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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999
Industrial Relations (Tribunals) Rules 2000

NOTICE

The following Agreements have been certified by the Commission:–

No/s	Title	Date certified	Cancelling
CA245/01	Murgon Shire Council Enterprise Bargaining - Certified Agreement IV	3/7/01	CA92/00
CA233/01	Brisbane Grammar School - Certified Agreement 2001	4/7/01	CA154/95 & CA670/97
CA234/01	Southside Education Centre - Certified Agreement 2001	4/7/01	
CA236/01	Cerebral Palsy League of Queensland - Certified Agreement 2000 - 2003	4/7/01	CA442/98
CA243/01	Gladstone Community Linking Agency Inc. - Certified Agreement 2000	4/7/01	
CA244/01	Micah Projects Inc. - Micah Disability Service - Lifestyle Support Workers and Community Workers - Certified Agreement 2001	4/7/01	
CA248/01	Queensland Health Service Districts Building, Engineering and Maintenance Services - Certified Agreement	4/7/01	CA147/95; IA37/93 & A62/79
CA252/01	Mater Hospitals and AWU - Rockhampton Diocese – Certified Agreement 2000	4/7/01	CA50/00
CA256/01	Bartter Enterprises Pty Ltd (Wacol Feed Mill) - Certified Agreement 2001	4/7/01	CA434/98
CA263/01	Crows Nest Health and Aged Care Partnership - Certified Agreement 2000	4/7/01	CA247/96 & CA322/97
CA268/01	Rosalie Shire Council State Awards - Certified Agreement	5/7/01	CA134/99

The following Agreement has been amended by the Commission:–

		Date amended
CA409/99	Australian Building Services Association - Queensland Division - Certified Agreement 1999	2/7/01

The following Agreement is Terminated:–

		Date Terminated
CA726/97	Climate Capital Packers Pty Ltd - Certified Agreement 1997	6/7/01

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

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

The Australian Workers' Union of Employees, Queensland AND James Hardie Australia Pty Ltd (No. C28 of 2001)

PRESIDENT HALL 12 July 2001

DECISION

The only issue on the appeal is the correct construction of clause 3.2* of *Fibre Cement Pipes and Building Products Manufacturing – James Hardie Australia Pty Ltd (1999-2002) – Certified Agreement.* The subclause is as follows:–

"**3.2 Wages**

Employees will continue to be paid wage rates specified in Part 7 Transitional Wage Classifications and rates of Division B, until transferred to the new classification structure as detailed below.

1. The variations are to occur from the first full pay period to commence on or after the dates below:

James Hardie FRC Pipe and Buildings Products Division –

LEVEL	01-10-99	01-04-00	01-10-00	01-04-01	01-10-01	01-04-02
1	$525.10	$533.10	$543.10	$553.10	$563.10	$573.10
2	$592.80	$600.80	$610.80	$620.80	$630.80	$640.80
3	$608.90	$616.90	$626.90	$636.90	$646.90	$656.90
4	$626.50	$634.50	$644.50	$654.50	$664.50	$674.50
5	$664.70	$672.70	$682.70	$692.70	$702.70	$712.70
6	$680.10	$688.10	$698.10	$708.10	$718.10	$728.10
7	$706.20	$714.20	$724.20	$734.20	$744.20	$754.20
8	$734.40	$742.40	$752.40	$762.40	$772.40	$782.40
9	$779.80	$787.80	$797.80	$807.80	$817.80	$827.80

The all groups CPI, (Weighted average of eight capital cities) as measured by the Australian Bureau of Statistics, will be reviewed at 12 monthly intervals (Oct-Sept) during the agreement. If the accumulative CPI from the date of commencement of the agreement to the end of each during these 12-monthly period substantially exceeds the accumulated wage increase as applied to the average wage rate for the 12 month period the difference will be paid as a flat increase from the beginning of the next period. (The flat increase will be calculated by applying % difference to the average wage rate).

(1) Reference should be made to either the Meeandah Pipes Training and Skill Development manual or the Janes Hardies Building Products (Carole Park) Training and Skills Development Manual for the appropriate job definitions.

(2) *Apprentices* – The following percentages of James Hardie Employee 6 classification rate shall apply.

During first year of apprenticeship	40%
During second year of apprenticeship	55%
During third year of apprenticeship	75%
During fourth year of apprenticeship	90%

(3) Tradespersons under this agreement shall be paid at 95% of the appropriate James Hardie classification dependant on trade qualifications. The tradesperson will receive 100% of the appropriate James Hardie Employee Level upon completion of "C" level general skills.".

*(Subclause 1 contains presently unhelpful definitions. Subclause 3 deals with allowances).

The debate is about the three sentence paragraph dealing with the CPI which appears immediately after the table of wage rates.

It is common ground that the all group CPI weighted average of eight capital cities (as measured by the Australian Bureau of Statistics) for the period 1 October 1999 to 30 September 2000 was 6.1%. It was common ground also that the flat increase calculated by applying the 6.1% to the average wage rate for the 12 month period yielded a money figure of $37.45. It is common ground that the threshold test, *viz* "substantially exceeds", has been met.

The appellant's contention is that on its proper construction the three sentences which immediately follow the table require that the difference between $37.45 and the wage increases made pursuant to the Certified Agreement over the period 1 October 1999 to 30 September 2000 (i.e. $16.00) should be added to each of the sums of money in the column headed 01/10/00. That is to say the appellant contends that each of the figures in the column headed 01/10/00 is to be inflated by the sum of $21.45 ($37.45 minus $16.00). The submission of the respondent is that on its true construction the passage requires the sum of $11.45 to be added to the money amounts in the column headed 1/10/00. The respondent says that the correct figure is $11.45 because the money amount by which the wage rates in the table headed 01/10/00 increase on 1 October 2000 (i.e. $10.00) must be brought into account additionally to the two $8.00 increases which occurred in the period 1 October 1999 to 30 September 2000.

It cannot be seriously disputed that the construction contended for by the Appellant conforms to a literal meaning of the words used. The difference between the "accumulated wage increase" and the nominated money valued of the all groups CPI increase is to "be paid as a flat increase from the beginning of the next period". The only way which it could be paid as an "increase" from the beginning of the next period (i.e. the period commencing 1 October 2000) is by paying it additionally to the money amounts set forth in the column headed 01/10/00. It may also be added that the phrase "from the beginning of the next period" indicates that the period commencing 1 October 2000 is not part of and does not overlap the 12 month period from 1 October 1999 to 30 September 2000. That would be the natural meaning of the phrase "12 monthly intervals (October-September)" in any event.

