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No. 1

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
CA283/01	Pacific Coast - Certified Agreement 2001	17/7/01	
CA259/01	Bundaberg Distilling Co. - Certified Agreement 2001	19/7/01	CA179/98
CA347/01	Stork Group South West Queensland Surface Facilities Construction - Certified Agreement 2000	13/8/01	CA361/98
CA348/01	Parliamentary Service - Certified Agreement 2001	16/8/01	
CA223/01	SEPR Australia Pty Ltd (Enterprise Bargaining) - Certified Agreement 2001	21/8/01	CA65/00
CA346/01	Cook Freeze - Certified Agreement 2001	21/8/01	CA183/95
CA359/01	J & SM Ross T/A Clydesdale Commercial Installations - Certified Agreement	21/8/01	CA73/99
CA360/01	East Coast Cabinets Pty Ltd - Certified Agreement	21/8/01	
CA361/01	Grencove Pty Ltd - Certified Agreement	21/8/01	
CA362/01	Abatech Pty Ltd - Certified Agreement	21/8/01	
CA363/01	Classic Stone Qld Pty Ltd t/a SAA - Certified Agreement	21/8/01	
CA365/01	CSR Construction Materials Brisbane and Gold Coast Quarries - Certified Agreement 2001	21/8/01	CA352/99
CA366/01	CSR Sugar Mills Group - Certified Agreement	23/8/01	CA576/99

The following Agreement has been extended by the Commission:-

	Date extended
CA354/99 Sunstate Fuel Mackay Terminal - Certified Agreement (Extended to 24/8/02)	20/8/01

E. EWALD  
Industrial Registrar

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999
Industrial Relations (Tribunals) Rules 2000
Part 17 – Lapse of Proceedings

INDUSTRIAL REGISTRAR EWALD

23 August 2001

NOTICE

PURSUANT to Part 17 of the Industrial Relations (Tribunals) Rules 2000, I hereby give notice that the Commission has Ordered that the matter listed in the Schedule hereto be disposed of by being struck out.

Schedule

Table with 2 columns: Case No., Certified Agreements. Row 1: CA400/98, MACKAY REGION HOSPITALITY EMPLOYERS - CERTIFIED AGREEMENT

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 287 – application for declaration of general ruling – application for exemption

The Australian Workers’ Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B797 of 2001)

Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B904 of 2001)

Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers AND The Australian Workers’ Union of Employees, Queensland and Others (No. B1448 of 2001)

PRESIDENT HALL
VICE PRESIDENT LINNANE
COMMISSIONER BECHLY

29 August 2001

General ruling re wages – Application for phasing in – Incapacity to pay – Evidence failing scrutiny – Application for exemption rejected.

DECISION

On 2 May 2001 The Australian Workers’ Union of Employees, Queensland, filed an application by which it sought a Declaration of a General Ruling pursuant to s. 287 of the Industrial Relations Act 1999 in order to flow into the Queensland Industrial Relations system certain wage increases allowed by a Full Bench of the Australian Industrial Relations Commission on 2 May 2001, in a case colloquially known as the 2001 Living Wage Case Claim by the Australian Council of Trade Unions, see Print PR002001. On 23 May 2001 the Queensland Council of Unions filed an application in similar terms. During the course of the hearing the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI) intimated that pursuant to s. 287(4) it sought partial exemption for the industry governed by the Fruit and Vegetable Growing Industry Award – State. The matter was severed from the hearing of the applications for a Declaration of a General Ruling. The hearing was set for 21 August 2001. Subsequently, on 17 August 2001 the QCCI made written application for the partial exemption previously referred to. We doubt that the filing of the further application was necessary but are content to rely on s. 320(1)(a) of the Industrial Relations Act 1999 and hear the matters together.

The case for the partial exemption was argued as if it was governed by Principle 13 of the Commission’s Statement of Principles, see 167 QGIG 353 at 356. In truth, the application for exemption was not governed by Principle 13. The Principles are guidelines for the disposition of matters by Commissioners sitting alone. Principle 13 applies where, a Full Bench having issued a Declaration of Policy allowing a general wage movement on an award by award basis, a single Commissioner processing the application to vary a particular award is asked to exempt a particular employer (whether temporarily or permanently or whether in whole or in part). Principle 13 has no application to an application for exemption from a Declaration of General Ruling. Only a Full Bench may grant such an exemption. The wide discretion at s. 287(1) and (4) may not be limited or constrained by Principles declared by the Commission. That said, where in fact the application for exemption is based on an alleged incapacity to pay, there can be no doubt that the testing of evidence should be just as rigorous as the testing on an application to a single Commissioner pursuant to Principle 13. The material relied upon by the QCCI does not withstand rigorous scrutiny.

The application was always going to be difficult to argue. It sought to phase in what would be a \$13 a week increase by way of an increase of \$6.50 from 1 September 2001 and a further \$6.50 increase from 1 March 2002. In the decision upon the applications for a Declaration of a General Ruling, 167 QGIG 350 at 351, we drew attention to the circumstance that the Australian Industrial Relations Commission traditionally takes into account that some industries are not performing as well as others and that the impact of a wage increase may vary from industry to industry. Granted that in a general way regard has already been had to the circumstances of the broader agricultural industry, we have difficulty in declaring ourselves satisfied that for a period of 6 months it is appropriate to fine tune the decision by an amount of \$6.50 in the case of one part of that industry. Certainly, the materials relied upon in this case would not justify the formation of such a view. There were two sources of the material about increases in costs. One was a survey based on a sample of three growers. The other source was data compiled by the Australian Bureau of Agriculture and Resource Economics for agriculture as a whole, supplemented by a submission that cost increases for fruit and vegetable growing would be higher because the industry is more “labour and input intensive”. The evidence about changes in prices is more satisfactory, but even if one assumed an overall increase in costs and an overall decrease in prices, in the absence of any evidence about productivity changes, it is difficult to make a judgement about changes in profitability and impossible to make a judgement about capacity to pay. We add that the materials about price increases suggest that some growers – the application relates to the entire industry – are very well placed to pay. The application for exemption is simply not made out.

We dismiss the application for partial exemption of the Fruit and Vegetable Growing Industry Award – State.

Dated this twenty-ninth day of August, 2001.

D.R. HALL, President.  
D.M. LINNANE, Vice President.  
R.E. BECHLY, Commissioner.

*Appearances:-*  
Mr M. Smith for Queensland Chamber of Commerce and Industry Limited,  
Industrial Organisation of Employers.  
Mr B. Swan for The Australian Workers' Union of Employees, Queensland.

Released: 29 August 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 287 – application for declaration of general ruling – application for exemption*

**The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B797 of 2001)**

**Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B904 of 2001)**

PRESIDENT HALL  
VICE PRESIDENT LINNANE  
COMMISSIONER BECHLY

29 August 2001

Application for declaration of general ruling – Application for exemption – Part of industry – Modest adjustment – Low paid workers – Application dismissed.

DECISION

On 2 May 2001 a Full Bench of the Australian Industrial Relations Commission published a decision in what is colloquially known as the 2001 Living Wage Case Claim by the Australian Council of Trade Unions. Amongst other things the Full Bench allowed a \$13 per week increase in award rates up to and including \$490 per week. On 2 May 2001 The Australian Workers' Union of Employees, Queensland, filed an application by which it sought a Declaration of a General Ruling pursuant to s. 287 of the *Industrial Relations Act 1999* flowing the wage increases allowed by the decision into the Queensland Industrial Relations system. On 23 May 2001 the Queensland Council of Unions filed an application in similar terms. In the course of hearing the applications we were informed by the Queensland Mechanical Cane Harvesters Association, Union of Employers that it sought partial exemption from any Declaration of a General Ruling. The application for partial exemption was severed from the other matters and set for hearing at Proserpine on 22 and 23 August 2001.

As crystallised at the hearings in Proserpine the exemption sought related to the *Sugar Industry Award – State* and to the Harvesting and Haulout Classifications. The comment must inevitably follow that apart from Mill employees who benefit from increases pursuant to Certified Agreements the increases allowed by the General Ruling of 1 August 2001, see 167 QGIG 352, flow to all other classifications in the Sugar Industry. Indeed, save where required to be absorbed into overaward payments, the increases flow to all employees under Queensland awards.

It would be remiss of us to fail to acknowledge the difficult economic circumstances being experienced by Cane Harvesters in the vicinity of Proserpine and Mackay. (The difficulties may apply statewide). As a consequence of weather and disease cane farms are not presently producing the tonnages of cane which they once did. We have heard evidence of figures of the order of 65,800 tonnes being cut from an area which previously yielded 130,000 tonnes. The gross income of the harvesters is based on the tonnage cut. Their outlays relate to the distance travelled by the machinery to cut the cane. In attempting to harvest additional hectares to boost tonnage the harvesters are working long hours, in some cases paying additional wages, incurring additional fuel costs and subjecting (expensive) machinery to additional wear and tear. They are also creating a price competitive market in which it is impossible to bargain with growers for an increase in harvesting prices. In fairness to the growers we should add that the growers themselves have faced a sequence of poor seasons and have but limited ability to pay any increase in harvesting cost. Regrettably, the other side of that story is that some harvesters are still carrying substantial grower debts from previous seasons. All of that said, we are not proposed to grant the deferral now sought.

The deferral is limited to the year 2001. How much, if granted, the increase will cost a particular harvester will depend upon the number of employees engaged by the harvester and the length of the crushing season. On the estimates given by the witnesses, who came from the Mackay/Proserpine area, the expectation seems to be that the crushing season will run from 9 to 10 weeks from 1 September 2001 (date of operation of the increase). The argument is about a grand total of \$117 to \$130 per employee. It may be accepted that overwhelmingly harvesters will endure a negative income, in many cases for a second year, and that \$117 to \$130 is a large sum to one who does not have it. However, the evidence is that harvesters have been able to borrow (very large) sums of money to carry them through the difficult times which they are experiencing. Granted that the employees would be paid out of borrowed money which would have to be repaid at some indeterminate future time, the comparison between \$117 to \$130 and the tens of thousands of dollars, in some cases hundreds of thousands of dollars, borrowed to support the operations is compelling. The employees for whom the application for partial exemption relates are amongst the poorest paid in Queensland. On an objective view, if the application for partial exemption were granted, during the period 1 September 2001 to 1 January 2002 (or more accurately the start of the next crushing season), the wages of those employees would not be "fair standards in relation to living standards prevailing in the community", see s. 3(f) of the *Industrial Relations Act 1999*. Additionally, there is no room for optimism about 2002. In *State Wage Case*, 165 QGIG 25 to 26, the Full Bench observed:-

"If the case now made succeeds, there will inevitably be a comparable case in 2001 seeking exclusion both of the current statewide increase and any statewide increase which might be granted in the year 2002. The building blocks for the creation of a subclass of (very) low wage earners in the field sector of the sugar industry may not be in place, but they are certainly available for assembly."

The passage is apposite here.

In all the circumstances we reject the application for a partial exemption.

Dated this twenty-ninth day of August, 2001.

D.R. HALL, President.  
D.M. LINNANE, Vice President.  
R.E. BECHLY, Commissioner.

*Appearances:-*  
Mr J.G. Powell for Queensland Mechanical Cane Harvesters Association, Union of Employers.  
Mr B. Swan for The Australian Workers' Union of Employees, Queensland.

Released: 29 August 2001

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement***Bettina O'Connor AND Electroboard Administration Pty Ltd (No. B1836 of 2000)**

COMMISSIONER FISHER

23 August 2001

Application for Reinstatement – Jurisdiction – Probation – Level of Income – Award coverage – Employee found award-free – Probationary period found not to be reasonable – Annual wages – Case Stated to Court.

## DECISION

After hearing the evidence and submissions and having given consideration to the matters involved, the Commission relisted the application to issue the following statement:–

“In this matter the Commission has been asked to determine three jurisdictional issues. These are: one, whether a six month period of probation for the applicant was reasonable having regard to the nature and circumstances of the employment; two, whether the applicant’s annual wages immediately before the dismissal were more than \$68,000; and three, whether the applicant’s employment was covered by a Federal award. In the event that it was a further jurisdictional point arises of whether the Commission has jurisdiction to deal with the application.

The first of these jurisdictional issues requires the Commission to consider the facts of the matter and apply any relevant case law in reaching the determination as to whether the probationary period was reasonable.

The second jurisdictional issue requires consideration of the facts and interpretation of the meaning of the phrase ‘annual wages immediately before the dismissal’. The parties were unable to provide any case law directly on point with the relevant section of the *Industrial Relations Act 1999* (the Act).

The third jurisdictional issue requires consideration of the facts and interpretation of the Award under which the employer contends the applicant was employed. Should the applicant be found to be employed under its terms then a further jurisdictional point is raised, and this has also not been determined under the present Act.

Determination of the second jurisdictional issue and the consequential jurisdictional issue will clearly have ramifications not only for this matter but will also have precedent value.

In these circumstances the Commission is considering taking action under s. 282 of the *Industrial Relations Act 1999*. This section enables the Commission at any stage of the proceedings and on any of the terms it considers appropriate to state a written case for the Court’s opinion on the question of law relevant to the proceedings.

Before making a decision about whether to take this step the Commission is interested in hearing the views of the parties on this matter, including the particulars of any case to be stated and the timing of the step.

It may be appropriate for the Commission to proceed to decide the issue of award coverage and having made a decision the course of action on the other issues becomes clearer. For example, if the Commission decides the applicant was covered by a Federal award the parties may agree to transfer the proceedings to the AIRC to have the remaining matters heard and determined. Alternatively, the parties may agree that a case should be stated to the Industrial Court.

In the event the Commission decides the applicant was not bound by a Federal award, the Commission could proceed to also determine the issue relating to the probationary period. The annual wage issue could then be dealt with as a case stated. These are just a few of the variables.

If a case is to be stated the Commission would prefer the parties to agree on its terms but would nonetheless consider preparing a case stated in the absence of any agreement but based on the relevant facts. Clearly, agreement between the parties to the process and the terms of the case would assist in the resolution of the matter.

