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No. 10

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
CA441/01	K & D Heirdsfield & P & T Carmichael t/a A Quick Fix Glazing Contractors - Certified Agreement	16/10/01	
CA445/01	Regson Pty Ltd t/a Regson Fabrications - Certified Agreement	16/10/01	
CA380/00	Bellwood Contracting Pty Ltd t/a Deen Bros - Certified Agreement	19/10/01	CA576/97
CA432/01	Stradbroke Ferries Ltd - AWU - Certified Agreement	22/10/01	CA561/98
CA482/01	Herron Associates - Certified Agreement 2001	22/10/01	CA300/99
CA470/01	Pozzolanac Swanbank - Certified Agreement 2001	24/10/01	CA421/98
CA476/01	Peter Chizzotti & Brett Weir t/a Bass Interiors - Certified Agreement	24/10/01	
CA477/01	R Matthews & M Cronin t/a Astro Painting Contractors - Certified Agreement	24/10/01	
CA478/01	Sunshine Coast Building Innovations Pty Ltd t/a Hebel Innovations - Certified Agreement	24/10/01	
CA491/01	Gunars & Patricia Vezitis t/a G&P Cleaners - Certified Agreement	24/10/01	
CA492/01	Rim Constructions Pty Ltd - Certified Agreement	24/10/01	
CA493/01	GCA Group Pty Ltd - Certified Agreement	24/10/01	
CA485/01	Kilkivan Shire Council Enterprise Bargaining - Certified Agreement 2001	25/10/01	CA113/98
CA434/01	Bundaberg Sugar Ltd (Moreton Mill) Enterprise Bargaining - Certified Agreement No. 4 2001	26/10/01	CA270/98
CA474/01	Acquired Brain Injury Client Integration Service - Certified Agreement 2001	26/10/01	

No/s	Title	Date certified	Cancelling
CA481/01	Bundaberg Sugar Ltd Regional Enterprise Bargaining – Certified Agreement 2001	29/10/01	

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

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

Smashcare Pty Ltd AND Clive James Newman (No. C27 of 2001)

PRESIDENT HALL

30 October 2001

DECISION

THIS is an appeal from a decision of an Industrial Magistrate finding Smashcare Pty Ltd guilty of an offence under the *Workplace Health and Safety Act 1995* and imposing a fine of \$17,000. (The Industrial Magistrate did not record a conviction.) The appeal impeaches both the finding that Smashcare Pty Ltd was guilty and the magnitude of the fine. The Industrial Magistrate's orders about professional and investigative costs are also attacked.

As is often the case, the prosecution arose out of an incident in which a worker was injured. The incident arose out of the use of a pneumatic seam sealer gun. To use the gun, one began by dismantling it by unscrewing a cylindrical metal canister (or container) which screwed into the head of the gun. The muzzle of a plastic tube of sealant was then inserted into a hole behind the muzzle of the gun. The metal canister was fitted over the plastic tube and re-screwed into the threaded (female) rim of the head of the gun. An air hose was then fitted into the head of the gun. The air hose connected to a compressor which generated air pressure. By use of a trigger on the gun that pressure might be manipulated to force sealant from the gun. It was whilst using the trigger to permit sealant to pass through the muzzle of the gun on 13 January 1999 that Shane William Lockie was injured. The cylindrical canister popped out of the head of the gun and struck him in the face. He was blinded in one eye. On 24 December 1999 the following complaint (formal parts omitted) was made against Smashcare Pty Ltd:-

“**THE COMPLAINT OF CLIVE JOHN NEWMAN** of Brisbane in the State of Queensland a Public Officer within the meaning of Section 142A of the Justices Act 1886 and an Inspector duly appointed under the provisions of the Workplace Health and Safety Act 1995 made this 24th day of December 1999, before the undersigned, a Justice of the Peace for the said State, who says that on or about the 13th day of January 1999, at Kedron in the Magistrates Court District constituted by the Central Division of the Brisbane District appointed under the Justices Act 1886, **SMASHCARE PTY LTD** being a person on whom a workplace health and safety obligation, prescribed by section 28(1) of the Workplace Health and Safety Act 1995 is imposed, did fail to discharge the obligation contrary to section 24 of the Workplace Health and Safety Act 1995, in that being an employer the said **SMASHCARE PTY LTD** did fail to ensure the workplace health and safety of each of the employer's workers at work;

Particulars:

Worker:	Shane William Lockie
Work:	Vehicle smash repair
Place of work:	80 Aruluen Street, Kedron 4031
Failure:	SMASHCARE PTY LTD did fail to provide a system of work that was safe and without risk.

AND IT IS AVERRED that the breach caused grievous bodily harm to Shane William Lockie.

Contrary to the Acts and Regulation in such case made and provided:”.

Four matters were not in dispute. One, Smashcare Pty Ltd was an employer within the meaning of the *Workplace Health and Safety Act 1995*. Two, at all material times Mr Lockie was a worker within the meaning of the Act and employed by Smashcare Pty Ltd. Three, 80 Araluen St, Kedron was a workplace within the meaning of the Act. Four, Mr Lockie suffered grievous bodily harm.

By a letter dated 29 February 2000, Crown Law, who were then acting for the complainant, conveyed to Smashcare Pty Ltd (and ultimately to the Industrial Magistrate) the factual ingredients of the offence charged. The relevant paragraph of the letter was as follows:

“The system of work failed to prevent the Wurth Spray Seam Sealer Gun cartridge holder cylinder detaching violently from the handpiece when pressurised. The system of work failed to properly inspect, maintain and replace worn or damaged components of the said Gun. In particular, the male thread of the cartridge holder cylinder and the female thread of the handpiece at the connection between the cylinder and the handpiece so as to provide a system of work that was safe and without risk.”.

That paragraph did two things. First, it identified the risk against which Smashcare Pty Ltd had (allegedly) failed to ensure the safety of Mr Lockie as the risk of the holder cylinder detaching violently at the connection between the male and female thread. Second, it particularised the inadequacies in Smashcare Pty Ltd's way of managing exposure to risk as the system for inspection, the system for maintenance, and the system for replacement of worn or damaged components, and in particular those three systems as they related to the connecting thread. The particulars are of some importance. A code of practice, viz The Code of Practice Plant, had been made on 8 March 1993. It commenced on 30 April 1993. It applied to the sealer gun. If the identified risk was shown to exist at the material time, Smashcare Pty Ltd might defend itself only by showing that it had adopted and followed the way of managing exposure to risk stated in the Code, or that it had adopted and followed another way that gave the same level of protection against the risk, s. 26(3). On such a defence, Smashcare Pty Ltd had the onus of proof, s. 37(1)(b). The particulars of inadequacy benefited Smashcare Pty Ltd by focussing the submissions to be made under s. 26(3) upon three areas, viz, inspection, maintenance and replacement of worn or damaged parts. It was not necessary for Smashcare Pty Ltd to prove compliance with the Code in every respect or, alternatively, to expose its other way of managing exposure to risk to open ended inquiry. It was sufficient to establish that in the case of the aspects of managing exposure to risk nominated in the particulars, Smashcare Pty Ltd had followed the Code or had adopted and followed another way of managing exposure to risk which gave the same level of protection. Doubtless if other inadequacies emerged in the course of evidence, the complainant might have sought to amend. If such an application was made and granted, Smashcare Pty Ltd would have had to shoulder an additional burden. But on an appeal, it is far too late to choose new particulars from the transcript and alter the circumscribed case which was fought.

It was not necessary for the complainant to prove that the risk had fructified. The complainant chose to do so because the complainant sought to support the expert evidence with the argument that the risk of the canister popping out might be inferred for the fact that it did. A finding that the canister did pop out also advantaged the complainant in that it became difficult to accept any expert view of the risk posed by the connection which did not accommodate the fact that the canister had in fact popped out.

Before the Industrial Magistrate the path to proving that the cylinder popped out was an easy one. There was only one witness to the incident of 13 January 1999, and only one witness to the events immediately preceding it, *viz*, the man who was injured (Mr Lockie). It was Mr Lockie's evidence that the canister popped out of the head of the gun whilst air pressure was being applied. He was asked a mild question about whether he had sufficiently tightened the canister. He insisted that he had. The matter was not taken further. All the evidence was that Mr Lockie was a competent tradesman. Given his competence and denial, in the absence of any material suggesting that he might not have sufficiently tightened the canister, counsel had no basis for taking the matter further. The same was true of a suggestion that the canister was cross-threaded which was put to Mr Lockie, denied and then abandoned. Importantly, evidence of Mr Lockie was assessed against the background of evidence of a Mr Reid, a leading hand employed by Smashcare Pty Ltd at the workplace, that the canister had popped out under pressure whilst he was using the gun on 12 January 1999. (Once again there was no basis for pursuing Mr Reid on the issue whether he had properly fitted the canister.) The case presented itself to the Industrial Magistrate as one in which on consecutive days a properly fitted canister popped out under pressure.

Also employed at the workplace was a Mr Lye. He had been interviewed by representatives of the Division of Workplace Health and Safety and by a representative of Smashcare Pty Ltd's solicitors. On neither occasion had he anything of moment to say. Subsequently, shortly before the hearing at first instance, Mr Lye was interviewed by two of the in-house lawyers of the Division of Workplace Health and Safety who had acquired carriage of the matter. It is the (affidavit and as yet untested) evidence of Mr Lye that he told them:

"In the course of this interview, I was asked about my observations concerning Mr Lockie on the morning in question. I told both of these persons that Mr Lockie had been a drug user; I told both of them that he looked stoned and off his face on the morning in question; I told both of them that I thought he was stoned on the morning in question."

Mr Lye was then told that he was not required as a witness. No complaint is made of that. The complainant is entitled to nominate the witnesses to be called in the complainant's case. The point which is taken on the appeal is that Mr Lye's observations of Mr Lockie should have been disclosed to Smashcare Pty Ltd. The case made is that if appraised of those observations Smashcare Pty Ltd solicitors might have revisited the question whether Mr Lye should be called in the defence case, and in any event might have given counsel instructions justifying a very much more vigorous cross-examination of Mr Lockie about whether he had correctly installed the canister. The complexion given to the case by the evidence of Mr Reid might have been contended to be quite different to the complexion which Mr Reid's evidence in fact gave to the case at the trial. It might have been argued that Mr Reid, a leading hand authorised under Smashcare Pty Ltd's system of work to correct malfunctioning equipment (if competent to do so), had serviced the gun (by cleaning it) on 12 January 1999, had tested it on 12 January 1979 to ensure that it worked, had found that it did, and that the likely cause of failure the very next day was operator error. In summary, it was put that the observations were relevant as suggesting an alternative cause for the popping out and going to the credit of Mr Lockie. In circumstances where Mr Griffin SC, who now appears for the complainant below, is prepared to deal with the matter on the basis that the remarks attributed to Mr Lye were made by him at interview, the submission that there was a miscarriage of justice seems to me impossible to resist. In *Regina v Keane* [1994] IWL 746 at 751-752 Lord Taylor of Gosforth CJ giving the judgment of the Court of Appeal said:

"If the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balance comes down resoundingly in favour of disclosing it. But how is it to be determined whether and to what extent the material which the Crown wish to withhold may be of assistance to the defence? First, it is for the prosecution to put before the court only those documents which it regards as material but wishes to withhold. As to what documents are 'material' we would adopt the test suggest by Jowitt J. in *Reg. V Melvin* (unreported), 20 December 1993. The judge said: 'I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2).' "

Each of propositions (1) and (2) is satisfied here. Additionally in *Regina v Brown* [1998] AC 367 at 377 Lord Hope of Craighead delivering the decision of the House of Lords accepted that the prosecution is obliged to give disclosure of significant material which may affect the credibility of a Crown witness. The evidence of Mr Lye about Mr Lockie's condition on 13 January 1999 is yet to be tested and may be unbelievable, but at this point one can only conclude that it is sufficiently significant that it may affect the credibility of Mr Lockie. The appeal must be allowed.

Allowing the appeal on the basis of failure to disclose leads inexorably to a conclusion that the matter should be remitted to the Industrial Magistrates Court to be heard and determined according to law. Mr Sofronoff, QC, who appears for Smashcare Pty Ltd submits that the decision of the Industrial Magistrate is flawed on other grounds which justify this Court quashing the decision in all its aspects and in refraining from remitting it.

It is contended for Smashcare Pty Ltd that the Industrial Magistrate erred in preferring the evidence of an expert, Mr Heron, called by the complainant over the evidence of two experts, Mr Francis and Mr Patin who were called by Smashcare Pty Ltd and, for that matter, in preferring the evidence of Mr Heron to that of the other expert witness called by the complainant, *viz*, Mr Patin. Alternatively, in reliance upon *Chamberlain v The Queen* (1983) 153 CLR 514 at 558-559 per Gibbs CJ and Mason J it was argued that the Industrial Magistrate should have proceeded on the basis that the conflict between the expert opinions was not capable of resolution.

The starting point is that it was the Industrial Magistrate who had the advantage of hearing and seeing the witnesses. Additionally, in Mr Heron's case, the Industrial Magistrate had access to a substantial written opinion and was entitled to be persuaded by it. Credibility is perhaps not an appropriate term to use with reference to expert evidence. But in cases arising under the *WorkCover Queensland Act 1996*, this Court has long accepted that in evaluating expert evidence an Industrial Magistrate does have an advantage in that the Industrial Magistrate has an opportunity to assess whether an expert witness is uncertain, confident, over confident, ready to consider new ideas or options or obstinate. Here, in explaining why the evidence of Mr Heron was preferred to that of Mr Frith, the Industrial Magistrate expressly referred to such factors. Indeed he castigated Mr Frith's approach as "more obstructive than constructive", and chastised Mr Heron for taking up the case of the party by whom he had been called. I am not prepared to go behind the Industrial Magistrate's decision to prefer the evidence of Mr Heron to that of Mr Frith. The Industrial Magistrate does not fully articulate why he preferred the evidence of Mr Heron to Mr Patin. However, given that Mr Patin's evidence was rather like the evidence of Mr Frith, *i.e.*, that user manipulation of the valves in an attempt to increase pressure might have produced much greater pressure in the gun than the user contemplated, it is scarcely surprising that it was not preferred to the evidence of Mr Heron.