Counsel for the Respondent seeks to go to extrinsic materials both to create and to resolve an ambiguity in clause 3.2. For reasons which I developed in *Queensland Police "Union of Employees" and Commissioner of Police* (2000) 164 QGIG 16 at 16 and which I do not now repeat, I accept that on the current state of the authorities such use may be made of extrinsic materials in the interpretation of Awards, Industrial Agreements and Certified Agreements. (I am indebted to counsel for the reference to *Ambulance Service Victoria **v** ALHMWU* (1998) 80 IR 275 where, at 281, Northrop J applied the rule to Certified Agreements under the *Workplace Relations Act 1996 (C'th))*. However, I rather think that much of the material which was put in at first instance goes beyond that which may legitimately be regarded as admissible extrinsic materials. The passage in *Short v F.W. Hercus Pty Ltd* (1993) 40 FCR 511 at 518 to 519 per Burchett J upon which counsel for respondent principally relies draws heavily upon the judgment of Mason J (with which Stephen and Wilson JJ expressed agreement) in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 347 to 353. At 352, immediately after the paragraph commencing "the true rule" quoted by Burchett J in *Short v F.W. Hercus Pty Ltd* (1993) 40 FCR 511 at 519, Mason J went on the observe –

> "It is here that a difficulty arises with respect to the evidence of prior negotiations. Obviously the prior negotiations will tend to establish objective background facts which were known to both parties and the subject matter of the contract. To the extent to which they have this tendency they are admissible. But in so far as they consist of statements and actions of the parties which are reflective of their actual intentions and expectations they are not receivable. The point is that such statements and actions reveal the terms of the contract which the parties intended or hoped to make. They are superseded by, and merged in, the contract itself. The object of the parol evidence rule is to exclude them, the prior oral agreement of the parties being inadmissible in aid of construction, though admissible in an action for rectification.
>
> Consequently when the issue is which of two or more possible meanings is to be given to a contractual provision we look, not to the actual intentions, aspirations or expectations of the parties before or at the time of the contract, except in so far as they are expressed in the contract, but to the objective framework of facts within which the contract came into existence, and to the parties' presumed intention in this sitting. We do not take into account the actual intentions of the parties and for the very good reason that an investigation of those matters would not only be time consuming but it would also be unrewarding as it would tend to give too much weight to these factors at the expense of the actual language of the written contract."

Here, the bulk of the material put in by affidavit or witness statement went to the actual intentions, aspirations and expectations of the parties. The evidence was not receivable for the purpose of showing the actual intentions, aspirations and expectations. It was, of course, receivable for the purpose of showing what it was that the parties were negotiating about. And some of it is quite revealing. It appears that as at 17 September 1999 the respondent's wage offer was a flat increase of $10.00 on 1 October 1999, a flat increase of $15.00 on 1 October 1999, and a flat increase of $20.00 on 1 October 2001 with "a review of these increases [to] occur if a significant difference occurs in the cost of living is measured by CPI". That offer, of course, conforms to the interpretation which the respondent now contends. However, it appears from the minutes of the meeting involving the AWU negotiation team on 27 September 1999 that that team was seeking "$10.00 wage every 6 months or 1.5% every 6 months which ever is the greater underpinned by the CPI. Therefor (sic) if the CPI increases above 3% in any 12 month period after the commencement of the Agreement, the wage rates will be adjusted to reflect the CPI". What was sought by that negotiating team with reference to the CPI conformed to the construction of clause 3.2 now contended for by the appellant. Relevantly, amongst the matters upon which the negotiators were not agreed, is the very issue which is now said to arise as a matter of construction. One may not however, adopt the simple approach that the clean words of clause 3.2 resolved the difference.

The documents distributed to employees who were to vote upon the Certified Agreement after negotiations with the Unions had broken down (Exhibit 14 to the affidavit of Mr Farley the respondent's Human Resources Manager) is clearly admissible. It was not a negotiating document. It was an express attempt, commencing "The following is an explanation of the changes being made to the EBA document for you to vote on", to explain what the proposed Certified Agreement meant. It is an "objective background fact". It has some similarity to an Explanatory Note. Materially it contained the following passage:–

"PAY INCREASES

The pay increases are flat increases to be applied to the base rate of pay. These are to apply from the first pay period to commence after the following dates:

1/10/199	$8	ie From pay period commencing Sunday 3rd October 1999.
1/4/2000	$8	ie From pay period commencing Sunday 2nd April 2000.
1/10/2000	$10	ie From pay period commencing Sunday 1st October 2000.
1/4/2000	$10	ie From pay period commencing Sunday 1st April 2001
1/10/2001	$10	ie From pay period commencing Sunday 7th October 2001.
1/4/2002	$10	ie From pay period commencing Sunday 7th April 2002.

Allowances that apply to the old structure will be adjusted by comparing the flat increase and how it relates to the Group 1 rate under the old structure.

CPI SAFETY NET

The intent is to ensure wages keep pace with cost of living changes. If the average CPI exceeds the average % increase of all employees, then a flat rate adjustment will be made to employees rate of pay.

How will the adjustment be made?

The cumulative effect of the all groups CPI (weighed average of eight capital cities) as measured by the Bureau of Statistics, will be reviewed after each 12 months of the agreement. Should the cumulative effect of the CPI exceed the average % wage increase over the same period, an adjustment will be made with effect from the first full pay period to commence in October 2000 and 2001. The difference in CPI and wages movement over the 3 years of the agreement will be taken into account when negotiating the next agreement.".

That passage is ambiguous. It is ambiguous because it talks about "increases" rather than nominating wage rates applicable as and from a particular date. In the case where the all groups CPI measured as a money amount in the way described exceeds the increases in the previous year, the question squarely

arises whether one is to increase the increase otherwise payable under the Certified Agreement or to adjust the increase otherwise payable under the Certified Agreement. The reference to "an adjustment" in the last sentence suggests that the latter meaning is intended. On the other hand, the second sentence under the heading "CPI Safety Net" provides for "a flat rate adjustment [to] be made to employees rate of pay" (emphasises added).

I accept the submission that the ambiguity in the explanation of the then putative Certified Agreement taints with ambiguity the Certified Agreement itself. However, in resolving the ambiguity, in circumstances in which the authors of the document were servants and agents of the respondent and the document was (intentionally) drafted for and distributed to lay persons who, looking at the wage rates were in humble circumstances, I can think of no reason why the ambiguity should not be resolved against the respondent who now seeks to avoid an obligation in reliance upon a particular resolution of the ambiguity; compare *Cheshire and Fifoot's Law of Contract*, 7th Australian Edition, 1997, Ed Seddon and Ellinghaus at para. 10.37. The "*contra proferentem*" rule is a contract rule but the latin maxim from which it derives is applicable to all written instruments, see *Maye v Colonial Mutual Life Assurance Society Ltd* (1924) 35 CLR 14 at 26 to 27 per Isaacs ACJ.

For the sake of completeness, I should add that if I be in error in proceeding upon the view that the evidence about intention, aspirations and expectations is not receivable (save for the purpose of showing the subject matter of the negotiation), I should have ignored the evidence of any event. I should have done so on the basis that the material was so lacking in clarity as to be unhelpful. On the broadest view of the decision of Burchett J in *Short v F.W. Hercus Pty Ltd* (1993) 40 FCR 511 His Honour considered such an approach to be legitimate. Indeed it was on that basis that His Honour distinguished the decisions of Northrop J and Gray J in *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241: see *Short v F.W. Hercus Pty Ltd* (1993) 40 FCR 511 at 517.

It may be conceded that adverb "substantially" at clause 3.2 of the Certified Agreement is redolent with ambiguity. It could mean real or of substance as distinct from ephemeral or nominal. It could mean large, weighty or big. It could be used in a relative or in an absolute sense. See generally *Tillmanns Butcheries Pty Ltd v Australasian Meat Industries Employees' Union* (1979) 42 FLR 331 at 338 Bowen CJ and 348 per Dean J. However, not withstanding the forceful submissions of counsel for the respondent, I am unable to accept that use of the adverb, or resolution of the sense in which it is used, suggests that the issue which has arisen on this appeal should be resolved favourable to the respondent.