As I indicated before I am prepared and indeed interested to hear the views of the parties, though not necessarily today, about whether the course of action contemplated by the Commission is a reasonable one in the circumstances.”

As the purpose of the relisted hearing had not been foreshadowed to the representatives of the parties, they were of course unable to commit to the Commission’s proposed course of action without obtaining instructions from their respective clients. Since that time the parties have advised of their positions. Against this background and taking into account the views expressed by the parties this decision is now issued.

**Award Coverage**

Electroboard Administration Pty Ltd (the Company) is the respondent to the substantive application for reinstatement but is the applicant for the jurisdictional issues. The Company will be referred to in this decision as the respondent.

The applicant commenced employment with the Company on 15 May 2000 as an Account Manager. In that role the applicant was required to sell the Company’s business equipment products to end users and be responsible for developing accounts with customers. To fulfil the duties, the applicant was required to have product knowledge, sales skills and be able to deal with minor technical problems with the equipment.

The applicant negotiated the terms and conditions of her employment with a Director of the Company, Marie Bolton. These terms and conditions were captured in an Employment Agreement signed by both parties.

The respondent contended that the employment of the applicant Bettina O’Connor, was covered by an award of the Australian Industrial Relations Commission (AIRC) viz, the *Business Equipment Industry – Technical Service – Award 1999*. The Company is a named respondent to the Award.

The basis of the respondent’s argument arises from clause 6 – Coverage of Award. Relevantly, the Award provides:–

“6.1 The industry covered by this Award is the business equipment industry in all its branches.

- 6.2 Subject to the exemptions specified in clause 8 Persons and Organisations exempted from coverage under the whole Award or certain sections of the Award, this Award shall apply to employees engaged in, or in connection with:
- 6.2.1 Servicing, repairing, maintaining, structurally altering and/or assembling business equipment but excluding the repair and structural alteration of typewriters; and
- 6.2.2 Sorting, packing and dispatching business equipment and parts and supplies thereof; and;
- 6.2.3 Every operation, process, duty and function carried on or performed incidental to the business equipment industry.”.

The respondent did not concede the applicant was exempted from coverage under clause 8 of the Award. It relied on clause 6.2.3 to argue that the applicant was engaged in or in connection with work carried on or performed incidental to the industry. The respondent acknowledged that finding an appropriate classification level for the applicant was a difficult task but nonetheless submitted that a Level 4 Technician could easily fit within the duties and functions of an Account Manager given the broad description contained in the Award.

The applicant initially contended that if her employment had been covered by an award then the Commercial Travellers’ Award – State would apply. After the respondent noted the definition of “Commercial traveller” applied to “a person employed . . . principally or substantially for the purpose of soliciting wholesale business. . .”, the applicant did not press this argument.

The applicant rejected the argument the Federal Award applied for several reasons. The first was that the Award is a “technical service” award. The term “technical service” is defined in the Award to mean “the process involved in the servicing, repairing, maintaining and/or structurally altering all forms of business equipment excluding typewriters, necessary to restore and/or maintain such equipment to the level of performance prescribed in the manufacturers specifications.”. Any duties or functions carried on or performed incidental to the industry would have been considered in the context of technical service as defined.

The Commission’s attention was drawn to clause 8.1 which provides that “This Award shall not apply to persons wholly or mainly engaged in managerial positions or, to employees whilst undertaking formal training courses or skills in connection with their employment.”. The applicant contended that there should be no distinction between an employee who managed accounts and one who managed employees. In any event, towards the end of her employment Ms O’Connor was promoted to a position of Commercial Sales Manager where she was responsible for the management of another employee. In that case the exemption would apply.

Reference was made to the types of duties and functions performed by Ms O’Connor as compared to those defined in the Award for a Level 4 Technician. The Award describes technical functions whereas Ms O’Connor was responsible for sales of the product.

The final argument raised by the applicant was the respondent had never contemplated the application of a federal award to Ms O’Connor’s employment. In this regard reference was made to clause 12 of the Employment Agreement which provides in part:–

“The notice required will be that in force under the relevant State award applicable to your employment.”.

The applicant argued that the employment agreement provides the true intention and understanding of the employment contract.

The argument of Federal award coverage of Ms O’Connor’s employment has little substance in my view.

The principles of statutory interpretation should generally be applied in interpreting awards. The purposive approach requires the purpose of the instrument to be taken into account even if the meaning of the words, interpreted in the context of the rest of the instrument, is clear. (D.C. Pearce and R. S. Geddes “Statutory Interpretation in Australia”, 4<sup>th</sup> ed, Butterworths, 1996, p.24)

The purpose of the *Business Equipment Industry – Technical Service – Award 1999* can be gained from its title; clause 4.2, the definition of “Technical Service; clause 6 Coverage of Award and clause 18 Classifications and Definitions. It is apparent from these provisions that the Award is intended to apply to those employers and employees who are engaged in the technical servicing (as defined) of business equipment. All of the classifications and definitions provided in clause 18 are technical and range from a Level 1 Technician with a relativity to the C-10 classification in the *Metal, Engineering and Associated Industries Award 1998* of 125% to a Level 6 Technical Employee with a relativity of 82%. Clause 6 provides for broad coverage but it must not be read in isolation nor extend coverage beyond that which is provided for elsewhere in the Award. This clause is to be read in the context of purpose of the Award which has been described above.

The Commission rejects the respondent’s submission that Ms O’Connor performed work consistent with a Level 4 Technician. Some of the duties specified for this classification include:–

“Performs preventative maintenance and repair service on demand and/or to agreed schedules.”, and “Runs routine diagnostics on printed circuit boards.”.

From the evidence presented to the Commission by both Ms O’Connor and Ms Bolton, it is clear the work performed by Ms O’Connor did not match these types of duties.

In light of the work upon which Ms O’Connor was initially engaged as well as that she performed when promoted, the Commission considers Ms O’Connor would have been captured by clause 8 which exempts certain categories of employee from the provisions of the Award.

The view that the *Business Equipment – Technical Service – Award 1999* relates to employees engaged in technical servicing of business equipment is further supported by an examination of the *Business Equipment Industry (Commercial Travellers) Award 2000*. This Award, as its title implies, applies, subject to certain exemptions, to “employees engaged in, or in connection with the sale and/or soliciting of orders for all forms of business equipment and operating supplies therefore.”. Were Electroboard a respondent to this Federal Award, then its argument for award coverage of Ms O’Connor’s employment would have been much stronger, subject to the application of the exemption clause.

The Commission also agrees with the submission of the applicant that the employment agreement reflects the true understanding of the employment contract. The attempt to argue federal award coverage of Ms O’Connor’s employment was disingenuous. In my view there was never an intention for Ms O’Connor’s employment to be covered by a federal award until, for whatever reason, it became convenient for the employer to contend otherwise. Had the respondent succeeded in its argument then the jurisdictional argument about annual wages would have become obsolete.

The Commission rejects the preliminary argument raised by the respondent that Ms O'Connor's employment was covered by a federal award. I therefore find it unnecessary to determine whether the Commission has jurisdiction to hear an application for reinstatement lodged by a federal award employee.

Except for the Commercial Travellers' Award – State no other state award was mentioned as being relevant to Ms O'Connor's employment. I think the true position is that her employment was award free.

On this question the Commission finds that it has jurisdiction.

### **Probationary Period**

Section 72(1)(b)(i) of the *Industrial Relations Act 1999* provides that s. 73(1) "does not apply to an employee serving a period of probation that is longer than the "probationary period", if the period decided, by written agreement between the employee and employer before the employment started, is a reasonable period having regard to the nature and circumstances of the employment."

In this matter there is no argument that a six month probationary period was agreed to prior to Ms O'Connor commencing employment. The evidence is that Ms O'Connor negotiated with Ms Bolton over various terms of her employment. She was aware that a six month probationary period would apply at the time these negotiations occurred. Moreover, Ms O'Connor was supplied with a copy of the employment agreement a few days in advance of her employment. Ms O'Connor had the opportunity to consider the terms of that agreement and seek advice if necessary. Ms O'Connor signed the employment agreement prior to her commencing in the position of Account Manager.

That a probationary period longer than three months was agreed to in writing before the employee started is only one aspect to be considered. The other matter to be considered is whether the period determined in advance is reasonable having regard to the nature and circumstances of the employment. It is on this aspect that the positions of the parties markedly vary.

Before proceeding to consider the arguments and other matters raised by the parties, the Commission notes that neither party sought to distinguish between "trial period" as contained within the employment agreement and a "probationary period" contained within the Act. Because the parties have apparently accepted the concepts are indistinguishable, I do not take the matter further.

The question of what is a reasonable period of probation does not appear to have been considered in this jurisdiction. Both parties referred me to the following decisions of the AIRC:

*Tzimias v Everco Wiring Systems*, Whelan C., Print P5253;  
*Lowe v DMA Australia Pty Ltd*, Deegan, C., Print R8416;  
*Pisa and Merritt v Country Fire Authority*, Watson, SDP., Print T0960.

The applicant also referred to *Mann v State Rail Authority* (1999) FCA 273.

These decisions deal with applications to exclude employees from the dismissal provisions of the *Workplace Relations Act 1996*. The exclusionary provisions are contained in Regulation 30B of the *Workplace Relations Regulations*. Regulation 30B(1)(c) deals with employees serving a probationary period in excess of three months. It appears in different terms to s. 72(1)(b)(i) of the Act but not materially so as far as the matter I have to determine is concerned.

The decision of Watson, SDP. (*supra*) usefully summarises a number of pertinent authorities. He comments that the authorities suggest:

- “\* the purpose of a probationary period is to provide a period for training to do the work and to allow an assessment to be made of his or her aptitude and capacity to do the work once trained
- \* whether a probationary period is reasonable is an exercise of judgment based on proved objective facts. The most important consideration will be the nature of the job
- \* the Commission must consider the entire circumstances of the employment and not merely the circumstances of the position held
- \* it is relevant to consider a probationary employee's previous experience, training and employment in assessing the "entire circumstances" of the employment
- \* regard should be had to the situation at the date the employment commenced.”

Each case will have to be decided on its own facts and circumstances. It may be that in one case certain matters are more persuasive than they would be in another case. In each case it will be a matter for the Commission to weigh and balance relevant factors.

Many of the factors identified by Watson, SDP are interrelated. Accordingly, I do not intend to discuss the evidence under separate headings but rather address the evidence with general reference to these factors.

The Company is engaged in the selling of such business presentation equipment as multimedia projectors, interactive and electronic whiteboards, digital cameras and videoconferencing technology. While their product range is extensive, the core business is projectors. The nature of Ms O'Connor's employment on commencement was predominantly sales. She was required to sell the Company's products primarily to end users within a defined territory. For this Ms O'Connor had to gain knowledge of the Company's products and be able to competently demonstrate them. Ms O'Connor was also required to be able to fix basic problems with the equipment.

It is true that Ms O'Connor had not participated in the paid workforce for just over twelve months prior to her employment at Electroboard. It is also true that she did not have previous experience in selling the type of equipment promoted by Electroboard.

Ms O'Connor's previous employment included several years of sales and marketing of various products and services including building emergency procedures programs using a range of equipment to a number of industry sectors. She also had experience in foreign exchange account management which required knowledge of equipment and software. This latter employment included sales and development of the client base. The material before the Commission shows that Ms O'Connor was successful in her previous employment and highly regarded by her superiors.

Although Ms O'Connor's experience in sales and marketing was not in the same field as that in which Electroboard operated, it is evident that some aspects of her experience attracted Ms Bolton to interview her for and then appoint her to the Account Manager's position. Ms Bolton's evidence was that Ms O'Connor's lack of experience in her Company's field together with her period outside of the paid workforce led her to consider that a six month probationary period was reasonable.

Evidence was given that two other Account Managers employed by the respondent were given three month probationary periods. One of these was employed prior to Ms O'Connor. The reason given for the shorter probationary period in this case was the person had audiovisual experience. The second Account Manager was engaged subsequent to Ms O'Connor. Her probationary period was set at three months because of her experience in sales. This employee was employed for six weeks before being terminated.

Great issue was not taken with the length of the probationary period offered to the first employee mentioned above, Karen Slipias. It was her evidence that she was told at her interview that a three month probationary period was the norm for employees in the Company. Ms Slipias said that training was informal and ongoing due to new products becoming available. In her opinion sufficient product knowledge could be gained within three weeks of commencing employment. She also stated that performance could begin to be judged after approximately one month of employment.

The applicant argued that the probationary period of three months set for the second employee showed that the probationary period for Account Managers was flexible. Like this employee, Ms O'Connor had sales experience.

Ms Bolton distinguished between Ms O'Connor and the second employee on the grounds the latter had sales experience in a similar industry and was familiar with the client base. The other employee only required technical knowledge. Ms O'Connor, however, needed to learn the technical knowledge and the clients as well as how to sell to an end user of the products. For these reasons a longer probationary period was required for Ms O'Connor. Ms Bolton conceded it did not take a long time to learn the basic products and a person could be selling within four weeks of commencing employment.

Ms Bolton attempted to portray the probationary period with Ms O'Connor as being non-negotiable. Her evidence on this issue was equivocal. At one point Ms Bolton said the period was set at six months and then qualified it to say that it was set at that length unless the sales person had experience in the industry or similar business. With respect to Ms O'Connor specifically, Ms Bolton initially said she had not thought about whether the probationary period was negotiable. Her later evidence was that the probationary period was "probably not" negotiable. This contrasts with the written outline of submissions which said the probationary period was negotiable.

The evidence showed that the bulk of the training was on-the-job training delivered by another Account Manager of the Company. An occasional seminar was scheduled to which all sales staff attended. No particular in-house training program was available nor was the applicant required to attend external training. Ms O'Connor's evidence was that she learnt about the Company's products by reading catalogues, asking questions, observing others demonstrate products and personally using the equipment. Ms Bolton also provided close supervision.