It is to be noticed also that gun had been tendered and on examination of the exhibit the Industrial Magistrate had pronounced himself satisfied that the thread was worn. It was to the worn thread of the connection that Mr Heron attributed the risk of the canister popping off.

The Industrial Magistrate did not explain why he preferred the evidence of Mr Heron to Mr Francis. The reason is quite clear. Mr Francis had measured the thread. It was his evidence that the area of the thread was five times the required safety level. It was Mr Francis' evidence that if the canister had been properly screwed into the gun it could not have come out. Given the way in which the case was presented, in consequence of the evidence of Mr

Lockie and Mr Reid, it was inevitable that an expert opinion which did not accommodate the circumstance that the canister had popped out twice in two days would not be accepted.

It was not the contention of Smashcare Pty Ltd that it had adopted and followed a way of managing exposure to the risk of the canister popping out which was a way stated in the Code of Practice Plant. Smashcare Pty Ltd accepted the burden (s. 37(1)(b)(ii)) that it had adopted and followed another way of managing exposure to the risk of the canister popping out which gave the same level of protection against the risk as would have been given if a way stated in the Code of Practice Plant had been adopted and followed. The Industrial Magistrate summarised the case which Smashcare Pty Ltd sought to make as follows:-

“The evidence establishes that the defendant had established a planning committee which considered among other things, matters of workplace safety. That it created a quality manual which is Exhibit 6, and which contained instructions directed at ensuring workplace safety and which was kept at the workplaces so that all workers had access.

The evidence establishes that the defendant had provided problem notebooks in which any workplace problems including defective equipment and safety issues would be noted for reference to managerial staff and a workplace planning committee. The defendant employed a maintenance technician.

The evidence also establishes that the defendant had in place a creditable apprentice training program and a creditable program for continuing staff training. Those programs addressed not only trade skills but workplace safety.”

In the end result the Industrial Magistrate concluded that Smashcare Pty Ltd’s way of managing exposure to the risk of the canister popping out did not give the same level of protection against that risk as a way stated in Code of Practice Plant. That conclusion is attacked by attacking the building blocks of the conclusion.

At one point in the course of his reasons, the Industrial Magistrate observed:

“The gun may have been brought into service as recently as six months prior to 12 January 1999. There were no manufacturer’s recommendations as to maintenance and it was apparently promoted by the distributor as a low maintenance implement. That being the case, despite it having been supplied as used equipment, even if a maintenance program had been in place for the gun, the program schedule may not have required a safety inspection prior to 13 January 1999.

However there was no program for regular maintenance in place and there could not be unless a record was kept. The failure to keep a record exposes a deficiency in the defendant’s system of work.”

The passage is subject to much criticism. Viewed in isolation the passage is legitimately subject to criticism. It could not be a criticism of Smashcare Pty Ltd’s way of managing exposure to risk that it did not require the recording of the outcome of inspections before the inspections had occurred and there was anything to record. With respect, the Industrial Magistrate was not saying something so foolish. In the sentence immediately preceding the passage extracted, His Worship had observed:

“There was no record kept of the seam sealer gun.”

The point which His Worship was trying to make, and a point which was in accord with the evidence, was that nobody had caused a record to be made of the date of acquisition of the (used) gun by Smashcare Pty Ltd. Although it might have been purchased as recently as six months prior to 12 January 1999, the gun may well have been purchased prior to that time. The point being made was that if the date of commencement of use was unknown, one could not know when the first inspection or service (malfunctions apart) was necessary. Certainly, the absence of the record neutralised the availability of an independent, i.e. non-user of the gun, technician to maintain and service equipment. The independent technician (Mr Williams) could not have known when he was to inspect or service the gun. That point was subsequently expressly made by the Industrial Magistrate:

“It is not likely that Williams would be in a position to inspect the equipment as a matter of course unless there was a record of his existence.”

(The reasons were oral. I am satisfied that “his” is a mis-transcription for “its”.) It is to be noted also that the quality manual upon which Smashcare Pty Ltd placed reliance expressly required:

“A register of Equipment and Company/Organisation is used by us to maintain company equipment is to be kept with notation of services and dates said services were performed.”

Additionally, as previously noted, Smashcare Pty Ltd placed reliance upon its “problem note books”. The quality manual relevantly provided:

“In each workshop there is maintained a problem note book. If any employee notices that a piece of equipment is not working/functioning correctly then they are to make a note of said problem in this notebook and/or refer the problem to the Maintenance Officer.

The Leading Hand has the responsibility of monitoring the problem notebook and then checking the problem, if he/she can rectify or repair said problem, he/she will do so. If the problem with equipment requires a qualified technician to deal with said problem, then it is the responsibility of the Leading Hand to arrange for servicing/maintenance of equipment.”

The incident of 12 January 1999 had not been recorded in the “problem note book”. Indeed, the Industrial Magistrate found that neither Mr Lockie nor Mr Reid knew of the existence of the “problem note books”. It may be accepted that there is a passage (of great ambiguity) in the transcript which may be construed as an assertion by Mr Lockie that he was aware of the “problem note books”, but there are other passages to the contrary. The question was one for the Industrial Magistrate to resolve.

It was contended that the keeping of records was not a matter in issue. What was in issue was whether the way of managing exposure to risk in respect of the particularised areas of inspection, maintenance and replacement which had been adopted by Smashcare Pty Ltd was as safe as the way stated in the Code of Practice Plant. If the Code of Practice Plant had been followed, records would have been kept of inspections, servicing, and repairs. I reject the submission that the Code is relevantly discretionary. The Code of Practice Plant, which deals with the widest variety of instruments and equipment, cannot be mandatory. It has to address itself to practices and precautions which it may be necessary to adopt, and issues which it may be necessary to consider. It is for that reason that the word “may” was used. Whatever the position might be in the case of a simple garden rake, which as a tool would fall within the definition of “plant”, in the case of this gun on any fair reading of the Code, and particularly when read against s. 22(2) of the *Workplace Health and Safety Act 1995*, if the Code had been followed, the option would have matured into an obligation, records would have been kept. Despite the attempts of the vendors of the gun to pass it off as a “simple instrument”, it was in truth a pneumatic instrument and a dangerous instrument.

The second building block which is attacked is the finding which the Industrial Magistrate made about Smashcare Pty Ltd's systems of training. It was put that training was not in issue. It was. Smashcare Pty Ltd put training in issue. It was relied upon as an element in the way of managing risk which it had adopted and followed and which was said to be as safe as the way stated in the Code of Practice Plant. It was plainly open to the Industrial Magistrate to hold that the way in which Mr Reid dealt with the gun on 12 January 1999 indicated an inadequacy in his training. Mr Reid failed to record the transaction in the "problem note book". Mr Reid, who cleaned the gun, determined that it was appropriate to return the gun to service by trying it out to see if the canister would pop out again. As a final observation on the matter of training, it is perhaps appropriate to note that Smashcare Pty Ltd had partially fought the case on the basis that Mr Reid's conduct could not be held against Smashcare Pty Ltd because it was a mere casual failure by an employee to follow a safe system of work, compare *Collins v State Rail Authority of New South Wales* (1986) 5 NSWLR 209 at 214 per Street CJ with whom the other members of the Court agreed. The Industrial Magistrate was simply making the point that the fault lay with the system of training, not with the employee. That point was emphasised by the evidence of Mr Lockie that:

"The job had to be done. You don't pick up a gun and start checking to see that it is faulty every day, if you know what I mean.";

a passage quoted by His Worship. The importance of identifying hazards and assessing risk had plainly not been brought home to Mr Lockie. (In the same way, the Industrial Magistrate was not criticising Mr Reid for the decision to inspect and attempt to rectify the gun himself. As Smashcare Pty Ltd points out, the judgement of whether to attempt to repair the gun himself or refer it to the maintenance technician (Mr Williams) was, by the Quality Manual, entrusted to Mr Reid. The Industrial Magistrate's point was that the Quality Manual, which His Worship described as (relevantly) "vague" left too much to the judgement of the user of the item of plant to qualify for protection pursuant to s. 26(3)(b).)

In all the circumstances, Smashcare Pty Ltd has failed to persuade me that the matter should not be remitted to the Industrial Magistrates Court.

I allow the appeal. I set aside the decision of the Industrial Magistrate. I remit the matter to the Industrial Magistrates Court to be heard and determined according to law.

In the nature of things the matter will have to go to a different Industrial Magistrate.

I reserve the question of costs.

Dated this thirtieth day of October, 2001.

D.R. HALL, President.

Appearances:-

Mr W. Sofronoff QC and with him Mr R.J. Lynch instructed by Russell and Company, Solicitors, for the appellant.

Mr M.J. Griffin SC, with him Mr S. Habermann, instructed by Workplace Health and Safety Legal Unit for the respondent.

Released: 30 October 2001

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 282 – case stated to court

Neville Palk of the Department of Industrial Relations AND Carey and Sons Pty Ltd (No. C67 of 2001)

PRESIDENT HALL

31 October 2001

DECISION

The question posed by the case stated is –

"Whether in proceedings under s. 278 of the Act before the Commission, s. 319 of the Act prohibits the parties from being legally represented either absolutely or on any terms and, if so, what are those terms?".

The parties differ as to the answer which should be given to the question. It is contended for Neville Palk (DIR) that s. 319 denies parties to proceedings under s. 278 the right to legal representation in all circumstances. The argument assumes s. 319(2) to be the (sole) grant of the right to legal representation in proceedings under the *Industrial Relations Act 1999*.

"(2) The party or person may be represented by a lawyer if, and only if –

(a) for proceedings in the court –

- (i) the proceedings are for the prosecution of an offence; or
- (ii) all parties consent; or
- (iii) the court gives leave; or

(b) for proceedings before the commission, other than proceedings under section 278 –

- (i) the proceedings relate to a matter under chapter 4; or
- (ii) all parties consent; or
- (iii) on application by a party or person, the commission is satisfied, having regard to the matter the proceedings relate to, that there are special circumstances that make it desirable for the party or person to be legally represented; or
- (iv) on application by a party or person, the commission is satisfied the party or person can be adequately represented only by a lawyer; or

- (c) for proceedings before an Industrial Magistrates Court, other than proceedings remitted under section 278(6) –
- (i) all parties consent; or
 - (ii) the proceedings are brought personally by an employee and relate to a matter that could have been brought before a court of competent jurisdiction other than an Industrial Magistrates Court; or
 - (iii) the proceedings are for the prosecution of an offence; or
- (d) for proceedings before the registrar, including interlocutory proceedings –
- (i) all parties consent; or
 - (ii) the registrar gives leave.”. (emphasis added)

The submission is that the effect of the words emphasised is that proceedings under s. 278 are excluded from the scope of the provision which grants the right to legal representation.

For Carey and Sons Pty Ltd it is contended that s. 319 must be read as a whole, and that s. 319(2) so far from granting a right to legal representation, limits the right to legal representation conferred by s. 319(1), which provides:

“(1) In proceedings, a party to the proceedings, or a person ordered or permitted to appear or to be represented in the proceedings, may be represented by –

- (a) an agent appointed in writing; or
- (b) if the party or person is an organisation – an officer or member of the organisation.”.

Neither the noun “agent” nor the noun “lawyer” is defined. The *Industrial Relations (Tribunals) Rules 2000* distinguish between agents and lawyers, but that is a weak guide to interpretation.

It is then contended that the effect of the words emphasised is that proceedings under s. 278 are excluded from the limitation imposed on representation by agents who are also lawyers. It is further submitted that:

“There is no logical or consistent reason why claims of this kind should have been the subject of a complete ban upon legal representation, irrespective of consent or the interests of justice. If the Applicant’s claim were brought under section 399 or 408 of the Act, legal representation would be permissible. On the Applicant’s contention, the same matter commenced under section 278, even if referred to the Magistrates Court, would carry a complete embargo on legal representation.”.

Against that it may be said that by s. 319(c)(iii) the Legislature took proceedings for an offence outside the suggested limitation by positive words. If the purpose of the words emphasised was to achieve that aim, one has to wonder why the same drafting stratagem was not used. If the words “other than proceedings under section 278” were deleted from s. 319(2)(b) and a new subparagraph (v) added in the terms “the proceedings are under s. 278” all would be clear.

Counsel for both parties invoke s. 14B(1)(a) and (c) to rely upon the explanatory note to the Bill and the Minister’s second reading speech. In my view the explanatory note and the Minister’s second reading speech are not consistent. The second reading speech at Hansard 25 May 1999 (at 1837) suggests strongly that a limited right to legal representation was to be conferred by s. 319(2). The explanatory note asserts:

“Representation of parties

Clause 319 provides a definition of ‘proceeding’ for the purpose of this clause. The clause specifies by whom a person ordered to appear or to be represented in a proceeding may be represented.

In proceedings, a party to the proceedings, or a person ordered or permitted to appear or to be represented in the proceedings may be represented by an agent appointed in writing or if the party or person is a organisation an officer or member of the organisation.

The clause also provides for strict limitations upon legal representation for a person or a party to proceedings.

As an example, for proceedings before the commission, other than proceedings under clause 278 (Power to recover wages and superannuation), a party or person may be represented by a lawyer if and only if:

- the proceedings relate to a matter under Chapter 4 (Freedom of Association); or
- all parties consent; or
- on application by a party or person the commission is satisfied having regard to the matter the proceedings relate to that there are special circumstances that make it desirable for the party or person to be represented; or
- on application by a party or person, the commission is satisfied the party or person can be adequately represented only by a lawyer.”. (emphasis added)

That passage strongly suggests that s. 319(1) creates the right, that s. 319(2) creates the limitation, and that s. 278 proceedings are outside the limitation.