I allow the appeal. I set aside the interpretation of the Queensland Industrial Relations Commission. In lieu thereof I order that the sum of $21.45 being the difference between the all groups CPI weighted average expressed as a sum of money calculated pursuant to clause of 3.2, *viz* $37.45 reduced by the amount of $16.00 which became payable by way of increase under 3.2 over the period 1 October 1999 and 30 September 2000, be added to each of the sums of money which appear in the column headed 01/10/00.

There can no order as to costs.

Dated this twelfth day of July, 2001.

D.R. HALL, President.

Released: 12 July 2001

Appearances:–
Mr A. Herbert instructed by Sciaccas Lawyers for the Appellant.
Mr G. Martin SC instructed by Deacons Lawyers for the Respondent.
Mr B. Burton for Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland heard by leave of the Court.
Mr R. Neal for The Electrical Trades Union of Employees of Australia, Queensland Branch heard by leave of the Court.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 74 – application for extension of time
Industrial Relations Act 1999 – s. 331 – application to strike out

Gregory Reidy AND Education Queensland (No. B1905 of 2000)

COMMISSIONER BLADES 5 July 2001

Unfair dismissal – Extension of time – Application to dismiss or refrain from hearing under s. 331 of the *Industrial Relations Act 1999* – Preliminary issues – Resignation – Constructive dismissal – Withdrawal of resignation – Employer policy not complied with – Resignation effective when tendered – Acceptance not necessary – Non-compliance with Policy irrelevant – Applicant with no chance of success – Significant delay – Further proceedings not in public interest – Section 331 application granted – Extension of time refused – Application dismissed.

DECISION

On 20 June 2000, the applicant Mr Reidy resigned from his job as Janitor at Sunnybank High School, to take effect from close of business on 10 July 2000. On 13 December 2000, he lodged an application for reinstatement, alleging that the resignation was as a result of compounding stress. By way of an application lodged in the Commission on 17 May 2001, the respondent Education Queensland has applied for the Commission to dismiss or refrain from hearing the application for reinstatement pursuant to s. 331(b) of the *Industrial Relations Act 1999* (the Act). This hearing has been held to determine preliminary issues as to whether the applicant should be granted an extension of time under s. 74(2) of the Act and whether the application should be dismissed pursuant to s. 331.

The material facts relied upon in the application under s. 331 are, briefly stated, as follows:–

- The evidence clearly indicates this case to be a resignation and not a dismissal.
- There is no case for Mr Reidy to argue the resignation was a constructive dismissal.
- The application under s. 73 was not made within the prescribed time limit in s. 74 of the Act and no valid basis exists for granting an extension.
- Education Queensland has consistently indicated that the applicant can make application for employment as a cleaner through the Department's normal recruitment process.

This application for reinstatement was lodged some 135 days, or a little over 4 months, out of time. Numerous decided cases require the Commission to consider the following matters, namely – the length of the delay, the explanation for the delay, the prejudice to the applicant if the extension of time is not

granted, the prejudice to the respondent if the extension of time is granted, any relevant conduct of the respondent, that s. 74(2)(b) of the Act vests an unlimited statutory discretion in the Commission which must always be exercised, that the time limit of 21 days must be respected and that the applicant's prospects of success at the substantive hearing is always a relevant matter i.e. that where it appears that an applicant has no, or very limited, prospects of success the Commission should not grant an extension of time. [*Colefax v Jupiters Limited* 166 QGIG 4 per Linnane VP; *Erhardt v Goodman Fielder Food Services Limited* 163 QGIG 20 per Linnane VP; *Breust v Qantas Airways Ltd* 149 QGIG 777 per Hall CC (as he then was)].

Applicant's prospects of success have been made an issue by the s. 331 application.

Evidence was called from the applicant and a supporting witness, a Mr Medlan. For the respondent, the Registrar of the Sunnybank High School Mr Kenny and a supporting witness Mr Marsden were called. This evidence was primarily directed to whether there was a resignation and the circumstances thereof.

The applicant alleged that due to stress suffered because of a needle stick injury and a dispute about a change in working hours, when he was asked on 20 June 2000 to make a report in writing to Mr Kenny about an incident that occurred earlier that day, he tendered his written resignation as well. He alleges that this resignation was tendered under great stress, such that it was a "constructive dismissal". He alleges that the next day and upon an overnight reflection, he signified to Mr Kenny that he wished to withdraw it. This request was subsequently refused. He approached the Industrial Relations Commission about 29 June 2000 but was advised he had no remedy because he had resigned. He wrote to Education Queensland seeking to withdraw the resignation and was again refused. He wrote to various Politicians and made other representations, finally to the Ombudsman to no avail. It was not until 4 October that he became acquainted with an Education Department Policy that provided for a 48 hour cooling off period in relation to resignations, a Policy of which he was not aware.

The respondent claims that the resignation was freely and voluntarily given and that there was no dismissal. The length of the delay and the reasons for the delay were also of particular concern to the respondent.
Although it was suggested in submissions by the respondent that if an extension of time was granted, the respondent would seek another preliminary determination of whether there had been a resignation, it seems to me to be necessary to make that finding to dispose of this application. The application brought by the respondent that the action should be dismissed because "the evidence clearly indicates this case to be a resignation and not a dismissal" has been heard in conjunction with the extension of time hearing and requires a determination whether there was a resignation. The applicant submitted that s. 74(1) requires a finding that an applicant has been dismissed before one can move on to deal with an extension of time application. I do not need to deal with that submission because of the application under s. 331.

There is no doubt that there was a resignation. Was it freely and voluntarily given?

The applicant had undergone a needle stick injury in March 2000 and it took three months before he was cleared of any potentially lethal disease. However, this clearance occurred no later than 3 June 2000. About 6 April 2000, he had a dispute with Mr Kenny about a change of hours. This dispute was resolved the next day to the applicant's satisfaction after representations were made to a Politician. There is no conflict with this evidence.

Mr Reidy claims that after this time he received petty harassment from Mr Kenny. His daughter suffered a broken arm and divorce proceedings were protracted and causing significant stress. He also complained of a lack of counselling in regard to the needle stick injury.

On 20 June 2000, at about 9.00am, Mr Kenny directed the applicant to obtain a whiteboard from the library but, for whatever reason, the applicant was not successful. Applicant alleges that Mr Kenny became very agitated and stated words to the effect that he must explain in writing why he had failed to follow his directions. Applicant felt it was a personal attack which was uncalled for and caused him great distress. He went home for lunch, typed up the report and also his resignation and upon return to School that afternoon, handed both to Mr Kenny.

Mr Kenny testified that because the library staff and the applicant had given different versions of the reason for the unavailability of the whiteboard, he sought a written explanation from both. This request would appear to have been made sometime in the morning. He denied that he became agitated with the applicant. When the written explanation was delivered, he did not read it, but in applicant's presence, he placed it in an envelope and sealed it. I do not accept Mr Kenny's denial that he became agitated. On the balance of probabilities he did. The written explanation which was placed into the envelope and which remained unread by Mr Kenny contained the allegation "I am confused about your verbal attack outside Block 7 and your aggressive request for this letter to explain a situation that is minor and inconsequential". On the balance of probabilities, I thought that sentence bore considerable corroboration for the applicant's allegations that Mr Kenny was agitated. I prefer then to accept Mr Reidy's allegation in connection with that matter.