The Company did not have in place any formal processes of monitoring and assessment of aptitude or capacity. Little in the way of informal processes seemed to be in place as well. Performance was measured by monthly sales figures. Ms O'Connor was able to make sales in the first month of her employment. A set rate of commission payments had been agreed for the first three months of employment. These were paid for the first two months but as the set rate was exceeded in the third month, the higher amount was paid. Ms O'Connor received commission payments for each month thereafter except for November when she was dismissed.

### Conclusions

In *Mann v State Rail Authority* (supra), the Federal Court in referring to the *Workplace Relations Regulations (Cth)* said the following:—

"Regulation 30B is designed to exclude the operation of beneficial legislation conferring rights on employees and the regulations should not be liberally construed: see *Rose v Department of Social Security* (1990) 21 FCR 241 at 244. Given the exclusionary effect of the regulation, the party asserting that it operates to deny right otherwise generally available bears the onus of establishing its application in the case in question: see *Nimmo v Alexander Cowan & Sons* (1968) AC 107 at 130 and *Vines v Djordjevitch* (1955) 91 CLR 512 at 519 – 520. cf *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249."

In this jurisdiction it is not a regulation that provides which employees are to be excluded from the terms of the Act but a section of the Act itself. That notwithstanding, the passage from *Mann* cited above is apposite to the present matter. Thus the onus rests on the respondent to show that the provisions of s. 72 should be exercised to exclude Ms O'Connor from accessing the unfair dismissal provisions of the Act.

In this case an objective analysis of the facts fails to establish that a six month probationary period determined in advance was reasonable having regard to the nature and circumstances of the employment. I have reached this view for the following reasons. A six month probationary period was not standard for Account Managers in the Company. The length of any probationary period was entirely within Ms Bolton's discretion. The evidence showed that it was not the nature of the position which required a six month probationary period but whether the person was considered to possess the skills required to perform the work.

Ms O'Connor had gained reasonable experience in sales as well as account development and management from her previous employment. She had not had experience in the business equipment industry nor had she participated in the paid workforce for a period immediately prior to commencing with Electroboard. In these circumstances it was reasonable for Ms O'Connor to have a probationary period of employment in order for the employer to assess her aptitude and capacity for the work. This was not a case where the employee had to learn sales or account management skills rather these were being renewed. Clearly, a shorter period of time would be required to refresh skills than learn them from scratch. This was more a case of whether Ms O'Connor could gain the technical knowledge in order to successfully demonstrate and sell business equipment products.

Training was essential to gain product knowledge. The training was on the job, informal and Ms O'Connor was often left to learn about the products herself. Three to four weeks was considered sufficient time in which to gain enough product knowledge to commence selling to customers. Thereafter, and like all Account Managers, on-going training (or self learning) was required to keep abreast of new products.

In order to successfully demonstrate and sell the products, an employee would need to be reasonably knowledgeable about and competent in their operation. Given the minimal period of initial training and the situation that employees taught themselves, this is not a case where detailed and complex knowledge was required to be gained. The work can be distinguished from that where formal qualifications or an in-house training program is required to be successfully completed.

The time given to become proficient in the operation of products in order to sell them did not significantly vary between Account Managers. An assessment of Ms O'Connor's capacity and aptitude to develop the relevant technical knowledge should, in my view and according to the evidence, be able to have been made in much less than the six month probationary period that was established.

Opportunities to assess Ms O'Connor's capacity and aptitude for her employment were regularly presented to Ms Bolton who closely supervised her. The assessments were informal but in light of the nature and frequency of the interaction, it should have been apparent within a relatively short period as to whether Ms O'Connor's performance would be satisfactory. The only objective performance measure was monthly sales figures. Given Ms

O'Connor was required to commence selling almost immediately on commencing employment, her sales performance could be scrutinised and her ability to reach targets assessed.

For these reasons, the Commission considers the six month period of probation not to be reasonable having regard to the nature and circumstances of Ms O'Connor's employment. Accordingly, the Commission finds that Ms O'Connor is not excluded by s. 72(1)(b) from s. 73(1) of the Act.

### Annual Wages

The last jurisdictional point requires consideration of the term "annual wages immediately before the dismissal" found in s. 72(1)(e)(iii) of the Act. After considering the positions of the parties the Commission has decided to refer the interpretation of this term as a case stated to the Industrial Court. To assist in the interpretation the Commission makes the following findings of fact:-

- ◆ The applicant was not employed under an industrial instrument nor was she a public servant employed on tenure under the *Public Service Act 1996*.
- ◆ The applicant was employed from 15 May 2000 until 10 November 2000.
- ◆ At the relevant time, the maximum amount of annual wages provided by s. 72(1)(e)(iii) of the Act was \$68 000.
- ◆ The applicant was employed under an Employment Agreement signed by the employer and the employee. The Employment Agreement commenced on 15 May 2000.
- ◆ Clause 8 Remuneration of the Employment Agreement specified the following:-
  - "a) The base salary for this position will be \$35,000 per annum gross inclusive of leave loading.
  - b) Electroboard will fulfil its obligations under the superannuation guarantee charge legislation and pay the appropriate amount of superannuation contributions as specified in the legislation.
  - c) Car allowance of \$15,000 p.a. is payable.
  - d) You will be paid in fortnightly instalments by direct deposit into your nominated bank account or accounts.
  - e) Commission on sales and the rates and conditions under which it is paid are contained in the Electroboard Commission Plan, appropriate to Account Managers and Branch Managers. Commission is paid monthly on the 15<sup>th</sup> of the month or first working day after this date, following the month earned.
  - f) Electroboard will guarantee a minimum commission payment of \$1 250.00 per month for the first 3 months of your employment (i.e. for commissions for May, June and July 2000)."
- ◆ The Electroboard Commission Plan specified the basis upon which commission is earned and the rate of commission. Ms O'Connor signed the Plan on 10 July 2000. Relevantly it provided that:-
  - the commission is earned as a percentage of the selling price that is received from the sale, exclusive of GST;
  - commission is income in addition to the base salary and allowances;
  - the commission paid for the sale for Electroboard products, services (excluding Hire) and room fit-outs is calculated as a percentage on the revenue earned in each month. It escalates based on the sales for the month. The Commission scale is as follows:-

Level 1	\$1 up to \$150,000 commission paid at	3% of Revenue
Level 2	\$150,0001 plus commission paid at	4% of Revenue

**Note:** Minimum commission earnings of \$30,000 must be earned in the month before the commission is paid. Once the minimum has been achieved the commission is calculated from \$1.

- Payment of Commission

"Commission is earned 50% on order, and will be paid on the 15<sup>th</sup> of the month following the order date. The 50% balance of commission will be paid on the 15<sup>th</sup> of the month following the month the client pays invoice for the goods (or COD or credit card this is the same as the order date). All finance programs will be paid in the month the equipment financed is installed and accepted by the customer.

In the event the 15<sup>th</sup> of the month falls on a holiday or weekend the commission will be paid on the next working day following.

**Employment resignation or termination will result in all commission outstanding or not paid being forfeited. No further commission claims will be considered, when no longer in the employment of Electroboard."**

- ◆ The applicant was paid the following commissions:-

<u>2000</u>	
June	\$1,250
July	\$1,250
August	\$1,724.59
September	\$1,506.90
October	\$2,250.15
November	Nil
Total	<u>\$7,981.64</u>

- ◆ The total amount of salary and commission paid for the period of employment was \$25,506.93.
- ◆ A sales budget was prepared by the Company for Ms O'Connor for the period July 2000 to June 2001. The Commission accepts Ms O'Connor had little or no input into the preparation of the sales budget. Projected commissions were calculated from the sales budget.
- ◆ The commissions earned from May 2000 until the end of her employment added to the projected commissions from November 2000 to June 2001 gives a total of \$45,036.24.
- ◆ This amount added to her annual salary of \$35,000 would have given a total income for 12 months of \$80,036.24.

**CASE STATED TO COURT**

The following cases are stated for the Court's opinion. In light of the above facts:

1. *Should commission which is paid for sales made and paid pursuant to an employment agreement be included in the calculation of annual wages for the purpose of s. 72(1)(e)(iii) of the Act?*
2. *In the calculation of annual wages should commission which is paid for sales made and paid pursuant to an employment agreement be treated differently to irregular payments, such as a bonus or payments not paid pursuant to an employment agreement?*
3. *If the answer to Question 1 is "yes", how should annual wages be calculated where an employee has worked for less than one year? Should projected commissions (ie commissions expected to be earned but not yet earned nor paid) be included in the calculation?*
4. *Should allowances which reimburse for expenses incurred in the course of employment such as a car allowance, and superannuation be included in the calculation of annual wages?*
5. *In s. 72(1)(e)(iii) of the Act, how does the phrase "immediately before the dismissal" affect the meaning of the term "annual wages"?*

In reaching its opinion, the Court's attention is drawn to the term "wages" in Schedule 5 Dictionary of the Act.

Order accordingly.

G.K. FISHER, Commissioner.

*Appearances:-*

Mr A. C. Harding (Barrister) instructed by Ms E. Vogler of Gilshenan and Luton for the applicant.

Mr L. Moloney (Livingstone's Australia) and with him Mr T. Wiltshire on behalf of the respondent.

Released: 23 August 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Carmela Serratore AND Doyles Construction Lawyers (No 2) (No. B1666 of 2000)**

COMMISSIONER BLADES

28 August 2001

Unfair dismissal – Invalid reason – Recourse to competent administrative authority – Queensland Law Society – Dismissal by conduct – Assault – Standard of proof – Compensation – Special, general and aggravated damages sought – Cause of action not contractual or tortious but statutory – Not necessarily appropriate to refer to contractual or tortious principles for assessment of damages – Compensation for hurt, humiliation and distress – Applicant suffered bruising and psychological damage and on WorkCover for 29 weeks – WorkCover payments taken into account and deducted from loss of income – Special losses associated with the dismissal awarded – Hurt, humiliation and distress assessed at \$10,000 – Aggravated damages refused – Estimated length of future employment considered in regard to future loss – Maximum amount available under s.79(2) of the *Industrial Relations Act 1999* does not include the employer's superannuation contribution – Compensation of \$17,067.64 awarded.

DECISION

This young lady commenced work as a Solicitor with Doyles Construction Lawyers on 13 March, 2000. She worked for that employer for only 7 months until 12 October, 2000 when the employment ceased.

She gave evidence of an unhappy relationship with the firm from almost the date of commencement of her employment. It would seem however that the relationship deteriorated greatly from about August 2000 when she was requested and then directed to sign a Statutory Declaration and Deed of Confidentiality (the documents) which the employer required because of an appointment as a Probity Auditor for the Brisbane City Council. She refused. She was eventually asked to resign her employment. Instead however, she had forwarded to the employer by her Solicitors a letter on 12 October 2000 which alleged that she had been dismissed. In consequence of this letter, depending on which of the versions be accepted, either she was dismissed or told to go on annual leave. Before being ushered out of the office and in response to a direction not to touch her computer, she alleges she was assaulted by Alexander Orange a partner in the respondent firm.

She alleges that she was dismissed because of an invalid reason, namely recourse to a competent administrative authority, the Queensland Law Society (QLS). She also alleges that in the course of the dismissal the assault occurred. The respondent denies the assault allegation. The respondent points out that although there was a requirement to sign the documents, it was never suggested she either sign or she would be dismissed.

I have made my decision upon a consideration of the whole of the evidence, including the demeanour of the witnesses and I have reached my conclusions upon the balance of probabilities.

**Dismissal for an invalid reason:**

The reason for the allegation that the applicant was dismissed for an invalid reason was particularised during the opening address of learned Counsel as being recourse to the Queensland Law Society. There had been the request by the employer for the applicant to sign the documents upon the appointment as Probity Auditor. Ms Serratore was told that this appointment would involve the mandatory execution by all employees of these documents. She had reservations and expressed these to Carmel Doyle, a partner, and to Alexander Orange. Draft versions of the documents dated 30 August and 5 September were presented to her in early September. She claimed she was badgered, intimidated and bullied as she was coerced to sign. She alleges that she was interrogated and intimidated by Alexander Orange on 5 October so she contacted the head partner, James Doyle, and advised him of the bullying and tantrums and of her reservations about signing the documents. She was later told by James Doyle on about 6 October there was nothing wrong with the documents and that she should sign or reconsider her relationship with Alexander Orange and Doyles. Again on Monday 9 October 2000 she expressed reservations to James Doyle about signing the documents and she was then asked by James Doyle to resign from the firm's employment. On 10 October she was ill from stress so she took the day off and took advice from the Queensland Law Society Deputy Secretary Mr O'Donnell who, she said, confirmed that the documents were too wide and poorly written and that she should not execute them. Mr O'Donnell did not confirm that advice when he gave evidence.

It was the applicant's testimony during her cross-examination that she had not told anyone that she had visited the Queensland Law Society concerning the documents and following upon that evidence it would be impossible to find the existence of an invalid reason as primarily particularised. However, there was a second part to the allegations as particularised and that was that she had been referred to a Solicitor for advice by the Queensland Law Society and it was further alleged that the dismissal occurred because the respondent must have *suspected* that the applicant had taken advice from the Queensland Law Society.

Section 73(2)(e) of the *Industrial Relations Act 1999* (the Act) makes "recourse to competent administrative authorities" an invalid reason for a dismissal. Before the conduct can become a reason, an employer must be aware of the conduct. In this case, the employer was unaware. The letter which was faxed through to Doyles on 12 October by Stubbs Barbeler and Grant (her Solicitors) revealed nothing of the applicant's recourse to the Law Society. All that letter did was to indicate to the respondents that the applicant had taken legal advice. The fact that an employee takes legal advice about an aspect of his/her employment is some evidence that the employment relationship has broken down or is breaking down. A dismissal for taking legal advice does not fall within the prohibitions imposed by s. 73(2).