The matter is anything but clear. Having regard to the textual consideration about s. 319(2)(c)(iii), on balance, and with great reluctance, I have accepted the argument for Mr Palk.

The question is answered:

“There is no circumstance in which a person or a party may be represented by a lawyer in proceedings under s. 278.”.

Dated this thirty-first day of October, 2001.

D.R. HALL, President.

Released: 31 October 2001

Appearances:-

Mr C. Murdoch of Crown Law for Mr N. Palk.

Mr A.K. Herbert instructed by Edgar and Wood, Solicitors, for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application to repeal an award and to make a new award

**Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch,
Union of Employees AND Queensland Chamber of Commerce and Industry Limited,
Industrial Organisation of Employers (No. B1596 of 2000)**

MARGARINE MANUFACTURING AWARD – SOUTHERN DIVISION

PRESIDENT HALL
COMMISSIONER EDWARDS
COMMISSIONER THOMPSON

31 October 2001

Application to repeal common rule award – Application to make new common rule award – award applying to one employer at one site – Award displaced by certified agreements – No prospect of reversion to the award – Proposed new award based on outdated certified agreement – Operation of ss. 125, 126 and 129 considered – Consideration of principles about deciding wages and conditions – Risk of flow-on discussed – Risk of barrier to entry of new competitors assessed – Application dismissed.

DECISION

The *Margarine Manufacturing Award – Southern Division* is a common rule award of the Queensland Industrial Relations Commission. Its coverage appears from s. 2 –

“This Award shall apply to all employers and employees engaged in the manufacturing and/or processing of margarine and/or the extraction and/or processing of vegetable oils in margarine factories in the Southern Division of the State of Queensland, that is, all that part of the State south of a line commencing at the junction of the sea-coast with 22 degrees of south latitude; thence by that parallel of latitude due west to 147 degrees of east longitude; thence by that meridian of longitude due south to 22 degrees 30 minutes of south latitude; thence by that parallel of latitude due west to the western border of the State:

Provided always that, without limiting the generality of the term, ‘manufacturing and/or processing’ shall be deemed to mean and include all processes carried out in a margarine factory necessary to the production of a finished product suitable for marketing purposes.”.

In fact the award applies to one employer and to one site. A company under the Corporations Law trading as Goodman Fielder Consumer Foods produces retail margarine, commercial oils and pastry products at a site at Murarrie. The factory is one of four Australian factories operated by Goodman Fielder Consumer Foods. The others are at Mascot (NSW), West Footscray (VIC) and Bunbury (WA). The factories have marginally different product mixes. The company has moved away from producing a full range of product at each site. Factories are now focussed at particular segments of the market. In volume terms the Murarrie site produces about one third of the company’s output. At the time of hearing there were 167 employees at Murarrie of whom 114 were production and laboratory employees covered by the *Margarine Manufacturing Award – Southern Division*.

Although the *Margarine Manufacturing Award – Southern Division* applies to the 114 production and laboratory employees, it does not govern their employment. There is a long history of (not always amicable) enterprise bargaining between the applicant and the company. The first agreement, given effect by s. 124 of the *Industrial Relations Act 1990*, was entered into in August 1992. At the date of hearing, employment at Murarrie was governed by the *Meadow Lea Foods Certified Agreement 1998-2001*. We were told that the agreement, which reached its nominal expiry date on 31 March 2001 but which has not been terminated, is to be superseded by a new agreement and that the company is in fact paying a wage increase of 4% in anticipation of execution of the agreement. The agreements have become increasingly comprehensive and leave no room for the operation of the *Margarine Manufacturing Award – Southern Division* at Murarrie. The only role for the Award is as the “relevant award” for the purposes of the no disadvantage test (s. 160) to which this Commission must subject any new enterprise agreement before granting certification.

Although one witness, an employee of the company and an official of the applicant, initially asserted that the company had threatened to abandon enterprise bargaining and retreat to the *Margarine Manufacturing Award – Southern Division*, she resiled from the assertion in cross-examination. There is uncontroverted evidence by the National Director – Human Resources (Mr Buxton) that the company has no intention of retreating to the Award. Indeed, it was Mr Buxton’s evidence that the company embraced enterprise bargaining and that it was the company’s opportunity to drive workplace change. Mr Martin for the applicant, concedes that reversion to the Award, which in some cases would reduce annual earnings by \$16,000, is industrially impractical. Termination of an existing agreement would, in any event, require consent of a majority of employees during the currency of an agreement (s. 172) or, after the nominal expiry date, require the consent of the Commission (s. 173). We proceed on the view that there will not be a retreat to the Award at Murarrie.

We also proceed on the view that no actual or potential competitor of the company has a present intention to establish a Queensland production unit. There is no evidence to the contrary. Mr Buxton’s evidence supports an inference that off-shore production is the realistic threat.

On 24 October 2000 the applicant, an industrial organisation of employees with coverage of the production and laboratory employees at Murarrie, applied for the repeal of the *Margarine Manufacturing Award – Southern Division* and the making of a new common rule award to be known as the *Margarine Manufacturing Award – State* to have effect throughout the State of Queensland.

The application of 24 October 2000 was said to be based on s. 129 of the *Industrial Relations Act 1999*. We do not accept that proposition. On a perusal of Part 2 Chapter 5 we consider the power to make, amend or repeal an award arises under s. 125. Section 126 then states the objectives which the Commission must achieve in exercising the otherwise discretionary powers to make, amend or repeal awards. Sections 127 and 128 then deal with nominated subjects with some particularity. Section 127 deals with dispute resolution procedures to be contained in each award. It provides:

“127.(1) The commission must ensure an award contains a dispute resolution procedure.

- (2) The form of the procedure is to be agreed on by the parties to the award.
- (3) However, if the parties can not agree, the commission must insert an appropriate procedure in the award.
- (4) Without limiting subsection (1), the procedure must include –
 - (a) procedures for consultation at the workplace; and
 - (b) procedures for the involvement of relevant organisations; and
 - (c) any other procedure prescribed under a regulation.”.

Section 128 deals with issues about gender equity and junior rates. It provides:

- “128.(1) In fixing wage rates payable to employees in a calling, the commission must fix the rates on the basis that a man and a woman employed by the same employer must receive equal remuneration for work of equal or comparable value without discrimination on the ground of sex.
- (2) Despite any other provision of this Act, wage rates fixed by the commission for persons under 21 years may be fixed on a progressive scale based on the wage rates payable to employees 21 years or over in the same calling.
- (3) In making an award that fixes the wage rates, the commission must consider the age and experience of the persons under 21 years.”.

One then comes to s. 129 which by its heading (which is part of the Act, *Acts Interpretation Act 1954*, s. 35C(1)) is said to be a section about the “flow-on of certified agreements”. Section 129 provides:

- “129. The commission may include in an award provisions that are based on a certified agreement only if satisfied the provisions –
 - (a) are consistent with principles established by the full bench that apply for deciding wages and employment conditions; and
 - (b) are not contrary to the public interest.”.

In the context, it seems to us that s. 129 confirms that in making, amending or repealing an award to provide fair and just employment conditions and to ensure that the award meets the benchmarks at s. 126, the Commission may not only have regard to the terms of certified agreements but may base the provisions of an award on a certified agreement (which in consequence of s. 32C of the *Acts Interpretation Act 1954* – singular includes the plural – presumably extends to basing the provision on more than one certified agreement). However, having confirmed the scope of s. 125, s. 129 also imposes each of two limitations on the exercise of the power. The first limitation is that the Commission must be satisfied that the provisions are consistent with principles established by the Full Bench that apply for deciding wages and employment conditions. The second limitation is that the Commission must be satisfied that the provisions are not contrary to the public interest.

Each of the Minister’s Second Reading Speech and the Report of the Industrial Relations Task Force chaired by Professor M. Gardner falls within the definition of “extrinsic material” at s. 14B(3) of the *Acts Interpretation Act 1954*. Regard may be had to both to confirm an interpretation, s. 14B(1)(c).

The Second Reading Speech is consistent with the construction contended for. After noting that –

“The award system is becoming irrelevant and out dated as a consequence of the Commission being limited to awarding minimum safety net adjustments targeted at the low paid. This is unacceptable as a significant proportion of Queensland workers remain solely reliant on the award system to set their wages and conditions.”,

the Minister went on to observe –

“The Report also found that a growing inequality in wages has developed between employees who are reliant solely on wages and those who are involved in enterprise bargaining. For instance, workers who rely on award adjustments for wage increases have received wage increases of 10 per cent since January 1992, while workers covered by collective agreements have had wage increases of up to 15 to 20 per cent above the award rates of pay during the same period.

In Queensland this has meant that workers who are employed by small business and in rural and regional areas who depend on awards have not fared well when compared with other workers employed in urban areas and, particularly, in the public sector who have been covered by enterprise agreements.

These developments provide the context within which legislative support for a relevant and up-to-date award system and general standards of employment must occur. Such a move will provide enhanced social cohesion, a decent standard of living for all workers and community commitment to change where all can benefit.

Without intervention in this system as proposed in the Bill, the wage gap will continue to widen. This has the potential to segment the labour market and lead to the development of a new working poor which may undermine social cohesion in the Queensland community.

The Bill also removes the current legislative restrictions which establish agreements as the primary vehicle for wage movements, and creates a real choice between awards and a range of agreements to suit particular industries and workplaces, employers and employees.”.

All of that may be achieved if s. 125 is used to achieve the benchmarks at s. 126. Relevantly, the Minister then concluded –

“In terms of the interaction between awards and agreements, the Bill makes it clear that the Commission is empowered to include the terms of a certified agreement in an award where the Commission determines this is consistent with full bench wage principles and it is in the public interest to do so.”.

The Minister was, with respect, entirely correct. Section 129 does clarify the Commission’s power to impose limitations about full bench principles and the public interest. (Though, with respect, the second limitation seems not to be satisfaction that it is in the public interest to do so, but satisfaction that it is not contrary to the public interest to do so. The distinction may not be of importance. It is not immediately obvious that ss. 125 to 126 would support insertion of a provision in an award where the Commission lacked satisfaction that its insertion was in the public interest.)

The Task Force Report is more explicit. After observing –

“In order to ensure that awards remain relevant for those dependent on them and as a benchmark for agreements there must be provision for varying them periodically.”;

(thereby we think summarising the dual role of awards), the Task Force turned its mind to what in the heading to s. 129 is described as “Flow-on of Certified Agreements”. It observed (at 122 to 123) –

“. . . While conditions won through agreements would be relevant to such variations, the restriction on automatic flow-on of terms in an agreement should prevail.

The Taskforce believes that allowing for application to vary awards will ensure that they remain relevant for those who are solely reliant on them for setting wages and conditions of employment. Two members of the taskforce argued that awards and agreements should be on an equal footing and that enterprise bargaining increases should be able to be rolled into the relevant award. The majority believed that retaining restrictions on automatic flow-on will prevent difficulties that might arise from allowing agreements in certain enterprises to act as a ‘whipsaw’ for conditions across a common rule award. However, it should be noted that the Commission has discretion in relation to flow-on of conditions, subject to its Full Bench principles. It would not be expected that agreement conditions would be easily incorporated in awards in most circumstances. However, it is worth noting that in the public sector there are special cases where such incorporation might not cause inappropriate enterprise-related outcomes to be imposed across a larger sector. Thus the relationship of conditions in agreements and in awards remains a matter for Commission decision. These proposed changes impose significant responsibilities on the Commission and are discussed further in section 6.”.

To the extent that those passages suggest that use should be made of certified agreements in an evidentiary way to provide fair minimum standards for employees (unable to bargain for themselves) in the context of living standards generally prevailing in the community, the passages take a view of the use which may be made of certified agreements which fall within the scheme ultimately enacted. To the extent that the passages confine the use of certified agreements to such cases, the passages take a narrower view than the scheme ultimately enacted. (The substantive provisions ultimately enacted must of course prevail.) But the passages do make it abundantly clear that “Flow-on of Certified Agreements” is not to be automatic. There is to be a testing against the Full Bench “principles” and the public interest. The fact that a provision appears in a certified agreement (or in a large number of certified agreements – within an industry) may be material to the question whether the provision or a derivative should be included in an award, but is not determinative of whether it is “contrary to the public interest” to include the term. The presence of a provision in a certified agreement goes to the merit of an application to include the provision in an award. It is not the merit in including the provision in the Award.

The limitations at s. 129 are not without their difficulties. As a matter of first impression, the reference to “principles established by the full bench that apply for deciding wages and employment conditions” is a reference to the Declaration of Policy – Statement of Principles which now appears at 167 QGIG 353 and which is reviewed from time to time by the Full Bench which processes the State Wage Case. If that construction be correct the outcome is passing strange. There would be no need to test a provision against, for example, the Declaration of Policy, Occupational Superannuation, 137 QGIG 1105 as amended. (Insertion in an award of a provision contrary to that Declaration of Policy might well be held contrary to the public interest.) More importantly, the Declaration of Policy – Statement of Principles does not set a standard against which proposed provisions may be tested. It guides single Commissioners sitting alone in processing applications to make, amend or repeal awards. We adopt the observations of the Full Bench in the State Wage Case of 1999, 162 QGIG 359 to 360:

“Role of Principles

The principles have always been Queensland principles set in the exercise of independent statutory discretion. But the lineage is Federal. In setting principles the AIRC (and the earlier Conciliation and Arbitration Commission was constrained by the proposition that it might neither prescribe a provision applying to industry generally, *R v. The Commonwealth Court of Conciliation and Arbitration; ex parte Ozone Theatres (Australia) Limited* (1949) 78 CLR 389 at 401, nor prescribe a system of industrial legislation, *R v. Kelly; ex parte Australian Railways Union* (1953) 89 CLR 461 at 475 per Dixon, CJ. Conformably with those principles the AIRC might formulate a principle and apply it consistently to cases falling within it, *R v. Clarkson and Others; ex parte Australian Telephone and Phonogram Officers’ Association* (1982) 32 ALR 1 at 9 per Gibbs CJ. In particular, a Full Bench of the AIRC has always been able to formulate principles which direct how the Commission constituted by a single member sitting alone is to deal with matters coming before it. The noun ‘matters’ is worthy of note. The existing principles are not confined to wage fixing. Neither is any of the drafts. We propose to set principles about making and amending awards.