On the whole of the evidence, I am satisfied that the needle stick injury and the incident over the change of hours bore little relationship to the resignation. By the time the resignation was tendered, there was clearly a strained relationship between Mr Kenny and Mr Reidy, probably fuelled by those incidents but I do not accept as claimed that they operated upon his mind to the extent that his act became other than free and voluntary. Mr Reidy obviously resented writing the explanation. However, the request for the whiteboards had been at 9.00 a.m. for use in examinations, the demand for the report was made before lunch, Mr Reidy had returned home at lunch time, drafted up the explanation and the resignation and delivered them at 2.00 p.m. The resignation was not delivered in the heat of the moment.

The other stressors identified by Mr Reidy attract sympathy but, taken in conjunction with the previous relationship with Mr Kenny, do not mean that the act of resignation was other than an entirely voluntary act. People resign for all sorts of reasons, discontent with relationships and working conditions not the least among them. It does not mean, *ipso facto*, that the resignation was involuntary or brought about by the action of the employer. In cross-examination Mr Reidy said he resigned because he got tired of harassment, the petty harassment, that whatever he did wasn't good enough, that he'd had enough, that he went to work to get paid not to get picked on. He did not condescend to any further particularity than that. What is also of significance is that his friend Mr Medlan counselled him to the effect that he had acted unwisely.

For there to have been a dismissal there generally needs to have been an act of the employer which results directly or consequentially in the termination and the employment relationship is not voluntarily left by the employee – *Mohazab v Dick Smith Electronics (No 2)* (1995) 62 IR 200.

In *Re Michaelis Bayley Trading Co and New South Wales Sales Representatives and Commercial Travellers Guild* (1979) AR (NSW) 392, cited by Hall CC as he then was in *Achal v Electrolux Pty Ltd* 143 QGIG 144, Macken J said:–

> "*Just as it is a fundamental requirement for an employment contract to be entered into by the genuine consent of both parties to the contract – a consent untainted by any hint of pressure or threat – so, too, it must be terminated by a resignation equally untainted by any such threat. Where a contract is terminated otherwise it amounts to constructive dismissal.*".

Chief Commissioner Hall also pointed out in *Iskander v Brisbane Display and Shop Fitting Pty Ltd* 154 QGIG 806 that not only does a "constructive dismissal" cover the cases in which an employee has resigned because he was forced to resign or was permitted to resign as an act of clemency rather than face dismissal, it also covers the case where an employer is guilty of conduct which is a significant breach going to the root of the contract, or which shows that the employer no longer intends to be bound by one of the essential terms. A "constructive dismissal" also covers the case where employers

conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. He said:–

> "*'Constructive dismissal' is not a concept or a doctrine of the common law comparable to consideration or nuisance. 'Constructive dismissal' is in truth no more than a convenient label for a set of cases decided under a variety of statutes of beneficial intent, and illustrative of how far particular jurisdictions have been prepared to go in order to ensure that statutes achieve their purpose.*".

This was not a case of an impetuous angry act on the spur of the moment. It was not a case where the applicant was placed under any pressure to tender a resignation. There was no evidence that he was acting irrationally and no evidence his powers of reasoning were somehow affected because of emotional stress. Nothing occurred which should have put the employer upon its guard that the applicant may not have the intention he was expressing. I am satisfied that he simply changed his mind because of the counsel given to him by Mr Medlan.

I am satisfied that in the circumstances the resignation was intended, considered, unambiguous and was freely and voluntarily given.

I turn now to another important issue.

Mr Reidy alleged that on 21 June, the day after the resignation was tendered, he spoke with Mr Kenny to indicate he had thought about the matter overnight and wished to withdraw the resignation. He further alleged that a written withdrawal was tendered on Friday 23 June. Mr Medlan said that he was told by Mr Reidy of the conversation Reidy had with Kenny on or about 21 June but he could not say that it was 21 June. Mr Kenny denied any conversation at all until Friday 23 June and he produced a diary note to corroborate his account. Mr Medlan said that it could not have been the Friday because he does not talk to anyone as he has to pick up his daughter after school. Mr Medlan clearly had no accurate recollection of the date and he was not called upon to recollect the date until some months after the event.

Mr Kenny's evidence was that as soon as the resignation was handed to him, he wrote upon it (leaving out apparent irrelevancies) the words "Accepted 20.6.00" and faxed it off to the Ancillary Services Unit. However, when he did this, he was then aware that there was a "cooling off" period in a Departmental Policy (he thought it was a 24 hour period). When Mr Kenny wrote upon the resignation the word "Accepted", he had no such authority. The authority to accept resignations lay with the Principal who was then away from the School.

Whether the initial conversation regarding the withdrawal between Mr Reidy and Mr Kenny was on 21 June or 23 June would appear to be important because the Policy provides that the resignation does not take effect until the completion of a cooling off period ceasing at the end of the next working day.

In reaching a conclusion on balance as to whether the verbal notice of a withdrawal was given on 21 or 23 June or some other day, I have considered it important that with all the complaints made by the applicant to various agencies over many months, he did not raise once that he had such a conversation with Mr Kenny as early as 21 June. That he was unaware of the Policy may be an explanation but the first time he was called upon to remember the date was sometime in early October when he was informed by Education Queensland. He was inconsistent in other evidence going hand in hand with the allegation of the verbal intention to withdraw. He told a Politician in a letter dated 5 July 2000 that when he produced the letter of withdrawal to Mr Kenny, Mr Kenny told him not to bother as they did not intend to recommend that he be reinstated. This is to be contrasted with his evidence to the Commission that that conversation occurred on 21 June. The conversation could not have occurred on 21 June in conjunction with the presentation of the letter of withdrawal because the applicant alleges the letter was tendered on 23 June. I am satisfied that Mr Reidy's evidence of the date of the first advice of an intention to withdraw the resignation is reconstruction and not very accurate at that. Even though Mr Kenny has exhibited a real desire to see the end of Mr Reidy, I prefer to accept his evidence which is at least corroborated by his diary note of 23 June, an entry which I did not consider to be fabricated.

An official letter of acceptance of the resignation was sent to Mr Reidy on 23 June from Education Queensland.

The letter of withdrawal of the resignation was I find, handed to Mr Kenny probably on 26 June and eventually handed to the Principal who wrote to Mr Reidy on 27 June advising him that "the matter has already been processed and, in the light of your departure, the school had put in train processes both to reorganise cleaners' duties and areas and to begin recruitment and selection procedures". This was admitted by Mr Kenny to be an inaccurate statement. Nothing at all had yet been done.

The question is in these circumstances, can the resignation be withdrawn?

Part of the Education Department Policy on "Withdrawal of Resignation/Retirement" was admitted as an exhibit. So far as relevant it provides:–

> ". . .
> *(2) . . . Wherever possible the decision to grant or not to grant an application should be provided within 48 hours of the lodging of that application.*
>
> *(3) Department management will not be obliged to approve any request to withdraw a notice of resignation/retirement.*
>
> *(4) Notice of any resignation/retirement will not be deemed to have taken effect until the completion of a cooling off period ceasing at the end of the next working day.*
>
> *(5) Each decision to grant or not to grant an application to withdraw notification of resignation/retirement must exhibit an open and balanced decision making process which will be robust in respect to any review or appeal.*".