Neither does the conduct which occurred lead to a "suspicion" that the applicant had sought recourse to a competent administrative authority. The suspicion is said to arise as follows: There was an adverse reaction by Mr Orange when the applicant raised, in July 2000, with QLS, matters about her Practising Certificate; the written evidence of James Doyle (which I accept in contrast to his later sworn evidence) that he was told by Mr Orange on 11 October that she was going to obtain legal advice about the documents; that she was new to Brisbane and not knowing any Industrial Lawyers would have gone to the QLS before she went to Stubbs Barbeler and Grant. I do not consider such facts raise a suspicion except perhaps in the mind of the suspicious. But "suspicion" is not proof, even on the balance of probabilities. Of course, facts can be proved by inference but the Commission is concerned with probabilities, not possibilities. To prove a fact by inference, the circumstances must give rise to a reasonable and definite inference and there must be more than conflicting inferences of equal degrees of probability so that the choice is not mere conjecture – (*Sayers v Perrin & Others* (No 2) 1966 Qd. R. 74 at 79).

I am satisfied however, that the dismissal occurred because of the breakdown in the relationship between the parties, finally evidenced by the letter of 12 October. The applicant had refused to sign the documents. She had been asked to resign. She had her Solicitors send that letter on 12 October stating "We are instructed that you have terminated our clients employment without cause. Our client is considering an action for unfair dismissal however, we are instructed that she will refrain from taking such action on the following terms and conditions:" and then certain demands were made. While the respondent claims she was not dismissed at all, there is some explanation for a dismissal which does not involve as a reason "recourse to competent administrative authority". That explanation is to be found in the evidence of James Doyle where he says that in a telephone call with Alexander Orange on 12 October at about 1.00 p.m., he decided that as the applicant had stated that her employment contract had been terminated then she had resigned and should leave the premises. He also considered her conduct in sending the letter through the normal channels to be in breach of her fundamental obligation to keep all matters in relation to her appointment confidential between herself and certain senior officers of the firm. He considered that breach to be so important as to justify dismissal. He informed Orange accordingly. He also considered her to be inarticulate, dishonest and underhanded, lacking in rational skills of analysis, lacking in advocacy skills and incompetent.

I am satisfied on the balance of probabilities that it was for these reasons that the dismissal occurred. The acrimonious relationship followed by the letter was the reason for the termination, not that the applicant had recourse to a competent administrative authority, a fact which was known only to her. I am not satisfied that the respondent even had a suspicion that she had resorted to a competent administrative authority. There was no evidence to justify such a finding. I am also not satisfied that the reason for dismissal was because she had, *ipso facto*, taken legal advice. The applicant conceded that the onus of proof rested upon her to prove that the dismissal included as a reason, an invalid reason. I am not satisfied on the balance of probabilities that the dismissal occurred because the applicant had recourse to a competent administrative authority.

There was argument that the Queensland Law Society is not a "competent administrative authority". However, it is not necessary to deal with that submission.

It is clear from the above that I am satisfied on the balance of probabilities that there was a dismissal and I reject the allegation that the applicant was directed to take leave. The word "dismissed" was not alleged to have been used by any witness but in my view, a dismissal can be inferred from conduct. Matters which support her claim that she was dismissed include the following: Mr Shore, her neighbour, told the Commission that in her distressed state on the afternoon of 12 October, she told him that she had been dismissed. That evidence was proximate enough in my view to provide corroboration and I think it hard for her to feign the distress noted by Mr Shore. (Similar evidence from Mr Hanlon (a Barrister) as to his observations on 16 October is viewed in a different light as it does not have the same weight due to lack of proximity). Mr Orange, at the time he escorted the applicant from the office demanded back her keys and office key card, a demand which I find inconsistent with being sent on annual leave. As earlier stated, Mr Doyle had communicated with Mr Orange about the letter of 12 October and indicated he considered she had resigned and that the breach of confidentiality was ground for termination. I am satisfied that Mr Orange's action in ushering her out of the office with a demand for her keys and office key card constituted the dismissal. I do not consider the demand for the resignation constituted a dismissal or a constructive dismissal. It was accompanied with an exhortation for her to reconsider her relationship with the firm. She was not given an ultimatum. The 12 October letter from the applicant's Solicitors was in my view, premature although it probably reflected the applicant's acceptance of the probable consequences of her refusal to sign the documents. The applicant went to work on 12 October and obviously by doing so, she considered she was still employed. The requests for the resignation occurred over earlier days. There was also the fact that upon being ushered out of the building Mr Orange testified that she said to other staff "Goodbye, it's been nice working with you", indicating to me that there was some finality.

#### **The assault:**

The applicant alleges that she was assaulted by Alexander Orange after she had been directed to leave. She complains that during the morning of 12 October, he was badgering her as to whether she would yield to the respondent's requirement that she resign because she would not sign the documents. She went to lunch as she was waiting for the delivery of the pre-arranged 'without prejudice' letter from her Solicitors, Stubbs Barbeler and Grant. After lunch, at about 1.45 p.m. Alexander Orange came to her in an agitated state yelling that he had received the 'without prejudice' letter and he wanted her to immediately leave the office. She attempted to log out of her computer when Orange yelled at her to "leave it on". He then seized her right upper arm with both hands and pulled her to him, shaking her, stating that he didn't want the hardware to get damaged. She was then escorted out of the office. She suffered some bruising to her right arm.

This assault has been denied. Mr Orange alleged that he went to her office to require her to take leave after the receipt of the letter. He directed the applicant not to touch the computer when she sought to turn it off. She ignored him and being concerned with what she was doing, he eventually took hold of her right arm to prevent her from doing so. She pulled away and his hand simply dropped off her arm. This account is not accepted.

Mr Gregory Sawyers, then an Articled Clerk with Doyles (now elsewhere employed) was seated in a glass walled office adjacent to the incident and did not see Mr Orange come into contact with the applicant at any time. He was privy however to the raised voices of both combatants. Although Mr Sawyers said he lost sight of them for a few seconds, this did not occur while the applicant was in the vicinity of her computer and he saw no assault at that time. He did not see Orange pull or shake the applicant. However, Mr Shore, the neighbour referred to earlier, remembered that at about 3.30 p.m. on the relevant day, he met the applicant in the common area (of their residential unit complex). According to him, she was distressed, tearful and trembling. She broke down and told him her "boss" had assaulted her and she showed him marks on her upper right arm where she said he had grabbed

her and manhandled her while dismissing her. The evidence of this event was sufficiently proximate in my view and as I said earlier to amount to substantial corroboration of an assault. There were of course, then the marks on the applicant's arm which in themselves provide sufficient corroboration. Those marks were also noted by a Doctor she visited on 12 October.

I am satisfied on the balance of probabilities that the bruising was caused when Mr Orange took hold of her right arm while she was seated in the vicinity of the computer. I am satisfied that he applied force to the extent that it caused bruising. It may be that because of Mr Sawyer's evidence (which I have no reason to doubt), the conduct was not as violent as Ms Serratore has detailed but I am satisfied there was an assault. It is notorious that witnesses will view an event from a different perspective, even being as honest as they can be and are unlikely to recant an incident that occurs so quickly with perfect accuracy. I am satisfied that the use of the force in this case was not reasonably necessary in order to defend Mr Orange's possession of the computer/software/information stored thereon, a defence which is available to him under the provisions of s. 275 of the Queensland Criminal Code. This was a young female first year practising Solicitor. The application of force sufficient to cause bruising was, I am satisfied, unnecessary to protect the property. Ms Serratore claimed she was endeavouring to turn the computer off and there was no real ground for any other suspicion.

**Standard of proof:**

Because of submissions made, it is appropriate that I make some reference to the standard of proof. Even though criminal conduct in the form of an assault is alleged, the standard remains the same, that is, on the balance of probabilities. It is the strength of the evidence necessary to establish a fact or facts on the balance of probabilities which may vary according to the nature of what it is sought to prove. It was said in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170 that "authoritative statements have often been made to the effect that clear and cogent or strict proof is necessary 'where so serious a matter as fraud is to be found'. Statements to that effect should not ... be understood as directed to the standard of proof". Those statements refer to criminal matters such as the assault but not in my view to allegations that a dismissal is for an invalid reason.

**Findings:**

Upon the whole of the evidence in this case, I am satisfied on the balance of probabilities that the dismissal was harsh, unjust and unreasonable. In terms of s. 77 of the Act, the applicant was not notified of the reason for the dismissal, was not warned about the conduct capacity or performance and was not given an opportunity to respond. The manner that the dismissal was effected is of significance and falls under the provisions of s. 77(d) of the Act "other matters". I am then satisfied that the dismissal was an unfair dismissal. I am not satisfied that the dismissal was for an invalid reason.

**The remedy:**

I turn then to the question of remedy. The applicant does not seek reinstatement or re-employment. The respondent objects to reinstatement or re-employment. It is clear that the relationship that developed between the parties renders reinstatement or re-employment most impracticable.

**Compensation – principles:**

The applicant seeks an award of compensation and there are a number of issues to be considered.

She was a short term employee (of seven months) engaged in a professional capacity for a firm of Solicitors. She had been admitted to practice in Queensland on 4 January 2000 after having obtained legal and other qualifications in New South Wales. She was admitted as a legal practitioner in New South Wales on 18 December 1998. She also worked for periods of time in New South Wales. She was described by a witness as "assertive" and that evidence is supported by other evidence that she resisted, in a number of ways, the authority of Mr Orange. She was much smaller in stature than Mr Orange.

Ms Serratore seeks an award of special damages, general damages and aggravated damages. As general damages and including damages for injury to her feelings and her distress, the sum of \$20,000 is sought. For aggravated damages, because of dishonest evidence by the respondents, because of gratuitous denigration of the applicant to blacken her name, because an attempt had been made by respondent's former Solicitors to denigrate her name and because the Friday before the trial, she was served with an attendance notice to produce certain documents with an apparent intention of intimidating her, a sum of \$10,000 was suggested. Acknowledging that there is a cap to the damages available in the Commission under s. 79 of the Act, she seeks that the award should equate to the maximum allowable.

It firstly needs to be said that the Commission, in assessing the amount, should not start with the proposition that the maximum allowable amount is 6 months wages and it is only the most grave conduct which would attract such an award. It is simply an arbitrary cap on the amount that may be awarded and is not a maximum amount reserved for the most grievous or serious case – *Shorten v Australia Meat Holdings Pty Ltd* (1996) 70 I.R. 360 and *Lucas v Lather and Golden Port Pty Ltd* 153 QGIG 1542.

Section 79(3) of the Act requires the Commission to take into account any amount paid to the employee by the employer on the dismissal. Nothing was paid. (This in itself leads to a conclusion that the dismissal was harsh, unjust or unreasonable).

A golden rule in the law of contract is to be found in *Hadley v Baxendale* (1854) 9 Ex 341, where Alderson B said:

*"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*

*Carter & Harland Contract Law in Australia* 3<sup>rd</sup> Edition at para 2109 relates that damages under the first limb of the rule in *Hadley v Baxendale* are sometimes described as "general" damages and those awarded under the second limb are "special" damages. "General" damages are those which the law presumes to flow as the direct consequence of the breach, whereas "special" damages are of an exceptional nature.

Aggravated damages may be awarded where a plaintiff's injury has been made worse by conduct of the defendant i.e. as learned Counsel has said, "where salt has been rubbed into the wound".

It should be pointed out that the claim in this case is brought under a Statute which makes provision for a remedy by way of compensation in lieu of reinstatement. It is not a claim for breach of contract for wrongful dismissal or a tortious action for a civil wrong. This Commission is not vested with ordinary civil jurisdiction. The right to bring the action in this Commission is created by Statute and the damages which may be recovered are limited to those which are provided for in that Statute. The Commission is governed in its decisions by equity, good conscience and the substantial merits of the case – s. 320(3), provisions which are not generally applicable in contract or tort. See also *Lucas v Lather* (supra). In *R v The Industrial Court of South Australia; Ex parte General Motors – Holdens Pty Ltd* (1975) 10 SASR 582 Bray CJ held that the South Australian Industrial Conciliation and Arbitration Act was designed to apply to all dismissals, whether wrongful or lawful at common law. He pointed out that the criterion under the Act was not lawful or wrongful dismissal but harsh, unjust or unreasonable dismissal. This is the same position under the Queensland Act. It is probably therefore inappropriate to refer to statutory compensation as being categorised as special, general or aggravated damages although principles applicable to an award of those types of damage may well be appropriate in certain circumstances (see e.g. *Capewell v Cadbury Schweppes Australia Ltd* 1998 43 AILR 13-133). Section 79(1) does not provide how the compensation is to be assessed.

Over the years, certain principles have been developed in this Commission which govern the assessment of compensation. This Commission is bound by the decisions of its Presidents and decisions of other Commissioners are persuasive. It is these Courts and Commissions dealing with industrial matters that have provided the binding precedents. References generally to principles from decided cases in the Anti-Discrimination Commission and the Human Rights and Equal Opportunities Commission dealing with the assessment of compensation are, in my view, of little assistance. Compensation in the Industrial Commission is awarded as an alternative to reinstatement, not as a remedy *per se*.

In *Atkin v Hymix* 160 QGIG 165, Williams J held that the object of compensation is to restore the employee as far as practicable to the financial position in which he would have been but for the wrongful dismissal. It has also been the practice in this Commission to apply certain principles from *Chenery v Klemzig Nursing Home* 55 S.A.I.R. 544 (see *Robinson v Goodman Fielder Mills Limited* 148 QGIG 247 per Swan C; *Ms B v Store X* 148 QGIG 181 – again per Swan C where the appeal entitled *Lindsay v Katies Fashion (Aust) Pty Ltd* 150 QGIG 59 did not result in reliance on *Chenery* being criticised; *Griggs v Health Equipment Hire and Supplies Pty Ltd* 149 QGIG 131 per Bougoure C and upheld on appeal in *Healthequip Hire and Sales Pty Ltd v Griggs* 150 QGIG 1402; *Axelby and Others v Australian Municipal, Administrative, Clerical and Services Union* 151 QGIG 826 and *Cater v Electra Cables (Aust) Pty Ltd* 155 QGIG 328 both per Bougoure C and more lately see *Marcinow v Marketplace Communications Pty Ltd* 166 QGIG 10 per Asbury C). The relevant Act, except in *Marcinow*, provided in each case that orders be appropriate “to put the employee in the same position (as nearly as can be done) as if the employee had not been dismissed”. That latter provision is absent from the *Industrial Relations Act 1999* but that absence in my view is no reason to disregard it as a sound principle in assessing compensation to be awarded under the Statute.