The Queensland Industrial Relations Commission (and the earlier Conciliation and Arbitration Commission) was not constrained to the prevention of settlement of industrial disputes on a case by case basis. It has (and always had) power to issue a declaration of policy (s. 288). In practice, in the interests of harmonisation, in developing wage fixing principles the QIRC has trodden the Federal route. The principles have taken the form of a Declaration of Policy. Such a declaration cannot establish a set of legally binding principles, see *Local Government Association of Queensland Incorporated v. The Australian Workers’ Union of Employees, Queensland* (1995) 150 QGIG 61, at 63 per Mackenzie President, though of course non-observance of the principles is appealable, by leave, to a Full Bench of the Commission and error in a *bona fide* attempt to apply the principles may constitute an error of law, see in *re Clerks Employed in Sugar Mills Award – State* (1990) 134 QGIG 141, at 142 per Moynihan, President. The principles are fundamentally guidelines. They are intended to guide a Commissioner sitting alone on the question whether that Commissioner may deal with the matter or should seek the consent of the President to refer the matter to a Full Bench. The principles do not bind a Full Bench, though, having regard to the elaborate procedural steps taken to ensure the widest participation in proceedings leading to the declaration of principles, we consider that a Full Bench which has heard submissions by a limited range of parties should be reluctant to depart from a Declaration of Policy. Indeed, to be precise, the guidelines do not (subject to the availability of appeal by leave) absolutely bind a Commissioner sitting alone. What they do is modify the general principle, that an administrative tribunal called upon to exercise a discretion does not perform its duty if it acts in blind obedience to a rule or policy previously adopted, compare *R v. The Port of London Authority; ex parte Kynoch Limited* (1919) 1 KB 176 at 184 per Bankes, LJ, and substitute for the obligation to hear an application for departure from the principles an obligation to seek to refer such a matter to a Full Bench, compare *R. v. Clarkson and Others; ex parte Australian Telephone and Phonogram Officers’ Association* (1982) 39 AKR 1 at 10 per Gibbs CJ.”.

There are no principles to guide a Full Bench in deciding wages and employment conditions. It arguably follows that s. 129(a) has no application where an issue about inclusion in an award of a provision based on a certified agreement arises before a Full Bench. Indeed, there are textual reasons for concluding that s. 129 has no application where reliance is placed upon the terms of a certified agreement in proceedings before a Full Bench about making an award. Sections 255 and 256 are in the following terms:–

“Continuance

255.The Queensland Industrial Relations Commission (the “**commission**”), as formerly established as a court of record, is continued in existence.

Composition

256.(1) The following persons are members of the commission (“members”) –

- (a) the president;
- (b) the vice president, commissioner administrator and at least 6 other industrial commissioners (“commissioners”).

(2) The full bench of the commission (“full bench”) is constituted by –

- (a) for chapter 12, part 16 or for the hearing of an appeal – the president and 2 or more commissioners; or
- (b) otherwise – 3 or more members.

(3) The commission is constituted by a commissioner sitting alone.

(4) More than 1 full bench or commission may sit at the same time.

(5) The commission’s jurisdiction or existence, is not affected by a vacancy in any office of the commission.”.

Prima facie, “commission” would appear to mean “the commission constituted by a commissioner sitting alone”. Doubtless context may suggest another meaning, *Acts Interpretation Act 1954*, s. 32A. But given that the principles which apply for deciding wages and employment conditions expressly limit themselves to proceedings before a single commissioner, the context here suggests that the noun “commission” was used in its *prima facie* sense.

On the facts all of that is of little moment.

If the application is granted the award wage rates will very significantly increase. It is useful to go to a table prepared by Mr Pawlowski, an industrial relations officer employed by Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers, and a witness called by the company.

Margarine Manufacturing Industry Award – S.D.			ALHMWU Claim – Margarine Manufacturing Industry Award – State				
Award Relativity %	Classification	Wage Rate per Week (40 hr/wk) \$	Classification Level	Calculated Relativity %	Wage Rate per week (37.333)hr/wk \$	Excess of Claim per week	
						\$	%
(a) Operational Stream							
79	Operator Grade 1B	417.60	Operator Level 1 (entry level)	96.4	490.60	73	17.5
82	Operator Grade 1A	430.10		96.4	490.60	60.50	14.1
87.4	Operator Grade 2	452.60	Operator Level 2	118.8	583.50	77.90	17.2
				128.4	623.80 (s/o)	171.20*	37.8
92.4	Operator Grade 3	473.50	Operator Level 3	125.1	610.00	136.50	28.8
				134.7	649.90 (s/o)	176.40	37.3
96	Operator Grade 4	488.20	Operator Level 4	134.6	649.50	161.30	33.0
				144.2	689.50 (s/o)	201.30	41.2
100	Operator Grade 5	507.20					
105	Operator Grade 6	528.10					
(b) Laboratory Stream							
<i>*Note: There are no senior operators at level 2 at Meadowlea Murarrie</i>							
82	Trainee/Lab Assistant	430.10	Operator Level D** (entry level - 1 st 3 mo)	133.4	644.70	214.10	49.9
92.4	Lab Assistant	473.50	Operator Level C	154	730.50	257.00	54.3
100	Lab Tech Grade 1	507.20	Operator Level B	161.2	762.70	255.50	50.4
			Operator Level A	171.5	805.60	298.40	58.8
105	Lab Tech Grade 2	528.10					
110	Lab Tech Grade 3	548.90					
115	Lab Tech Grade 4	569.80					
<i>**Note: Levels A-D appear wrong (ie in reverse order) in appendix 1 to the proposed award.</i>							

It must be conceded that wage rates may fairly be compared only where one is satisfied that the rates are payable in respect of the same classification. The assumption in the table is that the “grades” in the existing Award may be matched with the “levels” in the proposed Award. In terms, the “grades” do not match the “levels”. The grades are generically described and rely on time-based training modules. The “levels”, which are derived from the existing Certified Agreements, are specific to the Murarrie site and competency based. Mr Pawlowski has made the assumption that the “levels” may be fitted within the generically described “grades”. The assumption was freely disclosed in his witness statement. The applicant did not cross-examine about the assumption. In those circumstances we proceed on the basis the assumption is either correct or sufficiently close to being correct to make the table a reasonably accurate reflection of the scale of the increases in award rates which will be made if the existing Award were repealed and the new Award made. Our *prima facie* view is that the grant of wage increases of the magnitude proposed are not justifiable under the current principles relating to the fixation of wages and conditions of employment. Indeed, no attempt has been made to argue that the increases may be justified under those principles. What is contended is that no person at the Murarrie site will receive an increase and that there is no prospect of the increases “flowing on”.

The first point is factually correct. Indeed, save for a matter relating to enterprise bargaining to which we shall shortly turn, the proposed Award (if made) would have no more relevance to day to day activities at the Murarrie site than the existing Award. Indeed, as to wages, it would from the outset be 4% behind the paid rates. The second point (about “flow-on”) seems to us not to be immediately obvious. There is already the risk that the wage rates in the Certified Agreements will “flow on” to other food processing awards. The risk arises from the operation of ss. 125, 126 and 129 previously discussed at some length. If this Commission were to endorse the rates by including the rates within an award, the risk of “flow on” to other awards

would be exacerbated. The *Margarine Manufacturing Industry Award – Southern Division*, like the great bulk of Queensland awards, has been subjected to the minimum rates adjustment process. Each of the grades has a relativity to the tradesperson grade in the *Engineering Award – State*. If the proposed Award were made and the relativities of persons in the margarine industry were changed in the dramatic way disclosed at the table, other employees in the food processing sector (with perhaps not dissimilar generic classification descriptions) may very well seek a reassessment of their relativity to the tradesperson level. In our view we should be unwise to create risk of a new round of “change in work value” cases.

Notwithstanding the absence of evidence of any potential Queensland based competitor, it is of concern to us that the proposed new Award is to be a common rule award operating throughout the whole of the state. Any market entrant would be required to pay the award rates or negotiate a certified agreement which would be tested for disadvantage (as previously described) against the Award. Additionally, there is the consideration that the description of classifications in the proposed Award is unintelligible. It is plainly arguable that to interpret the Award one may go back to the Certified Agreements, compare *K and S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd* (1985) 157 CLR 309 at 315, *Busby v Chief Manager, Human Resources Department, Australian Telecommunications Commission* (1988) 20 FCR at 468 per Neaves, Birchett and Lee JJ and *Short v FW Herchus Pty Ltd* (1993) 40 FCR 511 at 517-520. However, even that may not help. The classifications are based on the technology and methods of performing work in use at Murarrie in 1998. One really needs to understand that technology and systems in order for one to understand the classifications. There is the obvious point that there is no justification for forcing new entrants into use of the technology and systems of work embraced by the company in 1998. Certainly, the company itself had no high opinion of those working arrangements. The company’s National Director – Human Resources (Mr Buxton) variously described the arrangements crystallised in the 1998 2001 Certified Agreement as “complex”, “confusing”, “prescriptive and restrictive” “outdated” and as permitting flexibilities within work areas rather than permitting flexibilities across work areas. The National Director may of course have entertained an unduly critical view. However, we cannot entertain any measure of confidence that it is appropriate to force the arrangements upon anyone else. We must also notice that once the Certified Agreement now under negotiation is concluded, the work arrangements in the existing Certified Agreements will not be the work arrangements at Murarrie.

It is contended for the applicant that the *Margarine Manufacturing Award – Southern Division* no longer serves as a safety net under enterprise bargaining. The discrepancy between the wage rates under the Award and under the Certified Agreement is such that abandoning negotiations in which the employer seeks too much and retreating to the Award, is not an option available to the workers. We think that that is so. However, unlike the repealed *Workplace Relation Act 1997* (s. 122(b)) the *Industrial Relations Act 1999* does not have as an object ensuring that “awards act as a safety net of fair minimum wages and employment conditions”. We recognise that enlargement or narrowing of the gap between award rates and certified agreement rates may affect the bargaining power of employees and employers. It may well be that in an appropriate case, e.g. where an employer was making an oppressive use of a large gap, the Commission would intervene to strike a new Award at or about the Certified Agreement rates. We say “may” advisedly because it may well be the correct approach to such a case would be to exercise the power at s. 173 (previously discussed) to refuse consent to withdraw from an existing certified agreement or impose conditions upon the grant of that consent. None of that is relevant here. All the evidence is that whilst vigorous and productive of some measure of animosity, enterprise bargaining is alive and well at the Murarrie site.

In all circumstances we dismiss the application.

Dated this thirty-first day of October, 2001.

D.R.HALL, President.

K.L. EDWARDS, Commissioner.

J.M. THOMPSON, Commissioner.

Released: 31 October 2001

Appearances:-

Mr J. Martin and Mr K. Krebbs for the Australian Liquor Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.

Mr A. Herbert of Counsel instructed by Mr P. Ludeke of Goodman Fielder Consumer Foods and Mr S. Pawlowski for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers on behalf of Goodman Fielder Consumer Foods.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Shane Barker AND Queensland Fire and Rescue Authority (No. B339 of 2001)

COMMISSIONER FISHER

25 October 2001

Application for reinstatement – Charges laid – Resultant dismissal – Witness statements redrafted – Objections – Full evidence not put to applicant – Case for applicant – Case for respondent – *Browne v Dunn* – Case Law – Other Witness statements – Parties directed to confer – Parties to advise prior to 19 November 2001 of any outstanding matters.

DECISION

Shane Barker was dismissed from the Queensland Fire and Rescue Authority (QFRA) on 30 January 2001. His dismissal followed a complaint about his conduct by Belinda Dyer and a subsequent investigation by the QFRA. Six charges were laid against Mr Barker as a result of the investigation of that complaint. Five of the six charges were found to have been sustained. In the circumstances the QFRA considered the appropriate penalty to be dismissal. Mr Barker’s union, the United Firefighters’ Union of Australia, Union of Employees, Queensland Branch (UFU), has filed an application for the reinstatement of their member.

It is inappropriate and indeed irrelevant to make any comment about the complaint, the process of investigation or the dismissal itself as at this point only the applicant’s case has been heard. The only uncontroversial comment that can be made is that the internal QFRA processes generated volumes of documents. Many of these and others are before or are to be before the Commission. The sheer quantity of material has led, in part, to the matter this decision now addresses.

By the Directions Order issued by the Commission for this matter, each party was required to file and serve statements of witness evidence. The applicant and the respondent, in the case of Ms Dyer, prepared witness statements in the first instance which consisted of a statement largely documenting various attachments. The attachments were generally documents relating to the investigative process, for example, statements prepared for the process or transcripts of interview. A number of the issues contained therein do not address the case which is before the Commission. They referred to allegations being investigated at the earlier stage of the process, before being narrowed to the charges. The presentation of witness statements in this form has caused difficulties for the parties in understanding their respective cases as the evidence, especially that being relied on has not been clearly presented. These difficulties contributed to the Commission having to issue decisions that set the scope of the evidence to be adduced. In effect, the

Commission decided to permit evidence about all six charges and matters which give context to the charges. These decisions caused the applicant to have redrafted a number of statements of evidence from witnesses being called for his case.