In *Birrell v Australian National Airlines Commission* (1984) 9 IR 101 Gray J said at p109:–

> "*The giving of notice of termination of a contract, in accordance with the terms of that contract, is a unilateral right. Its exercise does not depend in any way on the acceptance or rejection of the notice by the other party to the contract. . . . A question does arise, however, whether unilateral withdrawal of a notice is possible.*".

Gray J went on to refer to various cases and concluded at p110:–

> "*These authorities all support the view that unilateral withdrawal of a notice of termination of a contract of employment is not possible. In principle, this conclusion must be correct.*".

This proposition was followed in *CFMEU v Newcastle Wallsend Coal Co Ltd* (1998) 88 IR 202 at 214.

In *Achal*, the Chief Commissioner referred to *Birrell* but also recognised that a resignation given in heat or in a state of emotional stress or as a result of being jostled into a decision by the employer may be withdrawn. However, I am unable to come to a conclusion that Mr Reidy resigned in a state of emotional stress or in the heat of the moment and there was certainly no action taken by the employer which initiated the resignation.

Gray J said in *APESMA v Skilled Engineering Pty Ltd* (1994) 54 IR 236 that if a notice of termination is not withdrawn by consent, it operates inexorably to bring the contract to an end, **as long as it is notice in accordance with the contract and is not in contravention of any external provision with legislative force** (emphasis added). While that statement probably refers to the length of the notice, assuming that the proposition has a wider application and applies to the withdrawal of a resignation, is there any contractual basis for the application of the Policy and does the Policy have any legislative force?

It may be that the Policy had contractual force on a basis similar to that in *Riverwood International Australia Pty Ltd v McCormick* (2000) FCA 889 (4 July 2000) where the Federal Court held that the terms of a Human Resources Policies and Procedures Manual were incorporated into the contract of employment. It is unlikely however that a Policy of a Government Department, as opposed to a Directive, would have any sort of legislative force and none is alleged.

Mr Kenny conceded that he was not aware whether the merits of the withdrawal had been properly considered by the Department in compliance with the Policy. He failed to advise the applicant that there was in existence a policy dealing with withdrawal of resignations even at the time Mr Reidy first flagged the possibility. The Policy does not spell out that there is a 48 hour cooling off period but rather that a decision should be made within 48 hours of an application being made. The Policy requires however in subparagraph (5) that the decision "must exhibit an open and balanced decision making process which will be robust in respect to any review or appeal". The Principal wrote to Mr Reidy on 27 June rejecting the withdrawal because "the matter has already been processed", an inaccurate statement and apparently not in compliance with the requirements of the Policy. The whole process was tainted with impropriety.

However, a withdrawal does not depend on whether or not anything had been done to replace Mr Reidy, nor does it depend on whether the Department's Policy was properly applied.

It is noted that under s. 74 of the *Public Service Act 1996* a resignation takes effect in accordance with its terms and without needing the chief executive's acceptance. (The applicant, of course, was not a public servant). That position is consistent with the ordinary contract of employment as governed by the common law and as noted in the cases earlier cited. However, individual cases may provide exceptions. If the Policy formed part of the contract of employment, there was still no requirement, either by Statute, the common law or the contract, that for a resignation to be effective, it was required to be accepted in an appropriate manner by an appropriate person. No matter which way the situation is looked at, the resignation was effective without any acceptance.

Furthermore, even if the application to withdraw the resignation had been properly considered, there was no obligation on the respondent to approve the request. It is expected that a recommendation would have been obtained by the decision makers and that recommendation was that the withdrawal not be accepted. At best, it can be said that the Policy provided for an indulgence which did not translate into a legal right.

It is my view that this application would not succeed.

In regard to the s. 331 application, being satisfied that there was a resignation and not a dismissal, I hold that further proceedings are not necessary or desirable in the public interest.

As to the application to extend the time for filing, the explanation for the delay is basically that the applicant was, after seeking advice from Industrial Relations, unaware that he had any rights to make application under the unfair dismissal legislation. It is understandable that he would receive such advice, given that he resigned. He pursued numerous other avenues to seek redress, and of these the respondent was aware.

These circumstances may well admit of the exercise of a favourable discretion except for the fact that the application has no chance of success.

In all of the circumstances, it seems to me that the applicant has not discharged his positive burden of demonstrating that the justice of the case requires an extension of time.

The application is dismissed.

I order accordingly.

B.J. BLADES, Commissioner.

Released: 5 July 2001

Appearances:–
Mr J. Shepley, Counsel, instructed by Primrose Couper Cronin Rudkin, for the Applicant.
Mr R. Egan, with him Mr A. Thompson, for Education Queensland.

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Royce Vernon Jackson AND KP & T Best Gourmet (No. B659 of 2001)

COMMISSIONER BLADES 9 July 2001

Unfair dismissal – Procedural fairness – Conduct, capacity or performance – Warnings – Failure to follow directions – Not a wilful disobedience – Warning failed to particularise consequences – Held dismissal harsh, unjust or unreasonable – Reinstatement/re-employment not practicable – Compensation assessed.

DECISION

The applicant Mr Jackson complains that on 28 March 2001, he was informed by the General Manager of the respondent, Mr Alan Brown, that he was being dismissed as Production Supervisor and was asked to leave the premises. He further complains that at the time, he was given no reason and because he was in such a shocked state, he did not even ask for a reason.

The respondent claims that the applicant was required to supervise the staff on the factory floor during the hours of production. There had been numerous conversations about his absenteeism from the factory floor. He had been approached by Mr Brown expressing concerns about the hours he was spending in the office. There were numerous "warnings" issued but the applicant failed to follow the directions.

The applicant claimed that there were not enough hours in the day for the work to be performed and it was the paper work and attention to other matters that prevented him spending the time on the floor. The problems arose about October 2000 when the Factory Manager's services were dispensed with and part of his duties devolved onto Mr Jackson.

The applicant was unrepresented during the hearing and the respondent was, by consent, represented by Counsel. There is really little relevant material of substance that is in dispute.

On the whole of the evidence I am satisfied on the balance of probabilities that Mr Jackson was approached on many occasions by Mr Brown and told to spend more time supervising on the factory floor rather than attending to paper work in the office. I am satisfied that Mr Jackson spent many hours at his job, often up to10 or 11 hours a day. His failure to spend more time on the factory floor was not because of a wilful refusal to follow a direction but because he was apparently unable to manage the paper work in conjunction with the supervision and his failure to appreciate the importance of supervision over and above the other duties. I accept the evidence that on a number of occasions Mr Brown had asked Mr Jackson to leave the office and get back to the factory floor and whatever reason Mr Jackson had, he failed to do so.

I accept the evidence that on 28 March 2001, Mr Brown advised the applicant that his services were no longer wanted at the company and he was dismissed with two weeks pay in lieu of notice. No reason was given to the applicant and he sought none at the time. Later, the reason given was "general dissatisfaction with performance". Mr Jackson had been employed since 26 April 2000.

Mr Brown's written statement alleges that Mr Jackson had been "warned" on numerous occasions. However, whether those occasions be classed as conversations, discussions or meetings, it is admitted that Mr Jackson had never been issued with any written warnings and had never been warned that termination was being considered. I accept the evidence that on 20 March Mr Brown told the applicant that he should be able to give him a wage rise in about a month's time to compensate for the extra hours being put in. This evidence is consistent with the admitted evidence that there had been no warnings and it seems that a termination was not being considered even 8 days before dismissal.