In *Chenery*, the Full Commission considered the following, while not an exhaustive list, should be considered according to their relative importance:

“The nature of the employment; the qualifications required for the position held by the dismissed employee and the qualifications actually held by that person; the dismissed employee’s salary with the respondent; the dismissed employee’s age; the normal retiring age for an employee holding the position in question; the salary scale (if any) attaching to the position; what reasonable expectation might the dismissed employee have had for future job security; the loss by the dismissed employee of a reasonable chance to qualify for long service or other leave of absence; the loss by the dismissed employee of a chance to qualify for superannuation or other similar benefits; the loss by the dismissed employee of sick leave credits; the length of time that will probably elapse before the dismissed employee is likely to obtain equivalent or other suitable employment and at what likely remuneration. Consideration must be given here to evidence upon which a conclusion may be derived as not only to the availability of similar employment but also of the likely effect of the perception by prospective employers of the reasons for which the dismissed employee was dismissed; what non refundable remuneration (if any) has the dismissed employee received from any other source (other than interest from investments) between the date of the dismissal and the date of the assessment.”.

In *Aitken v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia* (1995) 63 IR 1 Lee J referred to the statutory remedy under s. 170EE of the *Industrial Relations Act 1988* (Cth) and said:

“In assessing the compensation that is appropriate the Court will have regard to what is reasonable in the circumstances and will look at what would have been likely to occur had the Act not been contravened. .... The Court will consider the detriment occasioned to the employee by the employer’s contravention of the Act, and the extent to which it is reasonable to compensate the employee for such consequences. Division 3 of the Act provides the context in which s. 170EE is to be construed. It includes provisions intended to protect the dignity of an employee, in particular, s. 170EA provides an employee with a right to seek redress in respect of a breach of the Act and s. 170EE provides the entitlement to receive compensation as the remedy for such a breach, characteristics of a statutory tort. Therefore, in some cases principles relevant to the assessment of damages in tort may provide assistance in assessing the compensation to be paid under s. 170EE(2).”.

#### **Damages for hurt, humiliation and distress:**

In holding that it was appropriate to award damages for vexation, mental distress, disappointment or frustration, Lee J said:

“It is also appropriate to keep in mind that the purpose of the Act in providing for compensation to be paid to an employee for an employer’s failure to abide by the terms of the Act is not only to redress a wrong done to the employee but, in the public interest, to instil greater awareness of, and adherence to, the provisions of the Act. A measure of compensation which addresses the consequences caused by conduct that has breached the Act assists to meet that purpose.”.

That decision was followed in *Burazin v Blacktown City Guardian Pty Ltd* 142 ALR 144 where the Full Court of the Industrial Relations Court of Australia left open the question whether damages for breach of contract (wrongful dismissal) could include damages for distress but held that Ms Burazin was entitled under her statutory claim to be compensated for the distress she had suffered as a result of her treatment by the respondent. The Court went on to say:

“The court’s power under s. 170EE(2) of the Act is to order payment of ‘such amount (of compensation) as the Court thinks appropriate’. In making its assessment, the court is obliged to have regard to lost remuneration, but is not limited to that item. If the evidence establishes other damage flowing from the unlawful termination, the court is entitled to take that into account in making its assessment ...”.

In concluding, the Court advocated restraint because there is an element of distress in every termination.

In *Oloyede v Sunshine Plantation Pty Ltd* 156 QGIG 674, Hall CC (as he then was) treated as “very persuasive” the decision in *Burazin* which was also followed by myself in *Sheedy v Farmers Arms Hotel* 160 QGIG 99. Distress damages were awarded in both cases. *Burazin* was followed in *Liu v Coms21 Limited* Australian Industrial Relations Commission 25 February 2000, Print S3571.

#### **Aggravated damages:**

In the New South Wales Court of Appeal in *Hunter Area Health Service v Marchlewski & Anor* (2000) NSWCA 294 Mason P, in delivering the judgment of the Court, dealt with an action for negligence where aggravated damages were claimed. It was pointed out that tort damages may be increased or aggravated by reason of the defendant’s conduct after the initial wrong. It was further pointed out that the classical example is defamation where conduct at the trial may increase compensatory damages by giving rise to aggravated damages.

This is what the applicant seeks here.

The Court went on to say that the conduct must go beyond what is involved in a *bona fide* defence raised properly or justifiably in the circumstances known to the defendant – (*Triggell v Pheaney* (1951) 82 CLR 497, cited by applicant’s Counsel).

Differences between aggravated damages (as compensation for aggravated harm) and exemplary damages (intended to punish) were highlighted. The Court referred to the surprisingly little attention that has been paid to the identification of those wrongs which attract an award of aggravated damages and those that do not. Reference was made to a Report of the Law Commission (UK) which expressed the firm opinion that aggravated damages are not available in personal injury actions based solely on negligence or actions for breach of contract. Usually they are awarded in actions for defamation, intimidation, trespass to the person and malicious persecution (all of which are torts).

Reference was made by Mason P to *Kralj v McGrath* (1986) 1 All ER 54 where Woolf J considered it wholly inappropriate to introduce the concept of aggravated damages into claims for breach of contract and negligence. It was considered to be wholly inconsistent with the compensatory function of damages in those areas. *Kralj* was approved in *AB v South West Water Services Ltd* (1993) QB 507.

Mason P held that aggravated damages were not available in an action for negligence.

In *Burazin*, the Full Court also pointed out that the traditional view is that the measure of damages for a breach of contract is unaffected by the manner of the breach so that even a wilful or malicious breach would not affect the measure of damages.

There was a submission that aggravated damages are often awarded in the Anti-Discrimination Commission and some authorities from that jurisdiction were cited. However, for the reasons related earlier, I think it inappropriate to rely on principles from that jurisdiction as authority for an award of aggravated damages. Until *Burazin*, it was regarded in industrial circles that compensation for hurt, humiliation and distress was not available – *Lucas v Lather* and *Mrs B v Store X* supra. *Burazin* held that such damages could be awarded as part of the statutory claim, not as part of a contractual claim. The judges in the cases just referred to have refused to extend the concept of aggravated damages into the field of contract or negligence where inconsistency with the concept of the compensatory function of damages was referred to. There is some similar authority in industrial law. In *Lucas v Lather*, Hall CC (as he then was) said that the essence of compensation is the making up of a loss. He opined that because the Industrial Commission is governed in its decisions by equity, good conscience and the substantial merits of the case, it should not decide on an amount of compensation which exceeds the actual loss. In *Capewell*, Sharkey P held that the conduct of both the employer and the employee is not relevant to the calculation of compensation. He rejected an increase in compensation for something equivalent to exemplary damages.

Moreover, the Act does specifically provide for sanctions for certain identified conduct. Section 73(2) (Invalid reason) sets out specific conduct which is to be subject to penalties and there is a provision in s. 335 where unreasonable acts connected with the conduct of the application can attract an award of costs. Of course, damages or compensation for hurt, humiliation and distress is just that, compensation. It is not awarded as a punishment.

The failure of the Courts generally to recognise awards of aggravated damages in cases other than a few torts, principally defamation, the apparent hesitance with which the industrial tribunals have accepted the inclusion of distress damages as compensation, together with the little authority that exists in industrial law, lead me to the conclusion that an award of aggravated damages should not be extended to compensation cases under the *Industrial Relations Act 1999*.

However, to deal with the merits of the application for aggravated damages, the applicant pointed to four matters, namely a dishonest defence, gratuitous denigration of the applicant in the affidavits, intimidation because of service of Attendance Notices and a letter written by a former Solicitor for the respondent to WorkCover.

In regard to the dishonest evidence claim, it was submitted that either the applicant was telling lies or the respondents were telling lies and that it was the duty of the Commission to decide which. With respect I do not see that as my duty at all. My duty is to decide on the balance of probabilities the facts necessary for the decision. If on that journey I come to the conclusion that a witness is telling lies is one thing. However, it may be that I simply accept certain evidence on the balance of probabilities. Because of that acceptance, the accompanying rejection of the alternative account does not mean I have come to the conclusion that the alternative version is lies. That a witness may appear to be telling a lie does not *per se* mean that aggravated damages should be awarded.

Secondly, there was a complaint that there were some statements made which would tend to blacken the character of the applicant. However, there were many statements made by the applicant which I have referred to elsewhere and which were not very complimentary to the respondents and which were intended to put the respondent in a "bad light", as submitted by learned Counsel for the respondent. Ms Serratore also called evidence to prove that the Office was operated in a "cloak and daggerish" manner, that the *modus operandi* was strange, that the work environment was odd, that Mr Orange deliberately kept an employee back after 6.00 p.m. when he knew her husband was waiting for her, that Doyles was not a sociable place to work, the general atmosphere was forced and odd and a failure to achieve 80 units or 8 billable hours per day had resulted in Carmel Doyle going "ballistic". Another witness gave evidence of being harassed about fairly petty things, including her clothing (or lack of it), that Mr Orange became aggressive, red faced and would shake with rage, banging his finger onto the desk. These allegations provide fertile ground for retaliation.

Another complaint was that by service on her of an Attendance Notice to produce documents, the applicant was being intimidated. That Attendance Notice required, *inter alia*, that the applicant produce copies of applications made for other employment during the course of her employment with Doyles. The Notice was set aside, principally because the respondents had the opportunity to cross-examine the applicant about those issues and did not. However, they were *prima facie*, very relevant issues in regard to how long she intended to stay at Doyles and had the Notice required the documents to be produced at the start of the trial and not at the end of the trial, it probably would not have been set aside.

There was also a letter written to WorkCover by Mr Buntman, the respondent's former Solicitor. The contents were extremely vague but were in fact not connected with this litigation at all.

#### Other damages:

After the incident, Ms Serratore, through the efforts of a friend, obtained two weeks' work and received a gross payment of \$1,200. On 8 November 2000, she lodged a WorkCover application following medical certificates in relation to "psychological distress" and "soft tissue injury right upper arm". She also experienced "tingling" in her fingers. The claim was accepted by WorkCover on 14 February 2001. She received 85% of her salary for 26 weeks and then 60% of her salary for another 3 weeks until she commenced full time work with another firm of Solicitors.

Her claims for special damages are quantified as follows –

Loss of potential income to Friday 18 May, 2001	5,827.94
Difference between cost of medications, counselling and medical attendances	635.85
Interest because of late payment or nonpayment for reliance on credit card (to date)	335.64
Loss of potential pay rise (p.a.) because Practising Certificate status affected Superannuation contributions	10,000.00 not quantified
Air fare to second interview for position at Doyles	634.00
Car hire – airport to city and return – re that interview and petrol	107.41
Relocation costs to Brisbane – car hire and petrol	442.50
sale of Telstra shares to provide funds – brokerage sought	– purchase 50.00
	– sale 50.00

**Statutory cap – superannuation contribution:**

The applicant accepts that after all amounts have been assessed, they are subject to the statutory cap which in this case would amount to \$21,600 being one half of her annual salary of \$40,000 plus 8% superannuation contribution amounting to \$3,200. Is the superannuation contribution of 8% to be included in the term “wage”? In my view it is not. The applicant pointed to the definition of “wage” in the Dictionary in Schedule 5 of the Act and submitted that an amount payable on termination of employment includes compensation and therefore includes any element of financial loss referable to the unfair dismissal. However, it is noted that under s. 278, “wages” and “superannuation” are separately provided for, leaving me with the view that the superannuation contribution required to be paid by an employer is not part of “wages” as defined and as consequently provided for in s. 79(2). An amount payable on termination includes long service leave, annual leave and notice and does not include compensation for unfair dismissal which is not “payable” until it has been assessed after application in that regard. In my view, the cap provided for in that subsection does not include the superannuation contribution so that the sum of \$20,000 is the maximum that the applicant can be awarded in this case. “Wages” is not “remuneration” as was previously provided for in the *Workplace Relations Act 1997*.

**Deduction of WorkCover payments:**

With regard to the claim for loss of potential income amounting to \$5,827.94, learned Counsel for the applicant, during submissions argued that the receipt of WorkCover benefits should not be taken into account so that the figure of \$5,827.94 should be much higher and would in fact amount to the salary plus superannuation contribution actually lost before she finally secured work elsewhere.

Learned Counsel for the applicant referred to a decision of Moore J in the Industrial Relations Court of Australia in *Brown v Power and Power t/a Royal Hotel Tumut* Decision 140/96. While Moore J held that compensation payments should be taken into account, learned Counsel pointed out that care needed to be taken in applying such decision to the law as it exists in Queensland. It was submitted that in that case, the employer was notionally required to make the compensation payments and although it is almost always paid by an insurance company, the obligation remains on the employer. His Honour treated as quite different, payments made under the Social Security Act 1991 (Cth). It was further submitted that the section of the Commonwealth Act under which the decision was made, s 170EE(3) requires the Court to have regard “to the remuneration that the employee would have received, or would have been likely to have received, if the employer had not terminated the employment”. It was submitted that there is no equivalent provision in Queensland.

That is correct. However, the discretion as to the amount to be awarded is not fettered in any way by s. 79, other than for the cap.