As mentioned, the affidavit of Belinda Dyer, was in a similar form to many of the statements of witnesses for the applicant. It contained twenty attachments including the statement of her claim of sexual harassment against Mr Barker and transcripts of various interviews with the Investigation Team. The affidavit was provided to the applicant on 20 July 2001, with nineteen of the attachments being provided to the applicant's solicitors on 21 June 2000 as part of the internal QFRA process.

On 18 September 2001 the applicant received a fresh affidavit from Ms Dyer. It was a consolidated document, that is to say, rather than being a statement with a series of attachments, the affidavit contained her evidence in prose. It is a lengthy document running to 325 paragraphs over 48 pages. The affidavit was received by the applicant, after the case for the applicant had concluded and shortly before the proceedings were to resume. A final version of the affidavit was provided to the applicant on 25 September 2001, the day of the resumed proceedings and when Ms Dyer was to give evidence.

In the circumstances the Commission adjourned the hearing on 24 September 2001 to allow the applicant to consider the affidavit and to discuss certain matters of concern with the respondent. When the hearing resumed on 25 September 2001, by consent, the respondent recalled Mr Barker and two other witnesses for the applicant to put certain matters that had been overlooked in the cross-examination. Counsel for the applicant then raised with the Commission a series of objections to the statement of Ms Dyer. In essence, the complaint was that many of the matters contained in Ms Dyer's statement had not been put to the applicant in cross-examination. This was, in their submission, contrary to the understanding reached by Counsel for both parties and recorded on transcript (p. 97). Further, the omission by Counsel for the respondent breached the rule in *Browne and Dunn* (1893) 6 R 67. Accordingly, the material not put in cross-examination should not be admissible. Other objections were also raised about some matters in the statement being hearsay or opinion or conclusions not supported by admissible evidence. The complaint of the applicant goes beyond Ms Dyer's statement and extends to statements from a number of other witnesses for the respondent.

The Commission adjourned proceedings to allow Counsel for the respondent the opportunity to consider its position. On resuming the hearing, Counsel for the respondent argued "in a case where each side has provided the other with witness statements then there is no requirement to put each and every part of those witness statements to the witnesses." (p. 798).

After hearing the submissions, the Commission decided, with some reluctance, to abandon the remainder of the sitting days and to consider written submissions from the parties about the matters in dispute.

The Case for the Applicant

The applicant argues that its case would be seriously prejudiced if Ms Dyer's statement (and others) were allowed to stand unchanged. The applicant contends there were many assertions and issues raised in Ms Dyer's statement that were not put to the applicant or other of his witnesses where that evidence was at odds. It is submitted that the applicant was not and could not have been on notice of what the cross-examiner intended to rely on because at the time of giving his evidence there was no affidavit from Ms Dyer – only the various documents which formed the attachments to her July 2001 statement. Moreover, the rule in *Browne and Dunn* requires matters that are contrary to the interests of the applicant be put to him and his witnesses.

The respondent has, in the submission of the applicant, breached this rule. The applicant argues that the appropriate course to afford fairness to his case is to have the Commission rule on those parts of the statements to which objection has been taken. The applicant opposes the recalling of witnesses (again) to have the objectionable matters put.

The Case for the Respondent

The respondent contends that the applicant has been aware of the matters contained in Ms Dyer's statement for a considerable period as material had been provided to the applicant's solicitors in June 2000. It submits there was no obligation, under the *Browne and Dunn* principles, to put all matters that were in contradiction of his evidence and the applicant has not been prejudiced by not having them put.

The respondent also submits that consistent with the Commission's usual practice and the provisions of s. 320(2) of the *Industrial Relations Act 1999*, these are matters which should be admitted. Submissions are also made about the course to adopt where matters consist of opinion or conclusion.

The Principles in *Browne and Dunn*

Both parties have argued that the principles emanating from the decisions in *Browne and Dunn* are applicable to proceedings in the Queensland Industrial Relations Commission, despite s. 320 of the Act providing that the rules of evidence do not apply in proceedings before the Commission.

Reference was made to decisions of both the (then) Australian Conciliation and Arbitration Commission and the Industrial Commission of New South Wales, that the rule in *Browne and Dunn* should be observed as a matter of good practice (see *Re: National Building Trades Construction Award 1975* (1983) 17 IR 446 and *Pastrycooks Union v Gartrell White* (1990) 35 IR 60).

This Commission would generally share the views expressed in these decisions. In various matters, the Court and Commission have adopted the view that although the rules of evidence do not bind the Commission, they should generally be followed to ensure fairness and justice are served. To this end, the *Browne and Dunn* decision would appear to be applicable to proceedings in the Commission.

While both parties have relied upon *Browne and Dunn* to support their respective cases, they are clearly at odds about the application of the "rule" or "principles" which arise out of that decision. They have each provided decisions which support the positions they advance. Each of these decisions has been duly considered. The starting point must be, however, the decision of *Browne and Dunn* itself.

The relevant passage from the decision is by Lord Herschell LC at 70-71 where he said:

"Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some question put in cross-examination showing that the imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has been complained of as undue; but it seems to be that a cross examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross examination,

and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.”

The principles to be derived from this decision were summarised by Newton J. in *Bulstrode v Trimble* (1970) VR 840 at 846:

“The rule in *Browne and Dunn* has, in my opinion, two aspects.

In its first aspect the rule in *Browne and Dunn* is a rule of practice and procedure designed to achieve fairness to witnesses and a fair trial between the parties. In the second aspect it is a rule relating to weight or cogency of evidence.”

A number of decisions have sought to expound or clarify the fairness aspect of the rule in *Browne and Dunn*. In *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* (Cth) (1983) 1 NSWLR 1, Hunt J said at 26,

“I remain of the opinion that, unless notice has already been clearly given of the cross-examiner’s intention to rely upon such matters, it is necessary to put to an opponent’s witnesses in cross-examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from the evidence in the proceedings.”

In *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 3 FCR 168, Toohey J. agreed with the point made by Hunt J. above. Similarly, the Full Court of the Federal Court of Australia in *Flower & Hart v White Industries (Qld) Pty Ltd* (1999) 163 ALR 744 said at 757:

“As a general rule, before an adverse finding is made against a witness in contradiction of sworn testimony given by that witness, a matter in issue, the subject of that finding, must be put to the witness in cross-examination to enable him or her to give an explanation. However, there can be no need to put such an issue to a witness who has noticed that there is other material in the proceedings that will be relied upon to contradict the evidence of the witness . . .”

On the same matter, Higgins J. said, in *Hadzic v Bristol Paint Limited* (1994) ACTSC 121:

“The rule in *Browne and Dunn*, whatever its true scope, has no sensible application if a party or witness is on notice that his or her version of events is in contest (see *Seymour v ABC* (1977) 19 NSWLR 219; and *Trade Practices Commission v Mobil Oil Australia Ltd* (1984) 3 FCR 168.”

The question for consideration in the case now before the Commission is whether the applicant was on notice that his version of events was in issue. In the event that he was, then the above decisions support the contention of the QRFA that the applicant and his witnesses did not need to be cross-examined on all matters.

For the most part, I consider the applicant was generally aware that his evidence was to be contradicted and of the case against him. Ms Dyer’s original statement had been made available to the applicant in July 2001 and the applicant’s solicitors had been provided with nineteen of the twenty attachments in June 2000. The case against Mr Barker was known in some detail as evidenced by the vast amount of material which has been amassed and to which responses had been given in the various forums. The Commission acknowledges however that the sheer volume of material, the form of Ms Dyer’s original statement and the fact that much of the material provided did not form the basis of any charge, has caused difficulty for the applicant in being aware of all of the matters upon which the cross-examiner intends to rely to contradict his evidence.

To paraphrase Newton J. in *Bulstrode v Trimble* (supra), the first aspect of the rule in *Browne and Dunn* is about fairness – fairness to the witnesses and a fair trial. My concern goes not to the contextual matters, for Mr Barker and his witnesses were allowed opportunity and latitude to address this at some length. My concern is about the six charges that were laid against Mr Barker by the QFRA. As I said in my first decision relating to the scope of the evidence able to be presented, the focus of my determination must be on these charges.

The majority of charges against Mr Barker generally consist of a statement about conduct not fitting to an officer of the QFRA and then proceed to give particulars about such conduct. Some of the particulars are further particularised. The charges are thus multifaceted requiring a deal of evidence to be presented. The respondent’s initial submission about the scope of evidence to be called was that it should only relate to those charges that had been sustained. Early in its cross-examination the respondent put matters to Mr Barker about a number of particulars in Charge 1.2, a charge that was not sustained. In cross-examination evidence was not adduced about other charges or particulars that were not sustained. Exhibit 49, Ms Dyer’s statement, has a number of paragraphs which have been crossed out. In some instances these include paragraphs relating to particulars of charges that were not sustained. To clarify the matters upon which the respondent was intending to rely and to assist in the determination of the matters before me, the matter was relisted.

The respondent confirmed that it only intended to rely on those charges or particulars that had been sustained. In relation to a number of particulars of Charge 1.2 cross-examination of the respondent had occurred for reasons going to credit of the witness.

With this being established and having previously expressed the view that the applicant was generally aware of the case against him, I am satisfied that the respondent has acted in accordance with the first principle of *Browne and Dunn*. There are some matters in Ms Dyer’s statement that go to charges or particulars that were not sustained. For example, in paragraph 36 of her statement, Ms Dyer says:

“Shane concentrated on the fact that Jay was going overseas and that if he really cared about me and loved me he would not go. . . . At this point I got up and told him I wanted to go downstairs.”

These statements directly give rise to paragraphs (vii) and (viii) of Charge 1.2. These, and any other similar statements that do not relate to the charges or particulars that were not sustained, should not be retained in the witness statement.

I propose to allow the respondent to proceed with that evidence that goes to context (see my decision in transcript pp. 337-338). The matter will then become one of weight or cogency of evidence – the second aspect of the rule in *Browne and Dunn*, according to Newton J. in *Bulstrode v Trimble*. Where the respondent intends to rely upon such evidence it should give notice to the applicant prior to final submissions being made so that the applicant can prepare the necessary submissions about the weight and cogency of such evidence.

Other Witness Statements

The applicant also objects to the certain parts of other statements of evidence of witnesses for the respondent on the grounds that (a) material was not put in cross-examination, (b) hearsay, (c) opinion or conclusions or (d) beyond the scope of the Commission's decisions. Many of these objections have been addressed by the respondent by either agreeing to withdraw the objectionable part or modifying it to overcome the objection. Some objections remain and the Commission is thus required to rule on them. I shall deal with all objections to each statement collectively.

Maurice Cummings

Paragraphs 8 to 10 contain material which has not previously been made known to the applicant. Paragraphs 8 and 9 are statements of fact, provide some background and will be allowed. In relation to paragraph 10, the respondent says that it, together with paragraphs 8 and 9, provides the background of events leading to Mr Barker's preparation and the distribution of the options and ramifications paper. The applicant claims that this is the first time he has been made aware of this contention and accordingly is entitled to respond to the issues raised.

The matter of the options paper is the subject of Charge 6. If the respondent intends to rely on paragraph 10 as supporting Charge 6, then Mr Barker should be recalled to give evidence on these matters.

The same ruling applies to paragraphs 14 to 18 and the last sentence of paragraph 20, although the Commission notes the respondent's comment that the contents of paragraphs 14 to 18 are to be found in the Statement of Cummings provided to the applicant on 21 June 2000.

Paragraphs 30 to 35 will be allowed. There has been evidence generally from Mr Barker on this meeting. However, if these paragraphs, and especially paragraph 33, are also to be relied on to support Charge 6, then further evidence from Mr Barker about the matters raised in these paragraphs will be permitted.

Carmen Hunter

The paragraphs to which objection remains are the first sentence of paragraph 7 and paragraphs 8, 9 and 10. The content of the paragraphs had previously been provided to the applicant on 21 June 2000. In my decision on 20 July 2001 I permitted evidence to be called "on the nature of the work environment at the World Firefighters Games Brisbane 2002 office and the nature of the relationship between Mr Barker and Ms Dyer.". The contents of these paragraphs fall within that decision, bearing in mind also that the applicant has called a deal of evidence of this kind.

Renae Randle

Paragraph 8 is objected to on the grounds the material was not put to Mr Barker in cross-examination. The respondent advises the contents of this paragraph have their origins in the Statement of Ms Randle given to the applicant on 21 June 2000.

Matters raised in this paragraph relate to Charge Number 2 and especially 2.1 and 2.6. Evidence has been given by Mr Barker about these two matters. I am prepared to let paragraph 8 of Ms Randle's statement remain, however, in the event the applicant believes he would be prejudiced by not having had the contents of this paragraph specifically put to him, then I will allow him to be recalled for this purpose. I emphasise my position on this matter has been taken as the contents of the paragraph relate to the charges.

Norelle Dyer

Paragraph 12 is objected to on the grounds of relevance and being outside the Commission's rulings. I will allow it to remain on the grounds that is relevant, albeit marginally, to the nature of the relationship between Mr Barker and Ms Dyer.

Patricia Gaudry

The applicant takes objection to Ms Gaudry's statement in its entirety. Although being aware of it, the applicant did not respond to it as it did not form the basis of a charge and was provided as evidence of "other material". This submission was made in the applicant's final submission on the matters objected to in witness statements and has not drawn a further response from the respondent. Until this submission was received only certain paragraphs had been objected to and the respondent had either agreed to modify them or argued for their retention. I have proceeded on the basis the respondent maintains relevance.

Ms Gaudry's statement does not relate to any of the charges. It is about the nature of the relationship between Mr Barker and Ms Dyer. Given the objection raised by the applicant, the fact it does not relate to a charge and does not generally take the case further, the Commission does not propose to admit the statement.

The parties are directed to confer about the decisions now made to clarify whether Mr Barker or any other witnesses for his case need to be called. The Commission would propose to deal with any matters that cannot be resolved between the parties in the week of 19 November 2001. The parties should advise the Registry prior to that date if any matters remain outstanding.