Under s. 77 of the *Industrial Relations Act 1999* in considering whether a dismissal is harsh, unjust or unreasonable, the Commission must take into account – (a) whether the employee was notified of the reason for dismissal; and (b) whether the dismissal related to the employee's conduct, capacity or performance and (c), if it did, whether the employee had been warned about the conduct capacity or performance, or whether there was any opportunity to respond and (d) any other matters the Commission considers relevant.

In *Goodwin v Fastidia Pty Ltd* Print S9280, although dealing with differing Legislation, it was relevantly said that a warning should make it clear that the employee's employment is at risk unless the performance issue identified is addressed.

This employee worked exceedingly long hours for the respondent and obviously was unable to comply with the directions to provide more supervision because of other tasks he had. Whether the failure to comply was because of the inability to organise the other work, or an inability to ignore the other work, I do not know. I am satisfied that the failure to abide by the direction was not simply wilful disobedience to a lawful order or rebellion or defiance. While the

employer was anxious to have more supervision and told the applicant on many occasions, it did not make it clear to the applicant that the alternative to the failure to obey the direction was termination. I consider that in these circumstances, the employer should have made it perfectly plain what the alternative was. The employer did not make it perfectly plain what the consequences were and because of that I can readily accept the evidence of Mr Jackson that when he was terminated, he was shocked – "it blew me out the window".

I am satisfied that on the whole of the evidence the failure to provide appropriate warnings combined to a lesser extent with the failure to provide a reason for the termination at the time of termination render this dismissal harsh, unjust and unreasonable.

The applicant seeks reinstatement but not to the position he was in at the time of termination. He seeks reinstatement to the position he occupied when he was first appointed to the job and before these problems arose. Neither position exists any longer. Mr Jackson's job has not been filled at all but other arrangements have been made and the duties of the position distributed, presumably among others. If Mr Jackson was to be reinstated to the position he held at dismissal, it is likely that the same problems would re-emerge as he appears to still hold the same views about the job. I am satisfied that reinstatement or re-employment would be impracticable.

As an alternative to reinstatement, Mr Jackson has sought 6 months' compensation. I do not consider that to be appropriate. He was given two weeks pay in lieu of notice and has been without work for about 7 weeks. He has secured a casual job, initially for 3 months and earning about the same amount of money he earned with the respondent. However, his future beyond the 3 months is not assured. It is a real probability that had the respondent provided appropriate warnings, the employment would not have continued on for much longer in any event. Mr Jackson was dissatisfied with his position and seemed unable to comply with requirements and his point of view about how to rectify the problems still persists, a point of view which does not appear to be favourably received by the respondent.

In all the circumstances, I assess a period of 6 weeks as compensation for the dismissal which I calculate to be $4,153.80. I order that the respondent pay that amount to the applicant.

I order accordingly.

B.J. BLADES, Commissioner.

Released: 9 July 2001

Appearances:–
Mr R.V. Jackson, Applicant, on his own behalf.
Mr A. Horneman-Wren, Counsel, instructed by McLaughlins Solicitors, for the Respondent.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 276 – application to amend or void contract

Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees AND Bark Australia Pty Ltd (No. B459 of 2001)

COMMISSIONER BROWN 11 July 2001

DECISION

This application by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU) on behalf of Rachel Bartholomew (RB) sought orders declaring void her employment contract with Bark Australia Pty Ltd (the respondent) pursuant to s. 276 of the *Industrial Relations Act 1999* (the Act) and awarding the amount of $2,640.08 to RB.

The respondent did not comply with the Directions Orders issued by the Commission and failed to appear. Following an adjournment to allow for late arrival on 18 June, 2001, I determined to hear the matter *ex parte*.

Having heard the evidence and submissions and whilst in the process of considering my decision, I became concerned when I discovered that the application which, as mentioned, sought orders, sought the first order (the voiding of the contract) against Bark Security Australia Pty Ltd and the second order (the payment of monies) against Bark Australia Pty Ltd.

Upon examination of the Directions Order issued, it was apparent that directions were only issued to the respondent as named in the first order sought and not Bark Australia Pty Ltd.

In that light I could not rule out the possibility that the failure of the respondent to appear may have been caused by incorrect service. I arranged for the matter to be re-listed and for the re-listing advice to be sent to both nominated entities against whom orders were sought.

The matter was re-listed for 3 July 2001 and again the respondent failed to appear. Had the respondent appeared I was prepared to issue further directions for the proper hearing of the matter which would have permitted the respondent reasonable opportunity to defend the claims against them.

At the hearing on 3 July 2001, Mr Crank for the ALHMWU sought leave to amend the application to the extent that both orders be made against Bark Australia Pty Ltd. Leave was granted.

Bark Australia Pty Ltd have, in my view, been provided reasonable and ample opportunity to defend this action and for whatever reason have not done so.

I am tempted to conclude that the respondent's actions amount to a contemptuous abuse of process, however, in the absence of any evidence as to the respondent's reasons, I will not make any finding in relation to their failure to appear.

I was satisfied that Bark Australia Pty Ltd were properly notified of the proceedings of 3 July 2001 and as such I remained of the view that the matter should be heard *ex parte.*

Mr Crank did not seek to add to or amend any of the evidence or submissions put before the Commission on 18 June 2001.

The evidence was that RB commenced work with the respondent on 1 November 2000 and performed her last shift on 10 December 2000.

RB signed a contract with the respondent and although not provided with a copy of same recalled that it contained:

- that the duties and responsibilities of the employee were to act as a security guard;
- a 3 month probation period;
- notice requirements for termination; and
- confidentiality requirements.

RB stated that Mr Dunning of the respondent told her that she would be paid $12.00 per hour, however this was not referred to in the contract.

Her evidence was that she was not paid for any of the work performed and Dunning cancelled the written contract on or about 17 November, 2001, but assured her that she would still be allocated work, and she was.

RB indicated that Dunning was pursuing her for certain monies he claimed were owing to him with respect to rent, assistance to repossess a vehicle and representing her private problems to the police on her behalf.

In submissions Mr Crank of the ALHMWU for RB stated:

> "Had Ms Bartholomew been engaged as a employee her terms and conditions would have been determined by the Bark Security Certified Agreement 1999.".

This Agreement was certified on 10 January 2000 and is still current.

Mr Crank also submitted that the contract between RB and the respondent was unfair and as such should be declared void because:

- the respondent failed to make any payments;
- the disparity in bargaining power of the parties at the time the contact was made;
- undue pressure because of RB's personal circumstances;
- RB was given no option in the way she was engaged; and
- the contract provided less remuneration than the Certified Agreement would deliver if RB was engaged as an employee.

Having considered all the submissions and evidence, I find that an employment contract was established in writing between the parties on 1 November 2000 and concluded on or about 17 November 2000 and that a collateral verbal contract existed between the parties from 1 November 2000, until RB's departure from the respondent to the extent that $12.00 per hour would be paid to RB for work performed.

Section 276(4)(b) states:

"(4) The commission may consider a contract to be an unfair contract if it considers the contract –

(a) was an unfair contract when it was entered into; or

(b) became an unfair contract after it was entered into because of the conduct of the parties, or a variation of the contract or for any other reason it considers sufficient.".

I find that the conduct of the respondent in not paying RB at all meant that both the signed contract and the collateral verbal contract became unfair in line with s. 276(4)(b) and s. 276(1)(b).

Accordingly, my decision is to void both contracts *ab initio*.