*Brown* was followed in *Shorten v Australia Meat Holdings Pty Ltd* (1996) 70 IR 360 where again, workers’ compensation payments were taken into account. *Chenery* makes relevant what non refundable remuneration the dismissed employee has received from any other source. Bougoure C said in *Griggs*, approved on appeal, that any award should be to compensate the employee for the loss caused by the dismissal and that an assessment would generally take into consideration any income received during the relevant period. He also said that to receive workers compensation and be paid compensation for the same matter was “double dipping”. In *Axelby*, he referred to *Norton Tool Co v Tewson* (1973) All E.R.183 where it was said that the object of a compensatory award is to compensate and compensate fully but not to award a bonus. He said:

*“It is therefore appropriate that a deduction be made for earnings during the compensation period and for unrefundable payments made in lieu of or due to inability to work.”.*

The Commissioner also held this opinion in *Cater* and again applied *Norton*.

In *Lucas v Lather and Others* (supra) Hall CC held that because the Industrial Commission is governed in its decisions by equity, good conscience and the substantial merits of the case, the Commission should not decide on an amount of compensation which exceeds the actual loss.

Learned Counsel relied on the decision in *Sprigg v Paul’s Licensed Festival Supermarket* (1998) 88 I.R. 21 where the Australia Industrial Relations Commission, while referring to *Shorten* said:

*“We can make no deduction at this stage for WorkCover payments made since the termination.”.*

The Commission gave no reasons for apparently departing from what had fallen in *Shorten* and with respect, it is unknown what the words “at this stage” mean.

The case of *National Insurance Co of NZ Ltd v Espagne* (1961) 105 CLR 569 was also relied upon by learned Counsel for the proposition that in a personal injuries action, a negligent party cannot treat insurance as operating in relief of liability so that the respondent here cannot rely upon the receipt of WorkCover to limit its liability. But as I said earlier, this is not an action based upon the tort of negligence, nor for breach of contract and while some of the principles applicable to an assessment of damages in tort and contract may be appropriate, I do not consider that, in my discretion, an amount which has the effect of providing a windfall by way of both WorkCover and full salary to be appropriate. I do not think it to the point that depending on what other litigation the applicant might pursue, the WorkCover payments may be potentially refundable. At the present time, they are not refundable. I do not propose to apply what seems to have fallen in *Sprigg*. I hold that the WorkCover payments should be taken into account and deducted.

**The length of time that the employment may have lasted:**

While the applicant was a Solicitor and, according to a Barrister friend, obtained “intellectual satisfaction” from the quality of the work she performed at Doyles, her documents and witness statements brought into question the whole of the employment relationship and her problems almost from the first day of employment. Some of her allegations were without foundation. However, these allegations have revealed that she was not happy in her relationship and that she challenged her employer on various matters almost from the inception of the relationship. It would appear that she was inconsistent when she told Mr Hanlon that she was “intellectually satisfied” by the quality of the work she did. Her allegations have included that:

- she was not informed that she would be required to execute a written contract of employment containing a restraint of trade clause. That claim was denied but I thought it to be probable that something along those lines would have been raised initially. The applicant related that there was an initial conversation about her not using the firm to advance her career and then leaving to go to a larger firm.
- her curriculum vitae would be provided to clients of the firm.
- she was denied her first pay until she signed a contract of employment and on 22 March (only nine days after commencing work) told Mr Orange that it was blackmail. At a previous place of employment with Corrs Chambers Westgarth in Sydney she had entered into an employment contract, she did not have one when she worked at the South-West Sydney Legal Centre (where she was firstly a volunteer law student and then as a Community Tenancy Worker for the Tenant’s Advice Service) and she did not have one when she worked with Bouzanis and Kekatos. However, the position was professional and I consider she should have expected a written contract and that the “offer and acceptance” to which she referred in evidence was conditional.

- she expressed reservations about terms and conditions of the contract, leading to some variations. That contract and other employment contracts involving other staff were signed under duress.
- she was not informed that she was required to perform a minimum of 8 billable hours per day.
- between 19 June and 23 June, 2000, she performed 70 hours of work and was not able to take lunch or dinner breaks and food was not supplied. She sought a day off but it was denied. She did not even receive a “thank you”.
- throughout June 2000 she reminded her employer that she had not had her performance review and salary increase she alleged was due on 9 June. This was not held until 26 June.
- she believed she was overworked and put through considerable stress to produce the 8 billable hours per day which, according to surveys produced, was well above the industry norm.
- despite the review being favourable, she was not paid retrospectively to the date which was to have applied under the terms and conditions of employment. When she raised this matter with Orange, she was subjected to verbal abuse. It emerged that although two weeks late, back payment was in fact made to 5 June which was prior to the anniversary of her three month appointment.
- the respondent did not provide her with business cards as they had done for another Solicitor and the employer had provided that solicitor with a car space. It emerged that she did not ask for business cards and the employer claimed that the other Solicitor was not provided with a car space at employer expense.
- after the applicant was given permission to attend a CLR seminar on the new Uniform Civil Procedure Rules, the other male Solicitor was sent instead to save on costs. Because of the respondent’s failure to promote her as it did her male counterparts, the applicant considered she was discriminated against because she was female.
- she contacted the Queensland Law Society in July 2000 for advice regarding the renewal of her practising certificate and was subjected to verbal abuse by Mr Orange because she did so.
- she sent an Email on 26 June to Tony Doyle complaining about her working conditions.
- she alleges that she used to cry on occasions because of the stress, that she suffered sleep deprivation, depression, reflux, vomiting, headaches and dizziness because of the bullying to sign the documents. Yet she made no complaint to her Barrister friend of stress, harassment, discrimination or bullying, nor did she complain to Ms Doyle or seek medical help.
- James Doyle admitted she had complained to him of bullying by Mr Orange, (which, by the way, indicates a degree of frankness upon his part).

It is not so much whether these complaints were soundly based. What is relevant is her feelings and attitude towards her employer. Her complaints, if true, reveal an employer who was intolerant and immune to the concept of basic human dignity.

In *Reine v Rumpe* Industrial Relations Court of Australia cor. Madgwick J on 1 November 1995, decision No 643/95, applied by Bougoure C in *Cater*, it was held that regard should be had to the true length of time that the employment might have endured. Williams J in *Atkin* held that compensation must be assessed in the light of the finding that, because of the breakdown in the working relationship, the appellant would not have remained for long in the employment of the respondent.

Superimposed upon this obvious unhappiness was the employer’s requirement that the applicant sign the documents. She objected and refused. While this trial did not devolve into an enquiry whether there was in fact anything in her objection, it was the employer’s requirement that they be signed. It was the employer’s practice that they be signed. All other staff were required to sign and it would appear that Ms Serratore had a brother who was a Consultant with a construction firm. Prior to her employment with Doyles, she had assisted her family, relatives and friends (who were in the construction industry) with preparation of tenders, invoices and administration. The documents were about the construction industry. No evidence was given to the Commission to the effect that there was anything wrong with the documents required to be signed, other than the evidence of the applicant herself. In these circumstances, it is probable and I so find, that the applicant’s employment with Doyles was not long term. She may well have been terminated lawfully because of a failure to comply with a lawful and reasonable direction, whether the requirement was contained within her contract of employment or not. The implication of such a term into the contract may well have met the legal tests – [*R v Darling Island Stevedore & Lighterage Co Ltd; ex parte Halliday and Sullivan* (1938) 60 CLR 601 at 621-2]. But the real issue in my view is that because of her unhappiness, it is probable she would have eventually resigned. Counsel submitted that any unhappiness was due to the respondent’s conduct and in those circumstances, it would be improper to bring it into account. But not all of the conduct complained of was improper. Her dissatisfaction was due, to some extent, to her own misconceptions.

I am satisfied that the applicant would not have continued in this employment for any longer than another 6 months. That period would not have extended beyond about 12 April 2001.

#### Compensation assessed:

As to the claim for loss of potential income, applicant was employed for 2 weeks and earned \$1,200. She was on WorkCover at 85% of her normal salary until 29 April, 2001. While I consider her employment would have terminated by 12 April, 2001, her loss of earnings extended beyond that date because of her injury. That loss extended up until she ceased WorkCover and commenced employment on 18 May, 2001. I assess loss of earnings as follows –

Difference between normal pay for the initial two weeks and the amount actually earned – \$1,538.46 less \$1,200	\$338.46
26 weeks (expiring 29 April 2001) x 15% of gross salary of \$769.23 (after deducting the 85% WorkCover and ignoring the employer’s superannuation contribution)	\$3,000.00
3 weeks (expiring 18 May) x 40% of gross salary of \$769.23 (after deducting 60% paid by WorkCover and ignoring the superannuation contribution)	\$923.08
<u>Total loss of income</u>	<u>\$4,261.54</u>

The difference in the cost of the medications etc. is directly related to the dismissal, is not too remote and in my view is appropriate compensation. I allow the \$635.85 claimed.

Because of the employer's resistance to the grant of WorkCover following upon the injury sustained at the time of the dismissal, I am satisfied that the applicant was required to pay for many items on her Visa Cards. Her claim for the interest on those cards is not too remote, is directly related to the dismissal and is allowed at \$335.64.

The claim for loss of potential pay increases due to the status of the Practising Certificate, estimated at upwards of \$10,000 is not allowed. It was claimed that because the injuries delayed her ability to achieve an unconditional status, a loss has occurred. I consider this claim is too remote.

There was an unquantified claim for superannuation contributions. While I do not consider superannuation to be wages, compensation under the Act is not limited to wages. I am satisfied that the lost superannuation contribution is directly relevant to the dismissal and was lost because of the dismissal and should therefore be included. I allow 8% of \$769.23 times 29 weeks, calculated to be \$1,784.61.

The claims for air fares and car hire in connection with the second interview for the job and then the claim for relocation costs from Sydney to Brisbane were claimed as general damages for the waste of her investment in gaining this employment. They are not allowed. I consider these had nothing to do with the dismissal, are too remote in that they do not fall within the rule in *Hadley v Baxendale*. The applicant did not seek reimbursement during the term of the employment and there was no contractual liability or other undertaking or expectation for reimbursement by the respondent. Her subsequent employment has been found in Brisbane where she now resides. The claims are disallowed.

The applicant sold some Telstra shares soon after termination because of a lack of funds. She seeks reimbursement of the brokerage charges. Her lack of funds to pay rent was directly attributable to the dismissal and her WorkCover claim which, although not admitted until 14 February 2001 attracted a payment about 12 January 2001. I am of the view that the claim for \$50 brokerage for the sale of the shares is not too remote and should be included in the compensation allowed. The claim for the \$50 brokerage for the initial purchase of the shares is on a different footing and is disallowed.

As to the global claim for general damages, while a plaintiff is entitled to recover the estimated pecuniary loss resulting from the dismissal and of which he/she has been deprived by the dismissal, I have already found that this employment would not have continued beyond 12 April 2001 and the applicant has been awarded compensation to that period of time. A further award for future loss is not appropriate.

Unlike the assessments for hurt, humiliation and distress which were made in *Oleyede* (\$1,200 where she was told of the dismissal "bluntly" and forced to drive from Big Pineapple back to Brisbane in shocked state); *Sheedy* (\$1,500 for being pushed out the door at time of dismissal, suffering some bruising but no psychological damage); *Burazin* (\$2,000 for being forcibly removed by police); and *Sunderland v Sunset Equipment Pty Ltd* 157 QGIG 185 (\$800 for unexpected dismissal in front of wife, shocked), the applicant's suffering in this case was much more significant. While the assault itself was minor, the psychiatric damage evidenced by the time the applicant was off work, was occasioned by the assault and the dismissal and cannot be ignored.

Although when dealing with the question of aggravated damages, I have considered it to be inappropriate to follow cases in other statutory hierarchies like the Anti-Discrimination Commission, I would adopt, as relevant in these proceedings, the words of Wilcox J in the Federal Court in *Hall & Others v A & Sheiban Pty Ltd & Others* 85 ALR 503 at 544, a case in the Human Rights and Equal Opportunities Commission concerning sexual harassment. His Honour cited May LJ in an English case as follows:

*"Where the discrimination has caused actual pecuniary loss, such as the refusal of a job, then the damage referable to this can be readily calculated. For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months ..."*

At first glance, being on WorkCover for 29 weeks due to a minor assault may seem incredible. However, no issue appears to have been taken by the employer with the diagnosis, the WorkCover claim was approved and no review was sought. The following passage from *Hall* at 544 also seems to be appropriate in these circumstances:

*"One particular person may react to sexual harassment in a manner which is quite different from the manner in which another person may react. Whilst an unusual reaction may properly excite careful scrutiny, even scepticism, once it be accepted – if it is accepted – that the reaction is a genuine result of the relevant conduct, the complainant is entitled to have damages assessed upon that basis. The damage is not to be ignored or discounted simply because the effect of the conduct on the complainant is unusually severe. Expressed in presently relevant pronouns, the rule is the same as in other areas of tort law: a sexual harasser takes his victim as he finds her."*

Because of the receipt of WorkCover benefits and the allowance in this assessment for loss of earnings, the applicant has been fully compensated for her time off work. It remains for her to be compensated for the hurt, humiliation and distress associated with that assault and dismissal, as evidenced by the length of time she was certified unfit for work.

There are no precedents in this jurisdiction where there have been significant awards for hurt, humiliation and distress, probably simply because there have been no cases where significant injury has been sustained.

In all of the circumstances, I assess an amount of \$10,000 as compensation for hurt, humiliation and distress.

**Summary of compensation:**

Loss of earnings	\$4,261.54
Medications	\$635.85
Visa card interest	\$335.64
Superannuation contributions	\$1,784.61
Brokerage	\$50.00
Hurt, humiliation and distress	\$10,000.00
	<u>\$17,067.64</u>

Bearing in mind that as a result of this decision, the applicant will have been compensated fully for her lost income for the period she was incapacitated together with a significant sum for hurt, humiliation and distress, I do not consider that other matters identified in *Chenery* call for an increase to the

amounts already awarded. In endeavouring to do justice to both the applicant and the respondent, I assess the sum of \$17,067.64 as compensation in lieu of reinstatement. I order that the amount be paid to the applicant within 21 days of the date of release of this decision.

I order accordingly.

B.J. BLADES, Commissioner.