Order accordingly.

G.K. FISHER, Commissioner.

Released: 25 October 2001

Appearances:-

Mr W. Hinkley and Mr J. Nolan instructed by Ms A. Pratt (Hall Payne Solicitors) for the applicant.

Mr G. Martin SC and Mr C.J. Murdoch of Crown Law for the respondent.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 220(3)(b) – arbitration***Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees,
Queensland and Another AND Australia Meat Holdings Pty Limited (Nos. B766 and B827 of 2001)****AUSTRALIA MEAT HOLDINGS – DINMORE MAINTENANCE – CERTIFIED AGREEMENT 2000**

COMMISSIONER BROWN

26 October 2001

DECISION

The applications in the above matters related to claims by the applicant unions that the Australia Meat Holdings– Dinmore Maintenance – Certified Agreement 2000, CA 540 of 2000 (the Certified Agreement 2000) be interpreted in a particular fashion with respect to the accumulation of and payment of annual leave.

The matters were first before the Commission in a conference, D410 of 2000, which was convened as a result of a notification of dispute by the Automotive, Metals, Engineering, Printing and Kindred Industries, Industrial Union of Employees, Queensland (AMEPKU). Mr I. McComb represented the AMEPKU and also registered an appearance on behalf of The Electrical Trades Union of Australia, Queensland Branch (ETU). The dispute remained unresolved.

At the hearing there was some preliminary argument regarding the adequacy of the applications. Eventually the parties agreed that the matters would be dealt with by interpretation of the Certified Agreement 2000 in line with s. 284 of the *Industrial Relations Act 1999* (the Act). Leave to amend the applications was granted.

The issues to be determined are whether or not a week's holiday pay is 42 hours pay or 40 hours pay and whether leave accumulated at 210 hours per year or 200. The issue of how leave taken would be debited against accumulated hours was resolved by agreement.

The differences arise from a belief by the unions that because the employees in question, 7 day rotating shift workers, work in accordance with the Certified Agreement 2000 to a roster cycle which delivers 42 hours each week, then a week's annual leave should be made up of 42 hours pay and not 40 as contended by Australia Meat Holdings Pty Limited (the respondent).

The Unions presented evidence from witnesses Ross Saverin, AMEPKU Shop Steward, Merv Richards employee of the respondent and Neil Bennett, Special Class Electrician and ETU delegate.

Witnesses for the respondent were John Hughes, General Manager – Abattoirs, Industrial Relations and Personnel (via telephone), Neil Brereton, Group Engineer and Neville Tame, Assistant General Manager, Industrial Relations and Personnel.

The main points of Ross Saverin's evidence were:–

- He had been involved in the Certified Agreement 2000 discussions;
- His clear recollection of discussions regarding clauses 16 and 24 was that the work rosters would average 42 hours per week; and
- He had recalled an explanation given to him by Hughes in the presence of Tame was that annual leave would be 5 weeks at an average of 42 hours.

And in cross-examination –

- The Certified Agreement 2000 was in effect the 1998 Agreement with negotiated changes;
- A 7 day rotating roster was the main issue;
- Employees voted in favour of the Certified Agreement 2000;
- The change to Public Holiday provisions in exchange for 5 weeks annual leave was discussed;
- Members in taking a vote at a report back meeting did not discuss how the leave would be taken – how many hours or anything else;
- John Hughes during a white board exercise stated that annual leave would accumulate at 42 hours;
- Under the 1998 Agreement leave was debited at 8 hours per day taken;
- He did not recall detailed discussions occurring in the 1998 Agreement regarding how leave was to be accrued;
- He agreed that overtime and other overaward payments were rolled up into one all-purpose rate under this new Agreement;
- The explanatory document prepared by the Respondent was not considered by employees before the first vote; he agreed that there was no agreement on the question of whether annual leave accumulated on the basis of 40 or 42 hours; and
- He agreed that a reasonable term to describe an hour's pay under the Certified Agreement 2000 would be “ the loaded rate” and “the loaded rate” compensates for overtime.

Merv Richards gave evidence that he was advised on applying for leave that the respondent accumulated annual leave of 5 weeks at an average of 42 hours per week which worked out to 210 hours for 5 weeks. However, under cross-examination, Mr Richards conceded the leave sought may have been subject to the 1998 Agreement.

Mr Bennett made the following points in his evidence:–

- There were detailed discussions on the subject of working hours during the Certified Agreement 2000 negotiations;
- Agreement was reached on 7 day rotating shifts which averaged 42 hours per week;
- His impression from meetings and negotiations was that the new annual leave entitlement was 5 week's leave at an average of 42 hours per week; and
- He was later advised by the respondent that this was incorrect.

Mr Hughes gave evidence that at no time during the Certified Agreement 2000 negotiations did the respondent agree or even discuss the possibility of increasing the weekly entitlement to annual leave from 40 hours per week to 42 hours per week. He maintained that in respect of 7 day rotating roster employees, the respondent's agreement to allow 5 week's annual leave in exchange for changes to the public holidays provision was always on the basis

that the entitlement to annual leave was based on 40 hours per week (as it was under the 1998 Agreement). The white board exercise was about taking leave and not accumulation.

Mr Tame and Mr Brereton gave evidence in the same vein as Mr Hughes and confirmed the respondent's position as to its interpretation of the annual leave provisions (5 weeks based on 40 hours per week at the all-purpose rate). Brereton admitted to having misunderstood that issue previously.

Simply put the unions maintain that if an employee is entitled to 5 weeks annual leave (as per clause 24.1.2) based on the average hours worked, the employee's pay for the period of the leave should be paid on the basis of 42 ordinary hours per week, which equates to 210 hours for 5 weeks.

The respondent relied on the provisions of clause 16.1 (Ordinary Hours of Work) which state that the ordinary hours per week shall be 40, Monday to Sunday inclusive. Also clause 24.7.1 which states that payment for annual leave shall be on the basis of the employee's all purpose weekly rate of 40 ordinary hours worked. The respondent claimed that the effect of the provisions of the Certified Agreement 2000 is that employees on the 7 day rotating roster are entitled to 5 week's leave based on 40 ordinary hours per week or 200 hour's annual leave.

Conclusions

From the evidence it was apparent that whilst the parties had formed and held particular views of how annual leave would accumulate and be paid, there was no discussion in the lead up to the certification of the Agreement that specifically focused on those issues.

In fact, neither party was aware of the other's position until well after the certification of the Certified Agreement 2000.

In evidence and the material presented a number of terms were used to describe the hours of work of the employees in question, namely, ordinary time, ordinary hours, rostered hours, average hours and regular hours.

The true nature of the working hours, which determine the rate of accumulation of hours for annual leave and payment for annual leave, is to be found in the Certified Agreement 2000.

The Certified Agreement 2000 at clause 24 (Annual Leave) states (*inter alia*)—

“24.1 An employee, other than a casual employee, shall at the end of each period of 12 months continuous service be entitled to annual leave as follows:

- 24.1.1 Not less than 5 weeks if employed on shift work where continuous shifts per day are worked over a period of seven days per week;
- or
- 24.1.2 Not less than four weeks in any case.”.

The employees concerned are governed by the provisions of clause 24.1.1, i.e. entitled to 5 weeks per year annual leave.

“Week” is defined as Monday to Sunday inclusive. This definition does not assist the Commission.

The all-purpose weekly rate set out in the Certified Agreement 2000 is, in fact, a loaded rate as described in clause 19.2 as follows:—

“19.2 The rates contained in sub clause 19.1 incorporate all award, over award and non award payments which might otherwise be payable.

Without limiting the generality of this definition, the weekly rate, or ordinary hourly rate is payable in lieu of any and all entitlements by way of wages (for 40 hours per week), allowances (other than call back and tools of trade), loading, special rates and disability allowances or any other additional allowance or payments provided for in any award, agreement or the Act including all site allowances or payments not provided for in any previous award or agreement.”.

The ordinary hourly rate for these employees is arrived at by dividing the loaded weekly rate by 40.

Clause 17 (Overtime-Additional Hours) provides that all hours worked in excess of the ordinary hours of work as provided for in clause 16 shall be paid at the ordinary hourly rate.

Subclause 1 to 4 of clause 16 (Ordinary Hours of Work) reads as follows:—

- “16.1 The ordinary hours of work of an employee, other than a part-time or casual employee, shall be 40 hours per week as required by the company, Monday to Sunday inclusive.
- 16.2 Each employee on a seven day rotating roster shall work additional hours as required by the company so as to average a minimum of 42 hours per week.
- 16.3 Notwithstanding the provisions of 16.1 and 16.2, each employee shall work additional hours in excess of their ordinary hours of work per week as required by the company.
- 16.4 All hours worked by an employee shall be paid at the ordinary hourly rate. This includes hours worked in excess of an employee's ordinary hours of work on any day of the week.”.

Clause 24.7 (Payment for Annual Leave and Loading) provides payment for annual leave on the basis of the employee's all-purpose rate for 40 ordinary hours in respect of which leave is accrued or proportionate payment due.

In many awards ordinary weekly hours of work as varied have been used for the calculation of annual leave accruals and payment, e.g. where a 35 or 38 hour week exists the accumulation and payment is at 35 or 38 where once it was 40.

It would therefore follow that it would be acceptable and indeed appropriate that where the ordinary hours are varied so that 42 ordinary hours are worked that leave accumulates and is paid at 42 hours per week.

Unfortunately for the applicant unions in these matters, that is not the case.

I find that the ordinary weekly hours of the employees concerned is 40 (see clause 16.1) and that the extra time worked so as to average 42 hours per week is "additional hours" as referred to in clause 16.2 and not ordinary hours.

As the additional hours are in excess of 40, they are, in my view, dealt with in terms of payment firstly by clause 17 (Overtime) and secondly by clause 19.2 the explanation of the make up of rates of pay included in clause 19.1.

I find that annual leave accumulates at the rate of 40 hours per week and in this case for 5 weeks per year and that payment for a week's annual leave must be made in accordance with clause 24.7, i.e. at the "all-purpose weekly rate" contained in clause 19 of the Certified Agreement 2000 as varied from time to time. Further, that the hourly rate for the calculation of *pro rata* leave for these employees is the "all purpose rate" divided by 40. That is also listed in the table in the column headed "Weekly ordinary hourly rate" in clause 19 (Rates of Pay).

Order accordingly.

D. K. BROWN, Commissioner.

Appearances:-

Mr B. Burton for the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland.

Ms K. Inglis for The Electrical Trades Union of Employees of Australia, Queensland Branch.
Ms J. Sharpe for Australia Meat Holdings Pty Limited.

Released: 26 October 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Murray Campbell AND Mount Isa Mines Limited (No. B746 of 2001)

COMMISSIONER THOMPSON

30 October 2001

Application for reinstatement – Refusal to undertake work in lead smelter – Concerns of effects of long-term lead exposure – Evidence of medical records in relation to blood lead levels – Alleged anti-management attitude – Dismissal harsh, unjust and unreasonable – Reinstatement or re-employment impracticable – Compensation Ordered.

DECISION

Background

The applicant, Mr Murray Campbell, commenced his employment with Mount Isa Mines Limited (MIM) in 1983 as an apprentice boiler maker and in several broken periods of employment, had worked directly for the respondent for some thirteen (13) years.

A decision to terminate his employment on 27 March 2001 was made by the respondent following the refusal of the applicant to undertake work directed in the lead smelter.

The reasons given for the refusal were concerns by the applicant as to the levels of lead exposure he would encounter based on previous blood test results.

Applicant

The applicant was represented by Mr Ben Swan, of The Australian Workers' Union of Employees, Queensland (AWU), with reliance placed upon the evidence given by Mr Peter Sukroo, Mr Craig Perkins and Mr Campbell.

Mr Campbell's evidence to the Commission was that between 1983 and 1996 he had worked in the area of the lead smelter and on one occasion his blood lead levels had exceeded the maximum required under law and that he was "leaded out".

The use of the term "leaded out" means that a person is precluded from working in the proximity of exposure to lead until the blood lead levels decrease.

Between 1996 and 2001, Mr Campbell was employed as a maintenance technician in the copper smelter which is a part of the plant where there is minimal exposure to lead.

The company, in late 2000 or early 2001, advised the workforce that both the lead and copper smelter maintenance technicians would be required, at a future date, to work in either smelter at various times.

His evidence was that, at a meeting held in either December 2000 or January 2001, which was attended by some forty (40) or fifty (50) employees, having viewed a Pay Television documentary on the studies of long-term health complications that could flow from lead exposure, he raised with Mr Steve Murdoch, at that meeting, his reluctance to work in the lead smelter, and asked if he would be sacked if he did not go across.

Mr Murdoch is alleged to have replied "that he would not sack me and that we would talk about it later on".

In February 2001, he undertook a lead smelter induction course, but at the completion of the course, refused to sign the induction certificate due to his concerns in relation to a future exposure to lead.

Some two (2) weeks later, after completing a Personal Effectiveness Review (PER), his immediate supervisor, Mr Neil Lloyd, raised the issue of the unsigned induction certificate at which time Mr Campbell gave details to Mr Lloyd of his reservations in working in the area due to having previously being "leaded out".

His evidence was that on 26 March 2001, he was given a job sheet by Mr Lloyd which required him to work in the lead smelter and, on reiterating his previous position in that he would not undertake the task because of concerns in relation to his lead levels, he was instructed to report to Mr Paul Telford, the superintendent for the copper smelter.

On meeting with Mr Telford, he gave reasons as to why he felt uncomfortable about working in the lead smelter, and he requested a copy of his medical records that were kept by MIM so that he could get some independent medical advice on the risks associated with working in the lead smelter.

Mr Telford directed the applicant to the MIM medical centre where a blood test was performed which was to provide detail of his current blood lead level. However, his medical records were not provided to him as requested.