Having decided so, I find that RB's employment was governed by the Bark Security Certified Agreement.

In that light I order Bark Australia Pty Ltd pay the amount of $2,640.08 to Rachel Bartholomew within 22 days of the date of release of this decision.

Order accordingly.

D. K. BROWN, Commissioner.

Released: 11 July 2001

Appearances:–
Mr K. Crank for the Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Colin Haslam AND Daddows Charter Service (No. B292 of 2001)

COMMISSIONER THOMPSON 12 July 2001

Application for reinstatement – Witness evidence – Dismissal harsh, unjust and unreasonable – Reinstatement not practicable – Compensation ordered.

DECISION

Background

Mr Colin Haslam (applicant) was employed by Daddows Charter Service (respondent) from 1 July 1999 until advised by phone of his termination on 24 January 2001.

The nature of employment was that the applicant drove a bus that transported children with special needs to and from school for some forty weeks per year (the school year) and was required to work twenty hours per week.

Applicant

In evidence, Mr Haslam stated that on commencement of employment, he held a position as a carer until he had the opportunity to become accustomed to the "runs" after which time he became a driver.

The applicant, who had obtained his bus drivers licence on 5 July 1999, was subject, during the course of his employment, to undergoing a driver assessment on 28 February 2000, which he had been found "not yet" competent to safely operate a bus. However, a further assessment was conducted on 27 March 2000, which approved the applicant to be competent to safely operate a bus, with the recommendation that his performance be monitored.

In the affidavit of evidence from Mr James Van Der Mei, attention was drawn to issues including:–

- Driving
- Ignoring instructions
- Dropping off child at child care centre
- Fuelling the bus
- Employing a supervisor.

Whilst there had been a number of issues raised by Mr Van Der Mei over the period of the employment, the applicant, in evidence, maintained that they were of a minor nature and at no point was he given what could be regarded as a warning, either written or verbal.

On or around 15 December 2000, at the finish of the school year, Mr Haslam ceased work with expectations of returning to normal duties once the school year recommenced in late January 2001.

The applicant received a phone call from Mr Van Der Mei on 24 January 2001, advising that he had been dismissed and would not be required to drive for Daddows Charter Service (Daddows) at any future time.

On 25 January 2001, the applicant stated that he had phoned Mr John Daddow to inquire as to the reasons for his termination and was told by Mr Daddow that the reasons were unknown to him and that he would seek to contact Mr Van Der Mei and then contact the applicant thereafter.

In evidence, the applicant indicated that Mr Daddow had phoned at 12.30 p.m. on 29 January 2001 and advised that the reason for his dismissal was his failure of a driving assessment on 28 February 2000.

Respondent

Evidence was given by Mr William Milligan and Mr Van Der Mei for the respondent.

Mr Milligan, in evidence to the Commission, stated that he was employed by Queensland Transport as a driving examiner, in addition to being the Principal of Bundamba Driving Service which provided a range of services including driver education and an independent assessment of various classes of motor vehicle licences and driving skills.

He identified himself as the person who had conducted the assessment of Mr Haslam on 28 February and 27 March 2000, and confirmed the outcomes of those assessments. At paragraph 8 of his affidavit of evidence, Mr Milligan states:–

> "Although I have no recollection of Mr Haslem [Haslam] and my recollections are based on the contents of my two Assessment reports, I do believe that for me to make a written comment like 'I do recommend that his performance is monitored' than [then] Mr Haslam would not have demonstrated professionalism in his driving abilities and also would not have demonstrated a commitment to maintaining or improving his driving abilities. I particularly note my comments concerning risk taking by Mr Haslem [Haslam]. My conclusion that I could recommend Mr Haslem [Haslam] 'for the position of Driver with your company' was based on my assessment that he had the ability to operate the bus safely. However, my concern about his risk taking prompted me to add the rider that 'his performance be monitored.' ".

In respect of the monitoring aspect of the assessment, this issue was raised by the Commission at page 40, line 32 of transcript:–

> "Commissioner: Again, if you have – would the monitoring be something that comes up very often, I mean, with people that you pass. I mean, anyone that gets a licence for the first time to drive a bus might – one might think as a consumer might need to be monitored anyway irrespective of who they were?
>
> Milligan: For a person to get a licence first time I would say any employer would have a consistent monitoring process but that's apart from the actual on the day performance. We all need monitoring all the time for whatever we do.".

The final witness for the respondent, Mr Van Der Mei, has been employed by Daddows for eleven years and has held his current position as Area Co-ordinator – Charter Operations in the Logan and Beenleigh area for the past two years.

The duties associated with his employment included the supervision of drivers employed in the geographical area for which he was responsible and where the applicant was employed.

His evidence surrounded the various tasks performed by Mr Haslam, and went into significant detail in respect of the applicant's work performance.

Among the issues raised, concern was expressed at the driving expertise of the applicant and his attitude towards the witness following the decision to have the applicant undertake a driving assessment on 28 February 2000.

There was a continued refusal by the applicant, according to the witness, to accept instruction given by Mr Van Der Mei, with most requests being subject to challenge.

A series of complaints were made against Mr Haslam from a number of sources, and Mr Van Der Mei indicated that he personally had the need to address the issues with the applicant on numerous occasions.

Mr Van Der Mei confirmed that, in his view, in raising the complaints with the applicant he had, in effect, provided the applicant with verbal warnings.

In answer to a question raised in re-examination by Mr S. Connor, of Counsel, representing the respondent, as to the reasons for termination, at page 64, line 26 of transcript:–

> "Connor: Commissioner, I'm not sure that I have too many questions arising from Mr Haslam's cross-examination. There is one other one, yes. That last question, Mr Van Der Mei, it was suggested to you that the reason for Mr Haslam's dismissal was his standard of driving. Is that the only reason?
>
> Van Der Mei: No, it was also lack of – lack of wanting to follow instructions and James Dixon, in particular, was a safety issue which he just totally ignored. So it was a number of issues.".

Final Submissions

Applicant

In summary, Mr Haslam informed the Commission that he had enjoyed working for Daddows, and such was his commitment and interest in the job that he had been involved in numerous work related activities outside of work hours for which he had not sought any form of payment.

If the reason for his dismissal was due to his ability and performance as a driver, then it would be expected that the employer would have issued formal warnings, and it was contended that no such warnings, either written or verbal, had been given.

He acknowledged that the first driving assessment was not passed, however he was subsequently successfully assessed (by the same assessor) just one month later.

In terms of a remedy, Mr Haslam believed that if he were to be reinstated, he would not have any difficulty in resuming his employment.

Respondent

Mr Connor, on behalf of the respondent, submitted that the applicant was employed on an "as needed" basis, employed for the term of school terms, and was not subject to any ongoing employment relationship with the respondent.

The role of a bus company that transports children with special needs brings with it much responsibility, and the respondent had a very legitimate concern ensuring that the children were safe whilst in their custody on their transport.

Those concerns related to the performance of their drivers, and hence, the assessment process adopted by the company.

Mr Van Der Mei, as a responsible person within the respondent's business structure, had the task of accepting complaints, dealing with problems, supervising drivers, and ultimately ensuring that a proper standard of service existed for the clients.

The Commission should accept the evidence of Mr Van Der Mei in that he raised with the applicant, on many occasions, issues relating to his performance, and whilst it was not the practice of the company at that time to provide formal warnings, clearly a series of verbal warnings were given, most of which Mr Haslam disregarded.