Released: 28 August 2001

*Appearances:-*

Mr M.P. Amerena, instructed by Ms C. Tucker, of Stubbs Barbele Grant for the Applicant.  
Mr J. Merrell, instructed by Mr C. McInerney of Hopgood Ganim for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 276 – power to amend or void contracts*

**Robert Wilson AND TNT Australia PTY LTD (No. B460 of 2000)**

COMMISSIONER SWAN

29 August 2001

Application pursuant to s. 276 of the *Industrial Relations Act 1999* – Contract between contract courier driver and respondent company – Contract unfair – Compensation to be awarded – Further Submissions on question of compensation – “Current Value” of the “vehicle with work” – Accounting methodology considered – Amortisation of interest over term of applicant’s contract – Respondent’s offer of “redundancy termination payment” – Discretion to be exercised – Respondent to pay compensation to applicant – Contract voided.

DECISION

On 12 April 2001, the Commission issued a decision relating to matter No. B460 of 2000 (Robert Wilson and TNT Australia Pty Ltd). The application had been made by Mr Wilson pursuant to s. 276 of the *Industrial Relations Act 1999* (the Act) and sought to amend or void a contract he had made with TNT Australia Pty Ltd.

In that decision, it was determined that:-

“...the contract is unfair in that it does not permit the applicant to sell his “vehicle with work” as claimed. In terms of s. 276(2) particularly, I do not query the relative bargaining power of the parties however, my general reasoning is more squarely under s. 276(2)(d) of the Act for reasons cited in this decision. I propose to grant the first limb of the relief, as amended by the applicant, to declare the contract between the parties void as from the date of this Order.”.

This decision is to determine what quantum should be awarded to the applicant.

In order to appreciate the background against which this decision is now made, I cite the “**Brief Summary of applicant’s claim**” which appeared in the 12 April 2000 decision:-

“In 1972, Mr Wilson commenced employment with the respondent as a storeman. During 1989, Mr Wilson resigned from that position and entered into a contract for services with the respondent as a contract driver. The applicant claims that, as part of normal practice, he purchased a ‘vehicle with work’ from an existing contractor with the respondent, and, as part of the purchase price, paid a component for goodwill. The total amount paid was \$43,000. It is submitted that the utility purchased was valued at \$15,000, leaving goodwill valued at \$28,000 although the applicant believes a figure of \$31,000 for goodwill more accurately reflects the true valuation.

It is submitted that Mr Cullen, the then manager of the site where Mr Wilson worked, was aware of the transaction and raised no objection to its implementation. The applicant also states that Mr Cullen advised him that after the expiration of three years, he could sell his ‘vehicle with work’.

Over time, the applicant claims that he made several enquiries about the possibility of selling his ‘vehicle with work’, but was told to desist because ‘this was not a good time to do so’. Mr Wilson states that he was never advised that he could not pursue this course of action, but rather that he should await a more appropriate time in which to do so.

It is submitted that whilst it appears that the last ‘sale’ in this vein occurred around 1993, the respondent did not determine a policy that this practice should cease until late 1999.

During late 1999, it was shown that a Mr Edwards was interested in buying the ‘vehicle with work’ from the applicant. To this end, it is submitted that Mr Edwards met with both Mr Wilson and Mr Potts (the current General Manager, Customer Service TNT) and arranged to ‘go on Mr Wilson’s run, to have access to the site depot and to obtain confidential information regarding TNT’s operation.’ It was around this time period, that the applicant was advised that TNT would not sanction the sale.”.

At that time, I deferred making any monetary award to Mr Wilson for the following reasons cited in that decision:-

“I now deal with the second limb of the relief sought by the applicant, i.e. ‘an order declaring that the respondent pay the applicant the amount of sixty-two thousand dollars (\$62,000) plus costs.’.

In terms of the ‘goodwill’ component, consideration needs to be given to a range of issues which have arisen in this particular case.

From a consideration of the cases earlier mentioned, it seems that no specific formula has been applied in relation to an award which may be made by the Commission. Each case turns upon its own facts. Section 276 (5) of the Act states that ‘The Commission may make an order it considers appropriate about payment of an amount for a contract amended or declared void.’.

The applicant states that, amongst giving consideration to inflation and interest matters, he has sought a payment of \$65,000 after considering the offer which Mr Edwards said he would have been prepared to pay for Mr Wilson’s interest, i.e. \$55,000. No real negotiation occurred between Mr Wilson and Mr Edwards around this point – in fact, Mr Wilson was unaware that Mr Edwards may offer such an amount. In reality, had the matter been fully negotiated between the parties, then a completely different amount may have been agreed upon. The applicant suggests that the amount attributed to Mr Edwards would more accurately reflect the market price for the interest. I feel constrained in acting upon such uncertainty.

During the course of the arrangement between the parties, the applicant has had the benefit of a lengthy contract which has assured him of work attracting a not insignificant yearly income. These are matters which, I believe, would require consideration when assessing a fair and reasonable award (see Macken J in *Brabib Pty Ltd v. Jilly Bean Pty Ltd* (1987) 21 IR at 96.

Having expressed these views and having made this decision thus far, I request that the parties make further submissions to me on the question of the monetary award to be made. To this end, the parties will be contacted by the Registrar to advise of an appropriate date upon which to make further oral submissions.”.

At the current hearing, the respondent sought, against the applicant’s objection, to provide evidence from a Chartered Accountant whose brief it was to “prepare a Report to assist with the assessment of an appropriate award of compensation for Mr Robert Wilson (the ‘applicant’ in relation to his contract with the respondent (TNT Australia Pty Ltd)) which has been found to be unfair.”.

“...In particular, we have been instructed that our Report address the following:–

The amortised value of the applicant’s alleged interest in a contract with the Respondent, and the present market value of the applicant’s alleged interest in a contract with the Respondent the basis that –

- (a) the applicant has a right to assign such an interest; and
- (b) the applicant has no right to assign such an interest.”.

This Report was admitted in the form of an Affidavit from Mr Rodger Flynn (Director, Litigation Consulting, Grant Thompson Accountants). The Report was made available to the applicant on the day preceding this hearing and Counsel for the applicant complained that there had been insufficient time for he and his client to digest the detail of the Report and to obtain rebuttal evidence.

I understand the rationale for the complaint and further time and a possible adjournment of proceedings was offered to the applicant, but was rejected on the basis of cost considerations. In effect, the applicant’s argument was that he had proved that the contract between he and his employer was unfair and now he faced the prospect of seeing any monetary award being whittled away by further protracted hearings.

In considering whether to admit the Report, against those objections, I would say that I did not find it unusual in any way that the respondent had sought this approach. It was made obvious in my earlier decision that I was seeking more detailed submissions on the question of how one might fairly determine the question of a monetary award in circumstances such as these.

In any event, further hearing time was offered to the applicant which was declined. It should be mentioned as well that I had earlier requested that the parties consider a “case stated” to the President of the Industrial Court, but, given the applicant’s objection to this proposed course, I declined to proceed. In fairness to the applicant, I believe that this refusal related as well to cost considerations.

Mr Rodger Flynn’s affidavit was admitted into evidence and Counsel for the applicant chose not to cross-examine Mr Flynn on this Report because of earlier stated difficulties with the Report.

The applicant reiterated earlier submissions made on the question of a monetary award and sought, as well, to address the Commission on concerns it believed the Commission had expressed in the decision on 12 April 2001. Those went to the following points:–

- “(a) the uncertainty as to the purchase price which would have been agreed upon between the applicant and Mr Edwards;
- (b) the relevance of the applicant having had the benefit of a lengthy contract “which has assured him of work attracting a not-insignificant yearly income.”.

The applicant held to his belief that the “going-price” for the sale of his “vehicle with work” was \$55,000 that he believed Mr Edwards was prepared to pay him.

In my earlier decision I considered the evidence given by Mr Edwards and found that in fact no offer had ever been communicated to Mr Wilson by Mr Edwards. No deal had ever been struck between Mr Wilson and Mr Edwards. At no stage did the parties’ discussions descend into particularity about payment for the “vehicle with work”. As a consequence of this evidence, I stated that I felt “constrained in acting upon such uncertainty”.

In terms of the previous sale referred to by the applicant (i.e. the sale by a Mr Freeman of his “vehicle with work” in 1993 for \$80,000), I stated in my earlier decision that “in terms of the respondent’s actions in acquiescing to these sales, there is nothing before me which seriously challenges the applicant’s assertions that the last sale in this vein occurred around 1993 where it is claimed that a Mr J. Freeman sold his “vehicle with work” for \$80,000.”.

The applicant saw that evidence as supportive of his belief that his “vehicle with work” was appropriately valued at \$55,000.

The question of the earlier sale of \$80,000 during 1993 was not explored in any depth during the initial hearing, and my finding was based more on the fact that I accepted that a practice of the type in question had existed and was condoned by the employer for a period of time prior to Mr Wilson’s attempts to sell his “vehicle with work”.

The applicant, at this point in time is still working as a contract courier driver and while he may not technically have been “assured” of a continuing position with the employer since his initial engagement, the reality is that this is what has occurred. The “relevance” of these comments goes to the point made – the applicant has enjoyed a lengthy contract with the employer.

I am not dealing with a situation, for example, where an applicant has entered into a contract of this type which has terminated some short time later.

The respondent’s primary belief is that there should be no monetary award made to Mr Wilson, but in the event that the Commission were to award an amount, it should be no more than \$11,950 which it claims represents the best amortised value of Mr Wilson’s interest. This amount represents a scenario where the alleged interest is originally valued at \$31,000 and amortised over a period of twenty years.

The Accountant’s Report upon which the respondent relies may adequately be summarised as follows:–

“The extent of the Applicant’s alleged interest depends upon the useful life of the contract the Applicant had with the Respondent. The Applicant was aged thirty-five (35) at the time he purchased the alleged interest. In the absence of any further information, we have amortised the value of the alleged interest based on two scenarios:

- The first represents the amortising of the interest over a twenty year period until the applicant reaches the average retirement age of 55; and
- Amortising the interest over the term of the applicant’s contract until such time as the contract ceases by an Order of the Commission.”.

In considering the question of “goodwill” the Report states:–

“In determining if goodwill is transferable and not linked solely to the personality of those who conduct the business, it is necessary to consider the type of business, the history and age of the business, its client base, its location and the surrounding circumstances relating to the operation of the business.

In terms of the value of the interest, it is asserted that “the price paid for an asset does not necessarily mean that this is the value of the asset.”.

The Report states that:–

“the appropriate methodology in valuing the Applicant’s alleged interest to be the capitalisation of future maintainable earnings methodology.”.

The Report then proceeds to amortise the interest based on the abovementioned scenarios. The best outcome for the applicant as a consequence of this Report is an amount of \$11,950.

The above is not a full representation of the respondent’s claim.

It is also claimed that the Commission should begin its analysis of the relevant facts and supporting case law by firstly considering the amount which was originally paid for the interest (i.e. somewhere between \$23,000 and \$28,000). The Commission should then consider the relevant discounting factors, such as:–

- “that the Commission should not compensate Applicants who enter into contracts for foolish amounts
- the amortised value of the alleged interest . . .
- whether or not the Applicant knew or should have known (both at the time when the Applicant entered into the contract with the Respondent and during the course of the contract) that there was a risk that the Applicant would not be able to sell the alleged interest . . .
- whether or not the amount originally paid by the applicant for an alleged interest was made wholly or partly on the basis of a misrepresentation by a third party as to the assignability of the alleged interest.”.

The respondent addressed the question of quantum to be awarded (if that was the Commission’s decision) by making reference to various cases around like, but not identical, circumstances. There are a number of authorities which have determined that an appropriate quantum would fall between one third and one half of the original amount paid for the interest (e.g. *TNT trading as Altrans Bulk v Thomas & anor* [1990] 34 IR 378 at 387 per Hungerford J, applied in *Palmer v TNT Australia Pty Ltd* [1995] NSWIRC 15/3/1995 at 32; *Brabid v Jilly Bean Pty Ltd* [187] 21 IR 90 at 96).

In this case, the respondent states that:–

“...there are strong reasons why Mr Wilson should not be awarded between one third and one half of the original amount paid for the alleged interest, namely –

- (i) TNT did not bring the contract to an end;
- (ii) Mr Wilson has not taken appropriate steps to mitigate any alleged losses; and
- (iii) the amortisation of the value of Mr Wilson’s alleged interest.”.

Regarding the question of mitigation of loss, it is claimed that Mr Wilson failed to mitigate his loss by:–

- (a) continuing “to perform his contract with TNT which TNT was ready, willing and able to perform;
- (b) accept TNT’s offer that he continue to work for TNT as an employee driver (including an offer by TNT to purchase Mr Wilson’s vehicle); and
- (c) accept the reasonable payment of \$20,000 offered by TNT when Mr Wilson wished to leave the business.

The Commission was also directed towards the provisions of s. 349 of the *Industrial Relations Act 1996* (NSW) which sets out matters to be considered by the Contracts of Carriage Tribunal when determining an appropriate award of compensation in similar circumstances.

#### Consideration of Evidence and Conclusion

I have already determined that I have not relied upon Mr Edward’s evidence that he would have paid \$55,000 for Mr Wilson’s “vehicle with work” as being determinative of an amount I should award Mr Wilson because it represented the “market-value” or “going-price” of the “vehicle with work”. I have cited the reasons for reaching that conclusion. I specifically stated that “had the matter been fully negotiated between the parties, then a completely different amount may have been agreed upon.”.

Within the constraints cited, I am unable however, to completely ignore the evidence of Mr Edwards. What I have done is attempt to apply a common sense approach to his evidence as providing an indicator of sorts as to what a prospective purchaser of the applicant’s “vehicle with work” may have been prepared to pay for this interest had the sale proceeded. That approach, however, does not of itself settle or underpin the question of quantum to be awarded for reasons elaborated upon hereunder, however, it is a factor to be taken into account when considering an appropriate finalisation to this matter. I have already found that the contract, as it exists between the parties:–

“is unfair in terms of s. 276 of the Act to the point that it permitted a course of action at its commencement (i.e. the purchase by the applicant of a ‘vehicle with work’ from Mr D. Anderson) and then unilaterally and arbitrarily refused permission to the applicant, to realise upon the sale of his ‘vehicle with work’ to a person suitable to the respondent. The respondent led the applicant to believe for many years that, notwithstanding its own formal assertions that it did not ‘condone’ such a practice, the applicant could sell his ‘vehicle with work’ at an appropriate time in the future.”.