The following day, 27 March 2001, he again refused to go to the lead smelter and, after meetings with both Mr Telford and Mr Murdoch, at which he again requested access to his medical records, he was "dismissed on the spot".

Mr Jim Murdoch, SC, appearing on behalf of the respondent, in cross-examining Mr Campbell, addressed a number of issues which included:-

- Previous blood lead levels;
- PER;
- Failure to seek exemption from the lead smelter;
- Smelter flexibility program;
- "Leaded out" working for Simon Carves; and
- Anti-management attitude.

On his meeting with Mr Murdoch on 27 March 2001, at page 44, line 25 of transcript, the follow exchange occurred:-

"Murdoch: Telford says that Steve Murdoch and he then requested you to discuss the matter with them?"

Campbell: Yes.

Murdoch: And Steve Murdoch asked you why you did not report to the lead smelter for work that day?"

Campbell: Yes.

Murdoch: And you said that you were leaded out while working for Simon Carves?"

Campbell: Also my concerns about my previous blood lead levels.

Murdoch: Steve Murdoch told you that your employee file and medical history did not indicate that you had been leaded out?"

Campbell: That's right. He showed me my blood tests from the day before and – and a blood lead test from 1995, none of the tests while I worked for the contractor.

Murdoch: And told you that the test the previous day was 10?"

Campbell: Yes, that was the previous day.

Murdoch: And you knew – he commented that 10 is a low reading?"

Campbell: Steve stated that, yes.

Murdoch: Well you knew it was a low reading, didn't you?"

Campbell: Yes.

Murdoch: And Steve told you that he'd give you a couple of minutes to think about the issue?"

Campbell: Yeah, and I told Steve that the reason why I'm not going to the lead smelter is because of my concerns.

Murdoch: They returned some minutes later and Steve again requested you to work in the lead smelter and you again refused?"

Campbell: Yes.

Murdoch: And Steve reiterated what he's said earlier about the fact that there were no restrictions preventing Murray Campbell – preventing you from working in the lead smelter?"

Campbell: Yes.".

The evidence-in-chief of both Mr Sukroo and Mr Perkins was that they were each present at the monthly meeting of managers held in January 2001 where Mr Campbell raised with Mr Murdoch his concerns about working in the lead smelter, and of the ramifications should he refuse to carry out work in that area. Their evidence, in effect, corroborated the account given by Mr Campbell during the course of his evidence.

Mr Murdoch, SC, in cross-examination, questioned Mr Perkins on his role as a member of the Smelter Improvement Team which dealt with the introduction of the flexibility arrangements regarding employees working in both smelters, and of his own exemption from working in the lead smelter due to his high blood lead level.

Respondent

Evidence was given on behalf of the respondent by Mr Murdoch, Mr Lloyd, Mr Neil Hastie, Mr Mark Ezzy, Mr Telford, and Mr Tony McPaul.

Mr Murdoch, the Manager of the Metallurgical Operations Maintenance, gave evidence that he was responsible for the implementation of a plan to allow flexible employment arrangements that would have employees to work in different areas of the plant from time to time.

The plan was implemented, in the first instance, in the concentrators, and as a result of successful outcomes, it was decided to look at developing a workplace flexibility program in all plants including the copper and lead smelters.

In April 2000, it was communicated to employees that management was to embark on a workplace flexibility program in the smelters, and in September of that year, every employee in the copper and lead smelters was sent a letter advising of the proposal, and each employee was made aware of their right to nominate for a committee that would, in turn, have the task of making recommendations to management on the implementation of the smelter flexibility program.

The committee conducted an in-depth consultation process, including a review of records of all employees to ensure that there were no employment and/or medical issues that would prevent certain employees from working in the different areas.

As part of the process, Mr Murdoch, in evidence, referred to a meeting of employees held in early January 2001 where Mr Campbell asked him whether he would be sacked if he refused to work in the lead smelter.

In his affidavit of evidence, at paragraph 15, he set out the reply he gave to Mr Campbell's question:-

"I replied that we always address each case individually on its merits and that I could not envisage any reason given the extensive work that had been carried out on the process why anyone would be in that situation. I do not recall Murray stating that he had an issue regarding previous blood lead levels, or that he was concerned about previous fatalities in the Lead Smelter."

On 27 March 2001, he was advised by Mr Telford that Mr Campbell was refusing to report for work at the lead smelter and, prior to meeting with Mr Campbell, he, along with Mr Hastie, reviewed the employee's file, and could find no identifiable reason as to why Mr Campbell would not accept a direction to work at the lead smelter.

At around 9.15 a.m. on that day, he, along with Mr Telford, met with Mr Campbell in a meeting that was scheduled to ascertain as to why he had refused to work in the lead smelter. A reason was given that Mr Campbell had been "leaded out" whilst working for Simon Carves prior to 1992 and, it was on that basis, that the refusal to work in the lead smelter had been made.

It was pointed out to Mr Campbell that blood test results from the previous day (26 March 2001) showed a reading of 10 which was considerably lower than the legislative level of 40 that requires a person to be removed from an area where they may have an exposure to lead.

Mr Murdoch's evidence was that, despite being given numerous opportunities at that meeting to reconsider his position, Mr Campbell continued to refuse what Mr Murdoch considered to be a reasonable direction and, as a consequence of that, he was summarily dismissed and escorted by Mr Telford and Mr Lloyd from the lease.

The cross-examination of Mr Murdoch touched on a number of issues including:-

- Campbell's work performance;
- Acting in higher positions;
- Flexibility work group;
- Reference to Pay TV documentary;
- Blood lead levels; and
- Campbell's PER and anti-management comments.

The evidence of Mr Lloyd, a supervisor at the copper smelter, provided detail on the introduction of the flexibility arrangements between the two (2) smelters.

As the direct supervisor of Mr Campbell, and having known him for over fifteen (15) years, his evidence was that on 26 March 2001, it was the first time that he had heard of Mr Campbell's alleged blood lead problem.

He did not believe that Mr Campbell had a blood lead problem, a position formed from viewing the medical details of all employees that were required to take part in the smelter flexibility program, including the records of Mr Campbell.

Mr Lloyd felt that if Mr Campbell had genuine health concerns, he had ample opportunity to raise them with management prior to 26 March 2001.

Following Mr Campbell's refusal to work in the lead smelter, Mr Lloyd told Mr Campbell that he should be prepared to talk to Mr Murdoch, to which it is alleged Mr Campbell said "If Steve Murdoch wants to talk to me, he can talk to me in the plant, not in his office where he can brow beat me. He can talk to me with Roy Harris."

Finally, in his evidence, at paragraph 23 of his affidavit, he stated:-

"I told Steve, Paul and Neil that I believed Murray was anti-management and simply did not want to accept that the workplace practices were changing. I told them that I believed that the alleged blood lead problem and fatalities issue were just excuses."

Evidence from the Employer Services Superintendent, Mr Hastie, was in the form of two (2) affidavits, wherein the first of those he provided evidence that he had reviewed Mr Campbell's medical file which did not contain any medical evidence that a blood lead problem existed, and further, there was no such evidence that indicated a problem had existed at the time Mr Campbell was employed on site by Simon Carves.

The second affidavit covered, in specific terms, the procedures adopted by contractors in relation to workers who exceeded the maximum blood lead levels and, in particular, applied to Simon Carves during the time of Mr Campbell's employment.

In respect of Mr Campbell's claim that he was "leaded out", at paragraph 5 of Mr Hastie's second affidavit of evidence, he said:-

"In addition to the searches which I conducted on or about 26 and 27 March 2001 and which are detailed in my statement made and filed on 13 August 2001 in this proceeding. I have since searched for any possible records regarding Murray Campbell's blood lead history. In particular, I

have contacted, or am aware that contact was made, ISA's Industrial hygienists, the ISA medical centre. Simon Carves, EPOCA Constructions, the Lead Smelter office and several long term Lead Smelter employees (both maintenance and production). I am satisfied that I have exhausted all possible avenues with respect to obtaining information regarding Murray Campbell's blood lead history. Neither the people I have contacted nor the information and files that I have reviewed have revealed to me any evidence of Murray Campbell ever having a blood lead problem."

Mr Ezzy, the Maintenance Superintendent at the lead smelter, recalled attending a training course on 26 March 2001 at which Mr Campbell told him, during a break, that he could not work in the lead smelter because of his blood lead levels.

He stated that he did not believe Mr Campbell's claim and, in his affidavit at paragraph 5:-

"I remember thinking that the real reason was because Murray was from the 'old school' as he did not believe that workers in the copper smelter should be required to work in the lead smelter as part of the changes implemented by the smelter flexibility program."

Mr Telford, the Supply and Contracts Manager at MIM, was the Superintendent at the Copper Smelter Maintenance up to 2 July 2001.

In October 2000, he was appointed Chairman of the Smelter Flexibility Program Committee and, in carrying out the functions of that role, chaired meetings and spoke directly with employees within the copper smelter regarding the potential changes.

On numerous occasions, he stressed to employees if they had any concerns they should raise them with either himself or other members of the committee and, on that basis, he could not understand that if Mr Campbell had genuine blood lead level concerns why he had not raised them prior to 26 March 2001.

On reviewing Mr Campbell's medical records kept by the company, he was unconvinced that a problem existed.

His evidence included his recollection of the meetings held with Mr Campbell, Mr Murdoch, and himself, on 27 March 2001, and supported the account given in evidence by Mr Murdoch.

On the summary dismissal of Mr Campbell, he told the Commission that he escorted him from the lease.

The last witness for the respondent was Mr McPaul, the General Manager of Metallurgical Operations at MIM.

He gave evidence that until April 2001, he chaired a fair treatment hearing in respect of Mr Campbell as it related to his dismissal on 27 March 2001, for failing to obey an instruction to work in the lead smelter.

During the course of hearing, he formed the view that the decision to dismiss Mr Campbell was fair and in accordance with MIM policy based on the following reasons:-

- There was no evidence whatsoever that Murray Campbell had at any time during his various periods of employment on the lease at Mt Isa been "leaded out" or experienced any other blood lead problem;
- There was nothing in Murray Campbell's terms and conditions of employment which prevented him from working in the lead smelter at Mt Isa;
- Given the extensive consultation process which took place during the development and implementation of the smelter flexibility program, Murray Campbell had ample opportunity to raise any genuine concerns which he had in respect of being required to work in the lead smelter with not only me, but also other members of management and members of the smelter flexibility program committee; and
- Given that Murray had acted on staff on a number of occasions, he would have been well aware of the changes being implemented by the smelter flexibility program and the importance of raising any queries held by employees in relation to those changes."

On 9 April 2001, after further investigation, he advised Mr Campbell that it was not his intention to overturn the decision to dismiss him.

Final Submissions

Applicant

Mr Swan covered the matters of importance in sequence, including Mr Campbell's employment history, blood lead level concerns, company process on introduction of flexible work arrangements for the smelters, personal effectiveness review, and the summary dismissal.

According to Mr Swan, the evidence was that between January 1990 and December 1993, when Mr Campbell was employed by Simon Carves working in the lead smelter at MIM, his blood level thresholds were, at that time, significantly higher than at the time of his dismissal in March 2001.

Those levels were in the forties (40), fifties (50) and sixties (60), which are now levels beyond what is the current threshold at which a person is "leaded out".

Following Mr Campbell's viewing of a Pay Television documentary which reported on scientific uncertainty as to the long term affects of high lead exposure to humans, Mr Campbell formed legitimate views that further exposure to lead would have effects on his long term health.

His evidence was that he raised with MIM management, through Mr Murdoch and Mr Lloyd, his concerns, and in the case of Mr Murdoch, raised the question of his possible sacking for refusing to work in the lead smelter.

It was reasonable for Mr Campbell to assume that Mr Murdoch's comments that "he would not be sacked and that they would talk about it" meant that his refusal to work in the lead smelter would not necessarily lead to his dismissal in the way that it occurred.

The failure of Mr Campbell to sign his lead smelter induction form, and the discussion with Mr Lloyd over that issue at the time of his PER, confirms that Mr Campbell certainly had strong opposition to working in the lead smelter, sometime prior to his refusal.

Mr Campbell had made a number of unsuccessful efforts to obtain his medical file from MIM, with the only information being made available to him being his blood lead level results at the commencement of his last term of employment which was in August 1995, and the test results from 26 March 2001.

In reference to the harshness, unjustness and unreasonableness of the dismissal, Mr Swan relied upon the authorities of *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 467 and *Bostik v Gorgevski* (No. 1) (1992) 36 FCR 20 at 28:–

“... ordinary non technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression is desirable. We agree with the learned trial judge’s view that a court must decide whether the decision of the employer to dismiss was, viewed objectively, harsh, unjust or unreasonable. Relevant to this are the circumstances which led to the decision to dismiss and also the effect of that decision on the employee. Any harsh effect on the individual employee is clearly relevant but of course, not conclusive. Other matters have to be considered such as the gravity of the employee’s misconduct.”

Mr Campbell had, as a result of his dismissal, lost a long-term employment association with MIM, with his dismissal causing him financial hardship and directly affecting his prospects of attaining further work at his trade in Mount Isa.

The gravity of the misconduct for refusing to work in the lead smelter until he had the opportunity to have his medical records viewed by an independent medical person did not, according to Mr Swan, warrant his summary dismissal, and the penalty was a disproportionate punishment for the offence.

Mr Campbell has the skills and qualifications to be either reinstated or re-employed in another position within MIM similar to that previously held. However, if both reinstatement or re-employment is considered impracticable, then a payment of compensation should be made.