In addressing the dismissal itself, Mr Connor, at page 70, line 40 of transcript, stated:–

> "And so there – in summary in relation to the issue of whether the dismissal was harsh, unjust and unreasonable I would actually concede that there was – it would be fair to say that the manner of it's delivery of the decision was somewhat abrupt. And I can't really say any more than that. It was rather unfortunate that Mr Haslam was not given more advanced warning and given formal criteria for addressing his shortcomings. But as the Commission has heard, those were not the practices of the company at the time, they now are. And hopefully the company is on a learning curve as well.
>
> The – but having said that, in all the circumstances the termination, in my submission, was not harsh, unjust or unreasonable. However should the Commission not agree with that submission then it's my submission further that in this case the relationship between Mr Van Der Mei and Mr Haslam is so affected by the events which surrounded the termination that there has been a loss of trust and confidence. And that, although it's not conclusive, is a very relevant consideration.".

Mr Connor provided, in support of his argument, authorities which included: *Bostik (Australia) Pty Ltd v Gorgevski* 1992 CR 36 in a joint judgement of Sheppard, Gray and Heerey JJ; and *Queensland Teachers Union of Employees v Department of Education* (2000) 165 QGIG 767 which included a reference to the Full Federal Court in *Perkins v Grace Worldwide (Australia) Pty Ltd* (1997) 72 IR 186.

Mr Connor, in reaching the end of his submissions, dealt with the remedies as provided for in the Act and argued firmly that reinstatement, for a number of reasons, would not be a practical outcome and if the Commission was to make a decision in respect of favouring the applicant, then compensation that should be considered should be that of a minimal amount between two to four weeks based on the applicant's actual wage scale.

Conclusion

The applicant had been employed for a period close to eighteen months, and whilst the evidence of Mr Van Der Mei clearly identified a number of concerns in respect of the work performance of Mr Haslam, the Commission is not able to accept that the methods used by the respondent to raise either complaints or work related issues was such that it could be adduced that a formal warning or warnings had been given to the applicant.

It would appear that Mr Van Der Mei had ongoing concerns at the applicant's ability to discharge his duties as a driver in a competent manner, despite the conclusions of Mr Milligan on 27 March 2000 in his driving assessment which stated "I find Colin Ross Haslam, to be competent in his ability to safely operate a bus, and I recommend Colin Ross Haslam for the position of Driver within your company".

Mr Milligan presented as a credible witness and a person with obvious expertise in the area of driving assessment, and whilst he indicated that the applicant's performance should continue to be monitored, in evidence he said that "We all need monitoring all the time for whatever we do".

In evidence, Mr Van Der Mei stated that it was not the standard of driving by the applicant alone that led to the decision to terminate the employment, but a number of issues including a major safety matter which involved a passenger, James Dixon, being "dropped" off across the road from his school.

The Commission was unable to give credence to Mr Van Der Mei's claims that the applicant's termination occurred as a result of a major safety issue involving James Dixon based on Mr Van Der Mei's own statement of evidence at paragraph 7 where he indicated that he had raised the issue with the applicant in September 2000, again three weeks later. Further, at paragraph 9, he asserts that Mr Haslam continued to ignore his instructions over James Dixon, yet the applicant was allowed to continue in work until around 15 December 2000.

In the view of the Commission, the substantive inaction by Mr Van Der Mei negates any argument that the James Dixon issue was ever regarded by the respondent as a "major safety issue" until possibly well after the time of the dismissal.

In respect of the termination itself, Mr Connor, quite rightly and honestly, conceded the abrupt manner in which it was effected, and this was emphasised to a greater extent by Mr Van Der Mei under questioning from the Commission at page 58, line 35 of transcript:

> "Commissioner: That some time prior to the school break-up you'd talked to Mr Daddow about not continuing on with Mr Haslam's employment?
>
> Van Der Mei: That was my recommendation, yes.
>
> Commissioner: Do you know when – was it – when does school break up?
>
> Van Der Mei: The school broke up in December of that year.
>
> Commissioner: Yes, but when in December?
>
> Van Der Mei: That was the final year 2000.
>
> Commissioner: Yes, but when, roughly, was it 1 December or the 15th or - -?
>
> Van Der Mei: I think it was about mid – 15th or 17th, yeah.
>
> Commissioner: And you chose not to provide that decision – notice of that decision until 24 January?

Van Der Mei: 22nd, yeah.

Commissioner: 22nd January. Okay. You didn't consider having – was it his actual driving that caused you to do that or was it the failure to carry out directions?

Van Der Mei: It was a major safety issue concerning James Dixon. That was my main concern and the lack of Colin being able to – or willingly to follow instruction.".

The Commission, having considered all of the evidence and the authorities in this matter, finds that the termination of Mr Haslam was harsh, unjust and unreasonable in that he was not provided with procedural fairness during the course of his employment, particularly in issues relating to his alleged poor work performance.

Certainly, having made the decision prior to December 2000 to no longer require the applicant's services, and to wait until 24 January 2001 to advise of that decision was not only harsh to the extreme but clearly prevented the applicant from seeking alternate forms of employment.

In terms of the remedy, I believe on the evidence before the Commission that, from the respondent's perspective, all of the trust and confidence that should exist in an employment relationship has all but gone and despite the applicant's position that he be reinstated, I am not prepared to order such an outcome.

That leaves the other available option of compensation to be considered, and despite Mr Connor's argument for a payment of between two to four weeks' wages to be awarded should the Commission find in favour of the applicant, I am inclined, for all of the reasons already stated in respect of the termination, to award a somewhat more significant amount, in this case a payment of eight weeks' wages.

The calculation of the compensation is based on the agreed hourly rate of $13.50 and for twenty hours for each of the eight weeks.

I therefore order that the respondent pay the applicant an amount of $2,160 gross within twenty-two days of the release of this decision.

I order accordingly.

J.M. THOMPSON, Commissioner.

Released: 12 July 2001

Appearances:–
Mr C. Haslam, Applicant.
Mr S. Connor, instructed by Ms B. Kruger of Kevin Bradley Solicitors, for the Respondent.

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 137 – application to amend order

Training Recognition Council AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Another (No. B999 of 2001)

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

PRESIDENT HALL
COMMISSIONERS FISHER AND BROWN 22 June 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 22 June 2001, this Commission orders that the said Order be amended as follows as from the twenty-second day of June, 2001:–

In Schedule 17 "Process Manufacturing Industry":–

(a) by adding a new provision 3.1.3 to clause 3 (Traineeships) as follows:–

"3.1.3 *Laboratory Operations Training Package*

The provisions in this subclause shall apply to trainees engaged in laboratory testing in the Process Manufacturing Industry.

The wage progression arrangements for traineeships based on qualifications contained in the above training package shall be in accordance with clause 3 of Schedule 1 of this Order."; and

(b) by adding a new subclause to clause 3 (Traineeships) as follows:–

3.3 *Adult Trainees – Laboratory Operations Training Package*

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

Provided that part-time adult trainees shall not be paid less than the *pro rata* of an amount equivalent to the *Queensland Minimum Wage*.

(b) Provided further these provisions shall not apply to a trainee who becomes an adult during the term of their traineeship.".

Dated this twenty-second day of June, 2001.

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

Released: 5 July 2001

Operative Date: 22 June 2001
Amendment – Order – Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities)