positions
Chairman.....	1
Senior Vice Chairman.....	1
Junior Vice Chairman.....	1
Immediate Past Chairman.....	1
Secretary/Treasurer.....	1
Councillor.....	5

Reason for Election

The Industrial Organisation advises that the transitional term of office from the date of registration as an industrial organisation has expired.

Timing of Election

No date is prescribed by the Rules for the opening of nominations to assist in determining the prescribed date for the filing of prescribed information and, after reading all rules, a date is not definable by me.

No specific meeting date is set by the rules other than that the Annual General Meeting shall be held within five months of the end of each financial year. The organisation has advised that the Annual General Meeting for this year will be on 15 October 2000. Therefore taking into account the indefinable time frame for the opening of nominations for the purpose of lodgment of the prescribed information (i.e. 2 months prior to the calling of nominations) I find that the prescribed information was not filed within the time frame prescribed by the Act.

Notwithstanding I am prepared to exercise my discretion and extend the prescribed time for filing of such information to 12 September 2000.

Method of Elections

I am satisfied that the election is a direct voting system by way of a secret postal ballot of members.

I have considered the request, the Act and Rules and I find that the election being sought is for positions of office within the meaning of the Act.

I am satisfied that an election for the above named positions is required to be held under the Rules of the Industrial Organisation.

Therefore, under section 482 of the *Industrial Relations Act 1999*, I am making arrangements for the conduct of the election of the above named positions by the Electoral Commission of Queensland.

Dated this twelfth day of September, 2000.

E. EWALD, Registrar

Released: 12 September 2000

QUEENSLAND INDUSTRIAL REGISTRAR

*Industrial Relations Act 1999 s. 482 – arrangement for conduct of elections***The Queensland Public Sector Union of Employees (No. Q35 of 2000)**

REGISTRAR EWALD

27 September 2000

Conduct of Elections – Prescribed Information – Reason for Elections – Method of Elections – Electoral Commission to Conduct Elections.

DECISION

On 19 September 2000, The Queensland Public Sector Union of Employees lodged in the Registry under section 482 of the *Industrial Relations Act 1999* the information as prescribed in section 53(1) of the *Industrial Organisations Regulation 1997* and supporting material in relation to its request for the conduct of elections by the Electoral Commission of Queensland for the following positions of Office:–

<i>Office</i>	<i>Number of Positions</i>	<i>Method of Election</i>
District Branch Committee		
<i>Branch Vice-President</i>		
Biloela, Bundaberg, Cairns, Emerald, Gold Coast, Mackay, Rockhampton, Sunshine Coast, Thursday Island	1 for each Branch	Direct vote by members of the District Branch
<i>Honorary Secretary/ Treasurer</i>		
Biloela, Emerald, Sunshine Coast, Thursday Island	1 for each Branch	
Delegates to Council Representing Sub Divisions		
Equity & Fair Trading	1	Direct vote by members of the Sub Division
Queensland Audit Office	1	
EPA & Qld Parks and Wildlife Service	2	
Families	4	
Health Department	2	
Justice	2	
Natural Resources	2	
State Water	1	
Communication, Information, Local Government & Planning	1	
Mines & Energy	1	
Police	1	
Corporate Services Agency	1	
State Development	1	
Tourism, Small Business & Industry	1	
Queensland Transport	1	
Other Business Units	1	
Public Works – Core	1	
District Health Services	2	
University of Queensland	1	
Department of Corrective Services	2	
Legislative Assembly	1	
Queensland Rail	1	
Other Health (including Private Sector Therapists, Red Cross and QIMR)	1	
Building Services Authority	1	
Cooloola Institute of TAFE	1	
Gold Coast Institute of TAFE	1	
Queensland University of Technology	1	
Legal Aid	1	

Reason for Elections

The Industrial Organisation advises of the existence of casual vacancies for the above positions.

Method of Elections

I am satisfied that the methods of elections are by a direct vote by way of a secret ballot of the members of either the District Branch or of the Sub Divisions.

Conduct of Elections

I have considered the requests, the Act, Rules and supporting material and am satisfied under section 482 of the *Industrial Relations Act 1999* that elections are required to be held under the Rules for the Offices as set out above, by the methods stated. Therefore, under section 482, I am making arrangements for the conduct of the elections by the Electoral Commission of Queensland.

Dated this twenty-seventh day of September, 2000.

E.C. EWALD,
Industrial Registrar.

Released: 27 September 2000

Reason for Elections

The Industrial Organisation advises that the abovenamed positions were not filled during the most recent election. The vacancies in the positions of Assistant State Secretary and Branch Secretary (Toowoomba) are due to the resignation of those elected to the positions.

Conduct of Elections

I have considered the request, the Act, the Rules and supporting material and I am satisfied that an election for the abovenamed positions is required to be held under the Rules of the Industrial Organisation.

Therefore, under section 482 of the Act, I am making arrangements for the conduct of the election of the abovenamed positions of office by the Electoral Commission of Queensland.

Dated this twenty-fifth day of September, 2000.

E. EWALD,
Industrial Registrar.

Released: 25 September 2000

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Queensland Teachers Union of Employees (No. Q37 of 2000)

REGISTRAR EWALD

25 September 2000

Request for Conduct of Elections – Prescribed Information – Method of Elections – Electoral Commission to Conduct Elections.

DECISION

On 25 September 2000, the Queensland Teachers Union of Employees lodged in the Registry under s. 481 of the *Industrial Relations Act 1999*, the information prescribed in s. 53 of the *Industrial Organisations Regulation 1997*, in relation to the conduct of elections by the Electoral Commission of Queensland for the following positions of office:

Office	Number of Positions	Method of Election
TAFE Council Representative Sunshine-Coolooloa Institute.....1	1	Direct vote by Members of a TAFE Branch

Timing of Elections

The Rules prescribe that nominations shall be called by advertisement in the “Queensland Teachers’ Journal” with the closing date of nominations no earlier than twenty-one days after the date upon which such notice first appears in the Journal. I am advised that the next Journal is to be printed on 5 October 2000. However, the Rules have no clear date for the opening of nominations for election to assist in determining the “prescribed date” as referred to in s. 53(4) of the *Industrial Organisations Regulation 1997*. Accordingly, a date is not definable. Notwithstanding, I have exercised my discretion under s. 481(2) of the *Industrial Relations Act 1999* and extended the prescribed time for filing of such information to 25 September 2000.

Reason for Election

The Organisation advises that the above vacancy exists as no nominations were received by the Queensland Electoral Commission at the closing date of the last election, namely 17 August 2000 (Case No. Q16 of 2000).

Methods of Election

I am satisfied that the method of election is as stated above.

Conduct of Elections

I have considered the request, the Act and Rules and I find that the election being sought is for a position of office within the meaning of the Act and required to be held under the Rules of the Industrial Organisation.

Therefore, under s. 482 of the *Industrial Relations Act 1999*, I am making arrangements for the elections of the above named positions to be conducted by the Electoral Commission of Queensland.

Dated this twenty-fifth day of September, 2000.

E. EWALD,
Industrial Registrar.

Released: 25 September 2000

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – order for unpaid wages and superannuation***Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees
AND Bodyline Intimates Pty Ltd (No. W72 of 2000)**

COMMISSIONER BROWN

25 September 2000

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 23 May, 18 August and 25 September 2000, this Commission after having decided that Irene (Marg) Leith was underpaid superannuation and wages by Bodyline Intimates Pty Ltd of 394 Montague Road, West End, Queensland, 4101, in accordance with the *Clothing Trades Award – Southern and Central Divisions*, doth Order as follows:–

1. That Bodyline Intimates Pty Ltd pay to Irene (Marg) Leith the amount of \$1535.40 in respect of unpaid wages for the period between 21 February 2000 and 24 April 2000.
2. That Bodyline Intimates Pty Ltd pay to Irene (Marg) Leith the amount of \$251.33 in respect of unpaid superannuation for the period between 21 February 2000 and 24 April 2000.
3. That the amounts set out in paragraphs 1 and 2 of this Order are paid by no later than twenty-two (22) days from the date of this Order.