I have also previously determined that I would order a monetary award to be paid to the applicant. Therefore, I reject any claim made by the respondent that I make no monetary award at all.

There is no comparable provision within the Queensland Legislation to that found in the New South Wales Legislation (previously cited) regarding matters which one would take into account in awarding monetary compensation in situations of this type. I am conscious, however, that much of the case law relied upon emanates from the New South Wales jurisdiction. Within the Queensland Legislation, the relevant provision (s. 276(5) of the Act) states:–

**“Power to amend or void contracts**

(5) The commission may make an order it considers appropriate about payment of an amount for a contract amended or declared void.”.

Notwithstanding the straightforwardness of the aforementioned provision, the decision to exercise the discretion referred to must be underpinned, as best it can be, by appropriate reasoning.

From my consideration of the case law cited, it appears obvious that each case dealing with the primary issue of unfair contracts usually turns upon discretely different facts. In this case some of those facts have already been cited by the respondent. Within this context, while general principles espoused in such cases cited may be considered, in the end the specifics of the case in question determine the outcome. In *Stowar and Ors v Myer Stores Limited (T/as Grace Bros) and Anor* [1993] 50 IR at 36, Cullen J, in considering s. 88F of the *Industrial Relations Act 1991* (NSW), cites Sheldon J in *Davies v General Transport Development Pty Limited* [1967] AR (NSW) at 374 as stating:–

“While it is hard to see how any transaction directly leading to work in an industry, and involving mutual promises, can escape a net so widely cast to attract jurisdiction, no action is warranted on a transaction not directly covered by (c), (d) or (e) unless it is unfair, or harsh or unconscionable. To determine this, requires no more than the common sense approach characteristic of the ordinary jurymen and this cannot be communicated – indeed it may be clouded – by an analysis of decided cases even where there is some analogy in the facts. It is a plain matter of morals, not law...”.

One of those “specifics” is as follows: The employer had made an offer to courier drivers that it would pay an amount of \$20,000 to each driver if they wished to leave the business. The respondent states that the amount of \$20,000 must not be viewed as the starting price above which a monetary award should be made. It says that this amount related to the employer offering, in effect, something akin to a “VR” or a “redundancy termination payment” for a driver to cease working for the employer. That may well be the stated rationale for the making of the offer, but, from my perspective, it is not unreasonable to view it also as a price the employer was prepared to pay for a driver to sever the contract in any event. That amount represents more than half of the good will initially paid by the applicant. Whether this is the case for other drivers to whom the offer was made is unknown to me. In light of the respondent’s submissions around this point, it is difficult to ignore this fact when considering the question of quantum to be paid to the applicant.

Another “specific” relates to the following: There was no evidence before me during the initial hearing to show that the employer had exercised any control or persuasion with regard to the setting of the price for “goodwill” paid by Mr Wilson when purchasing his “vehicle with work”. Within that context (where highlighted), I refer to and adopt the comments of Hungerford J in *TNT Ltd (T/as “Altrans Bulk” v Thomas & Anor* (op. cit.) at 388 where it was stated:–

“There was no suggestion in the evidence that the appellant was responsible in any way for the loss of the brewery contract; **nor did the evidence suggest any role of the appellant in the fixation of the price to be paid from time-to-time by LODs for “goodwill” and for a suitable truck.** The evidence was to the effect of an express disclaimer by the appellant as to any knowledge or control over the price paid. **Those aspects, in my view, are circumstances supportive of the appellant being reasonably liable to make only partial restitution to the respondents.”.**

A further “specific” relates to the Report tendered by the respondent, which has been considered in terms of offering a reasoned and accepted accounting methodology for dealing with the matter of goodwill. I have not accepted as definitive the amount proffered by the respondent based upon this methodology (ie \$11,950). To do this would be to ignore the very “specifics of the case”, to which I have earlier referred. However, I have considered the Report findings on the question of the current market value of the “alleged interest” in making this decision.

I have not found that the “amount originally paid by the applicant for an alleged interest was made wholly or partly on the basis of a misrepresentation by a third party as to the assignability of the alleged interest.” as claimed by the respondent. I did not make that finding in my earlier decision. My finding at that time was: –

“...The respondent led the applicant to believe for many years that, notwithstanding its own formal assertions that it did not “condone” such a practice, the applicant could sell his “vehicle with work” at an appropriate time in the future.”.

As stated earlier, there are no legislative guidelines to assist in determining the question of quantum in an unfair contracts case. Various cases (e.g. *Palmer v TNT Australia Pty Ltd* [1995] NSWIRC 15/3/1995 at 32; *TNT re White* [1984] AR 232 at 235; *Brown v Rezitis* [1970] 127 CLR 157 at 164; *Thomas Nationwide Transport Ltd (t/as Altrans Bulk) v Thomas & Anor* [1990] 34 IR 378 at 390) cited during this hearing have dealt with the broad concept of restitution and suggest that in some instances partial restitution may be the more appropriate course to adopt in certain circumstances.

The respondent has raised considerable issues for consideration in its response on quantum. All of those submissions, while not exhaustively detailed in this decision, have been duly considered.

For the reasons which I have specifically cited, I propose to adopt the general principles attributable to the various cases detailed above. I intend to adopt the approach of “partial restitution” and in so doing award to Mr Wilson an amount of \$26,000. I further Order that the contract which exists between Mr Wilson and TNT Australia Pty Ltd be voided as from the date of release of this decision.

To summarise the Orders as outlined in these conclusions the Commission states:–

- “1. That the Commission has ordered that the contract between Robert Wilson and TNT Australia Pty Ltd be declared void; and
2. That the Commission has Ordered that TNT Australia Pty Ltd pay to Robert Wilson an amount of \$26,000 within three weeks from the date of release of this decision.”.

Order accordingly,

D. A. SWAN, Commissioner.

Appearances:-  
Mr D. Rangiah (instructed by Mr J. Dwyer of Reidy and Tonkin) for the applicant.  
Mr J. Murdoch SC (instructed by Mr I. Humphreys of Blake Dawson Waldron) with  
them Mr S. P. Patten on behalf of TNT Australia Pty Ltd.

Released: 29 August 2001

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QUEENSLAND INDUSTRIAL REGISTRAR

*Industrial Relations Act 1999* – s. 481 – arrangement for conduct of elections

**Queensland Friendly Societies Pharmacies Association, Industrial Organisation of Employers (Q27 of 2001)**

REGISTRAR EWALD

23 August 2001

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

DECISION

On 8 August 2001 the Queensland Friendly Societies Pharmacies Association, Industrial Organisation of Employers lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* in relation to the conduct of an election by the Electoral Commission of Queensland for all positions of Office as follows:

<i>Office</i>	<i>Number of Positions</i>	<i>Method of Election</i>
President	1	Direct Vote
Secretary/Treasurer	1	
Committeeperson	3	

*Reason for Election*

Rule 36 prescribes that Management Committee members hold office from the date of the Annual General Meeting following the declaration of election to the day preceding the next Annual General Meeting and that nominations shall be called not less than 42 days before the Annual General Meeting. There is no defined date in the Rules for the prescribed date under the Regulation however the next Annual General Meeting is set for 19 September 2001. Therefore I extend the time for filing the prescribed information to 8 August 2001.

*Method of Election*

I am satisfied that the method of election is by a direct vote by secret postal ballot of the members of the Organisation.

*Conduct of Election*

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 by the Electoral Commission of Queensland.

Dated this twenty-third day of August, 2001.

E. EWALD  
Industrial Registrar

Released: 23 August 2001

#####

QUEENSLAND INDUSTRIAL REGISTRAR

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

**T.A.B. Agents' Association of Queensland Union of Employers (No. Q29 of 2001)**

REGISTRAR EWALD

24 August 2001

Conduct of Election – Prescribed Information – Timing of Elections – Methods of Elections – Reasons for Elections – Electoral Commission to Conduct Elections.

DECISION

On 16 August 2001, the T.A.B. Agents' Association of Queensland Union of Employers, lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* in relation to its request for the conduct of an election by the Electoral Commission of Queensland for the following positions of Office:-

Office	Number of Positions	Method of Election
President	1	Direct vote by financial members
Council Members		
– Brisbane North Region	3	Direct vote by members of respective TAB Regional Zone
– Brisbane South Region	3	
– Gold Coast Region	2	
– Burnett Region	2	
– Central Queensland Region	2	
– North Queensland Region	2	
– Bundaberg Region	1	
– Downs and South West Region	<u>1</u>	
	<u>16</u>	
Management Committee		
– Vice-President	1	Collegiate vote by members of Council
– Junior Vice-President	1	
– Treasurer	1	
– Secretary	1	

**Timing of Elections**

Rule 33(a) provides for the calling of nominations 6 weeks prior to the date of the Annual General Meeting, which this year, has been scheduled for 14 October 2001. Section 36(4) of the *Industrial Relations Regulation 2000* requires the prescribed information to be filed by the prescribed day i.e 2 months before the first day on which a person may become a candidate in the election, under the organisation’s or branch’s rules. Therefore I find that, in this instance, the prescribed information was filed later than the prescribed day however I am prepared to extend the time for filing to 16 August 2001.

**Methods of Elections**

The methods of election are set out above. Direct votes are by way of secret postal ballot and the collegiate vote shall be conducted as a secret ballot.

**Reason for Elections**

Rule 36(b)(iii) provides for “the election of President and the members of the Council” at the Annual General Meeting.

**Regions**

Rule 13(b) of the Industrial Organisation’s rules provide for 16 members elected from the TAB Regional Zones and should the TAB alter its definition, elections for TAB Regional Zones shall be held according to the new definitions, with such proportional representation as shall be determined by the Council. Evidence was previously produced by way of affidavit of D. Cullen as to the definitions and representation for each of the Regions.

**Conduct of Elections**

I have considered the request, the Act and Rules and I am satisfied that an election is required to be held under the Rules for the Offices as set out above.

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

Dated this twenty-fourth day of August, 2001.

E. EWALD,  
Industrial Registrar.

Released: 24 August 2001

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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. Q31 of 2001)**

REGISTRAR EWALD

27 August 2001

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

DECISION

On 22 August 2001 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 36 of the *Industrial Relations Regulation 2000* 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 terms of office for all the above positions have 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 24 September 2001. 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 22 August 2001.

**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 twenty-seventh day of August, 2001.

E. EWALD, Registrar

Released: 27 August 2001

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QUEENSLAND INDUSTRIAL REGISTRAR

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

**Queensland Teachers Union of Employees (No. Q30 of 2001)**

REGISTRAR EWALD

27 August 2001

Request for Conduct of Elections – Prescribed Information – Casual Vacancy – Branches and Area Councils – Methods of Elections – Electoral Commission to Conduct Elections.

DECISION

On 20 August 2001 the Queensland Teachers Union of Employees lodged in the Registry under s. 481 of the *Industrial Relations Act 1999*, the information prescribed in s.36 of the *Industrial Relations Regulation 2000*, 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
<i>State Council Representative of a Branch –</i>		
North Kennedy Branch.....	1	Direct vote by members of the Branch
<i>Area Council Representative of a Branch –</i>		
Central Western Branch.....	2	Direct vote by members of the Branch

**Reason For Election**

The number, formation and geographical boundaries of Branches and Area Councils are approved by the State Council through its general powers under relevant Rules. At its meeting held on 12 May, 2001, the State Council approved changing the name of the Capricornia Area Council to the Central Queensland Area Council and determined that the Central Western Branch shall be represented at the Central Queensland Area Council.

The Industrial Organisation also advises that the current State Council Representative of the North Kennedy Branch has resigned.

**Methods of Election**

I am satisfied that the methods of election are as specified above.

**Conduct of Elections**

I have considered the request, the Act and Rules and I find that the elections being sought are for positions of office within the meaning of the Act and are 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-seventh day of August, 2001.

E. EWALD,  
Industrial Registrar.

Released: 27 August 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999*

**TRAINING WAGE AWARD – STATE**

*(Rates of pay varied to accord with the General Ruling Declaration, 1 August, 2001)*

PURSUANT to the Declaration of the Commission as to a General Ruling made on 1 August, 2001, the Award is amended as follows as from 1 September, 2001:

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

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

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	151.00 (50%)* 176.00 (33%)	187.00 (33%)* 211.00 (25%)	256.00
plus 1 year out of school	211.00	256.00	298.00
plus 2 years out of school	256.00	298.00	346.00
plus 3 years out of school	298.00	346.00	396.00
plus 4 years out of school	346.00	396.00	
5 years or more out of school	396.00		

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

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	151.00 (50%)* 176.00 (33%)	187.00 (33%)* 211.00 (25%)	246.00
plus 1 year out of school	211.00	246.00	283.00
plus 2 years out of school	246.00	283.00	332.00
plus 3 years out of school	283.00	332.00	378.00
plus 4 years out of school	332.00	378.00	
5 years or more out of school	378.00		

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

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	151.00 (50%)* 176.00 (33%)	187.00 (33%)* 211.00 (25%)	237.00
plus 1 year out of school	211.00	237.00	266.00
plus 2 years out of school	237.00	266.00	298.00
plus 3 years out of school	266.00	298.00	333.00
plus 4 years out of school	298.00	333.00	
5 years or more out of school	333.00		

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

- (g) The rates of pay in this Award are intended to include the arbitrated wage adjustment payable under the 1 September 2001 Declaration of General Ruling and earlier Safety Net Adjustments. [Disputed cases are to be referred to the President.] This arbitrated wage adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award amendments to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

Dated this thirtieth day of August, 2001.

E. EWALD  
Registrar.