Dated this twenty-fifth day of September, 2000.

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

Operative date: 25 September 2000
Order – Arrears of Wages and Superannuation
Released: 27 September 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 125 – application for amendment***Australian Liquor, Hospitality and Miscellaneous Workers Union,
Queensland Branch, Union of Employees AND Queensland Chamber of Commerce
and Industry Limited, Industrial Organisation of Employers (No. B985 of 1997)****GRAIN AND ASSOCIATED PRODUCTS MILLING AWARD – SOUTHERN DIVISION**

COMMISSIONER BALDWIN

26 September 2000

AMENDMENT (Correction of Error)

WHEREAS an error occurred in the copy of the amendment of the abovenamed Award as published in the Queensland Government Industrial Gazette of 19 February 1999, Vol. 160, No. 7, pages 145-146, this Commission doth order that the following correction be made and be effective from the eleventh day of December, 1998:–

By deleting subclause (1) of clause 3.3 (Wages) and inserting the following in lieu thereof:–

“(1) The minimum rates payable to following classes of employees within the Southern Division Eastern District shall be:–

	Wages per Week \$
Level 1	373.40
Level 2	390.10
Level 3	415.10
Level 4	436.00
Level 5	465.20
Level 6	473.50
Level 7	490.20
Level 8	515.20

NOTE: The rates of pay in this Award include the arbitrated Safety Net Adjustment payable under the 1 September 1998 Declaration of General Ruling and earlier Safety Net Adjustments. Where an employee has received a wage increase in excess of the total \$34 Safety Net Adjustments made available since 1 February 1992, that increase may be set off against the wage rate prescribed in this Award. The payments which may be set off include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award variations 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 Case decisions or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated Safety Net Adjustments.”

Dated this twenty-sixth day of September, 2000.

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

Operative Date: 11 December 1998
Amendment – Correction of error
Released: 26 September 2000

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application to make award

Legal Aid Queensland AND Queensland Public Sector Union of Employees and Others (No. B117 of 1995)

LEGAL AID QUEENSLAND EMPLOYEES’ AWARD – STATE

COMMISSIONER SWAN

22 September 2000

NEW AWARD (Correction of Error)

WHEREAS an error occurred in the copy of the abovenamed New Award as published in the Queensland Government Industrial Gazette of 8 September, 1995, Vol. 150, No. 2, pages 87-113, this Commission doth order that the following correction be made and be effective from the thirty-first day of May, 1995:–

By deleting “\$35031.00” from the “Salary Payable Per Annum” column – Classification L4, Paypoint 4, from the Administrative Stream of Schedule A and inserting “\$36031.00” in lieu thereof:–

Dated this twenty-second day of September, 2000.

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

Operative Date: 31 May 1995
New Award – Correction of Error
Released: 26 September 2000

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999

DENTISTS’ AWARD – PUBLIC HOSPITALS BOARDS – STATE

(Gazette, 15th March 1983)

(Correction of Error)

WHEREAS an error occurred in the General Ruling as published in the Queensland Government Industrial Gazette of 6 August 1999, Vol. 161, No. 16, pages 392-393, the following correction is made:–

By deleting the amount of \$1,816.10” from the 4th year Staff Dentist Division II classification of subclause (1) of clause 11 (Salaries) and inserting the amount of “\$1,616.10” in lieu thereof.

Dated this twenty-eighth day of September, 2000.

E. EWALD,
Industrial Registrar.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999

LEGAL AID QUEENSLAND EMPLOYEES’ AWARD – STATE

(Gazette, 8th September 1995)

(Correction of Error)

WHEREAS an error occurred in the General Ruling as published in the Queensland Government Industrial Gazette of 6 August 1999, Vol. 161, No. 16, pages 467-469, the following correction is made:–

By deleting “\$35551.00” and “\$36071.00” from the “Salary Payable Per Annum” column – Classification L4, Pay Point 4, from the Administrative Stream of Schedule A and inserting “\$36551.00” and “\$37071.00” in lieu thereof.

Dated this twenty-second day of September, 2000.

E. EWALD,
Industrial Registrar.