Respondent

Mr Murdoch’s SC, final submissions appeared under the following headings:–

- Introduction;
- Outline of relevant facts;
- Legal conclusions;
 - Unfair dismissal – Role of Commission;
 - Failure to follow a lawful and reasonable instruction;
- Factual conclusions;
 - No evidence of applicant exceeding blood lead level removal rate;
 - Applicant did not raise alleged lead blood concerns until 26 March 2001;
 - Applicant’s blood lead concerns not reasonably or truly held;
 - Applicant had ample opportunity to raise concerns with management or smelter flexibility committee;
 - Respondent’s direction to undertake assigned work legal and reasonable;
 - Work assigned was integral to the respondent’s operations;
 - Respondent had no option but to dismiss the applicant; and
 - Reinstatement impractical.

In summary, Mr Murdoch relied upon the proper processes adopted by MIM in facilitating the flexibility process and the failure of Mr Campbell to raise any of his concerns until 26-27 March 2001.

There was no evidence of the applicant ever having exceeded the prevailing blood lead removal levels at any time in the past, and his blood lead test results on 26 March 2001 was ten (10) µg/dL which certainly was not a blood level to support his actions in refusing to work in the lead smelter.

The respondent gave the applicant a number of opportunities to comply with the direction to undertake the work assigned to him, and with his continued refusal, had little option at the end but to summarily dismiss him.

It was submitted that the applicant had not made a case to be entitled to the relief being sought from the Commission. However, if the Commission was to determine that the termination had been harsh, unjust or unreasonable then, in the circumstances, reinstatement would be most impracticable.

Conclusion

These proceedings were not of a complicated nature. Put simply, Mr Campbell was summarily dismissed for refusing to work in the lead smelter for the reason that he alleged that concerns existed for his health following high blood lead levels that he had had going back to 1990-1992 when he was employed by Simon Carves on work in the MIM lead smelter.

The company, on the other hand, justified the dismissal based on the belief that the applicant had refused, what they considered to be a lawful and reasonable directive to carry out work in the lead smelter.

It was not disputed that the company had put in place a procedure to facilitate the introduction of a more flexible work arrangement between the copper and lead smelters, and that the procedure, in principal, was not one that the Commission would criticise in that it allowed for broad participation from the workforce with a committee comprising of employees and management being given the task of making recommendations as to how the final changes would proceed.

There was a broad level of communication involved in the process, with numerous meetings held at which the workforce was briefed on the progress that was being made by the committee.

At one of these meetings, in January 2001, it was not disputed that Mr Campbell raised a question with Mr Murdoch as to whether he would be sacked if he refused to work in the lead smelter. However, there was not agreement that the reason behind the comment was the concerns of Mr Campbell as to his previously being “leaded out” and of the long-term effects of exposure to levels of lead that could occur with him working in the smelter.

The evidence from the respondent’s witnesses was that the applicant had every opportunity, from September 2000 to 26 March 2001, to formally raise his concerns, and by not doing so, did not engender a belief that there were genuine concerns for his health.

On the issue of the blood lead levels of Mr Campbell, the only evidence of substance before the Commission related to tests taken in August 1995 and on 26 March 2001, which showed levels of fourteen (14) µg/dL and ten (10) µg/dL respectively, which were both substantially below the current threshold of forty (40) µg/dL.

I am of the view that an employee with Mr Campbell’s knowledge and experience could have taken what would have been considered more reasonable steps well before 26 March 2001 to not only raise formally with MIM his concerns with his blood lead levels, but also seek to obtain information from Simon Carves in respect of his previous employment medical details.

His lack of action was, in my view, a fundamental cause of the predicament in which he subsequently found himself.

The manner in which MIM and, in particular, Mr Murdoch, dealt with Mr Campbell’s refusal was, in the view of the Commission, heavy handed when one considers the case of another employee, Mr Trevor Dempsey, who also refused to work in the lead smelter with this particular incident touched on in the evidence of Mr Perkins and, in somewhat more detail, by Mr Murdoch, who said at page 67, line 30, of transcript:-

“ . . . And the point in fact was that Trevor had some – some personal discomfort with removing the full extent of his mo and the – Trevor had gone a long way to try and satisfy the occupational health and safety requirements with regards to the clean-shavenness in his interpretation which was basically to shave down to the point where the contact point on the respirator does not interfere. We have a long history with – with this sort of debate or – or the interpretation because when does – when does a moustache become a moustache become a moustache, and basically the – the registered manager at the time, or the company standard or policy at the time, was – you know – you’re either in or out – clean shave or don’t clean shave. At no point in time did Trevor did not want to go and work there. He was quite happy to go and work there, however he had a personal issue with an aesthetic part of his face which was clean shaven or not, and he was fairly well distressed at the time that we spoke to him about it – **in fact heavily distressed – and was really physically and – visually distressed about it, and we elected to not send him back out in the workplace but send him home, calm him down, have a think about it, come back the next day. Subsequent to that Trevor came back and said, ‘I don’t have a problem.’** He then proceeded to the lead smelter on the next shut, fully clean shaven and proceeded to work in accordance with the directions we gave him.”. (emphasis added)

The refusal of Mr Dempsey to work in the lead smelter was followed by what could be best described as a “cooling off” period in that he was sent home and given time to reconsider, whereas Mr Campbell was given, in the end, somewhere around ten (10) minutes to make his final decision.

Whilst I think there was every reason for the company to question the sincerity of Mr Campbell’s claim over his blood lead levels, their response, in my view, in summarily dismissing him, and having him immediately escorted from the lease, was not only harsh but also unreasonable.

The evidence of Mr Murdoch and Mr Lloyd on Mr Campbell’s work performance brought in to question a view that they were less than happy with both his attitude and his ability to work with management, and this may have precipitated the way in which they dealt with his refusal to work in the lead smelter as opposed to how the position of Mr Dempsey was considered.

After consideration of all of the evidence and the authorities provided to the Commission, I find that the termination of Mr Campbell was harsh, unjust and unreasonable, in the circumstances. Therefore, he is entitled to have access to remedies in accordance with ss. 77 and 78 of the Act.

Mr Swan argued that either reinstatement or re-employment, because of the size of MIM, was a remedy that should be considered in a positive frame, by the Commission, whilst Mr Murdoch, SC, in his final submissions, in paragraphs 141 to 148 (inclusive) provided extensive reasoning as to why such options were not practicable.

Mr Murdoch’s, SC, summation of the evidence, in particular as it related to Mr Campbell’s views on management and his unwillingness to cooperate with higher levels of management, should convince the Commission, in the circumstances, that reinstatement for Mr Campbell to his previous position is not appropriate, and for the same reasons, nor is his re-employment a viable option.

I find, in all of the circumstances, that it is impracticable for the Commission to order the reinstatement or re-employment of Mr Campbell, and that a more reasonable option would be the consideration of awarding of some form of financial compensation.

At the time of his dismissal, Mr Campbell was being paid an annual salary of \$53,740, and since the termination, and at least up to the time of hearing, had been unable to find work and was receiving an amount of social security of some \$454 per fortnight.

I accept that, in attempting to mitigate his losses, it has been most difficult, if not impossible, to find work in his trade, in Mount Isa, whilst the matter of his dismissal had still to be finalised.

After consideration of all of the circumstances, I order that MIM pay Mr Campbell an amount of \$14,468.46 gross being three and a half months pay as compensation for having his employment terminated in a harsh, unjust and unreasonable manner. Payment is to be made twenty-two (22) days after the release of this decision.

I order accordingly.

J.M. THOMPSON, Commissioner.

Appearances:-
Mr B. Swan, of The Australian Workers’ Union of Employees, Queensland, for the Applicant.
Mr J. Murdoch, SC, instructed by Mr D. O’Brien of MIM Holdings Limited, for the Respondent.

Released: 30 October 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 72 – excluded employees

Ian James Walters AND B. T. Equipment Pty Ltd (No. B1005 of 2001)

COMMISSIONER SWAN

30 October 2001

DECISION

This matter was set down for hearing during October. At the commencement of proceedings, counsel for the respondent employer raised a preliminary issue for determination.

The respondent believed that the application should not proceed as the applicant was an employee on probation pursuant to s. 72 of the *Industrial Relations Act 1999* (the Act). The respondent relied upon the decision of the President of the Industrial Court, President Hall, in *Chubb Security v Chee*, 166 QGIG at 388 (No. C3 of 2001).

The brief facts of the matter are as follows. Mr I. Walters had been employed by Tutt Bryant Equipment Pty Ltd for a period of 13 years. Around March, 2001, Tutt Bryant Equipment Pty Ltd and Banbury Engineering entered into a joint venture. The new entity was called B.T. Equipment Pty Ltd.

On 2 April 2001, the applicant was advised that his employment with Tutt Bryant Equipment Pty Ltd was terminated.

A letter from a Mr J. Blaker, General Manager of Tutts Tat Hong, confirmed the termination of employment as from 2 April 2001, from Tutt Bryant Equipment Pty Ltd. At the same time, an offer of employment, to commence on 2 April 2001, was made by B.T. Equipment Pty Ltd to the applicant.

The terms of the new offer of employment were, *inter alia*, as follows:–

- “1. Your terms of employment with B.T. Equipment Pty Ltd will be the same as your existing terms of employment with Tutts Tat Hong.
2. If you accept this offer, your entitlement to:
 - (a) Annual leave, leave loading, sick leave and long service leave related to your service with Tutts Tat Hong will be honoured by B.T. Equipment Pty Ltd.
 - (b) Wages, salary, remuneration, compensation and other benefits related to your service with Tutts Tat Hong up to the Completion Date will be paid to you by Tutts Tat Hong.
3. You will remain a member of the existing superannuation fund.
4. Your service with Tutts Tat Hong up to the Completion Date will be regarded as continuous service with B.T. Equipment Pty Ltd for the purposes of all service related benefits (excluding superannuation).”.

The applicant accepted this offer. On 15 May 2001, B.T. Equipment Pty Ltd advised the applicant that his employment would be terminated on the basis of redundancy.

The applicant was offered 5 weeks termination pay and eight weeks severance pay, plus accrued long service leave and holiday pay entitlements from his prior employment.

A new contract of employment commenced on 2 April 2001 with B.T. Equipment Pty Ltd setting out its terms (detailed earlier) which were accepted by the applicant.

Counsel for the applicant submitted that clause 4 of the earlier cited correspondence met the requirements of s. 72 (1)(ii) of the Act where an employee was an excluded probationary employee save for the situation where the employee and employer “agree in writing that the employee serve no probationary period at all.” This is the only area where counsel for the applicant saw any difference between this matter and that determined by President Hall as possibly assisting his cause.

In my view, clause 4 talks of “continuous employment” but only as it relates to “all service related benefits (excluding superannuation)”. It is not drafted in such a manner as to meet the requirements of s.72 (1)(ii) of the Act. To satisfy that section of the Act, specific wording would be needed which made particular reference to the fact that a probationary period was not to be served by the employee.

Beyond that, the decision of President Hall (previously cited) prevails.

In my view, that interpretation is the only one open to the Commission with the Legislation worded as it is.

As such, I uphold the preliminary application made by the respondent and determine not to hear the application for reinstatement.

Order accordingly.

D.A. SWAN, Commissioner.

Appearances:–

Mr T. S. Mylne, instructed by Mr S. Ward of Burns Lawyers on behalf of the Respondent.

Mr M. K. Conrick, instructed by Mr R. Ellem of Praeger Batt Solicitors, on behalf of the Applicant.

Released: 30 October 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Dru Elliot Powell for the Department of Industrial Relations
AND Commercial Employment Services Pty Ltd (No. W115 of 2001)**

COMMISSIONER SWAN

30 October 2001

Claim for unpaid wages – Challenge over correct Award classification – Allegations of not recording time and wages records – Failure to correctly classify employee – Correct payment of wages awarded.

DECISION

Mr D. Powell (Department of Industrial Relations, Brisbane), on behalf of Mrs Michelle Hill, seeks the payment of unpaid wages (\$5,103.68) from Mrs Hill’s former employer, Commercial Employment Services Pty Ltd pursuant to s. 278 of the *Industrial Relations Act 1999* (the Act).

The employer was represented by Mr P. Churven. The particular place of employment was the Astor Hotel, Wickham Terrace, Brisbane.

Mr G. Pflugst (Industrial Inspector, Department of Industrial Relations, Brisbane) gave evidence for the applicant. Acting on a complaint made by Mrs Hill, Mr Pflugst investigated the matter and determined that Mrs Hill had not been correctly paid in accordance with the *Accommodation Industry (Other Than Hotels) Award – South-Eastern Division* (the Award), Grade 5 employee. Mr Pflugst stated that Mr Churven “was refusing the claim as Mrs Hill had failed to use the ‘bundy clock’ provided to record her work time”, amongst other things.

Mrs Hill’s evidence is that from 21 June 2000, she commenced duties at the Astor Hotel as a casual employee. From 24 August 2000 to 13 November 2000 she was employed as the Executive Housemaid on a full-time basis. She was paid a weekly rate of pay during the period of \$572.00. Mrs Hill claims that when overtime worked and penalty rates applicable were calculated, the set weekly wage was deficient. She also claimed that she performed duties consistent with those of a Grade 5 employee under the Award.

Mrs Hill states that, after working for one week as the Executive Housemaid and recording the hours worked (which did include overtime) on the “bundy clock”, she was advised by her Manager, Ms K. Purvan, not to use the “bundy clock” again as she was a permanent employee and that Ms Purvan would keep and accurate record of the extra hours worked.

This appeared not to have happened, and the only person keeping a record of extra hours worked was Mrs Hill. Mrs Hill’s records were submitted to the Commission and showed a record for each day of the extra hours worked. Mrs Hill stated that she submitted these records to Ms Purvan but that she was never paid for the hours.

Ms Purvan was not called to give evidence by the respondent. Ms Purvan had, some time prior to this hearing, left the employment of the respondent.

Mr Churven called two witnesses to give evidence for the respondent. One witness had worked in Mrs Hill’s position of Executive Housemaid, and the other assumed those duties after Mrs Hill’s departure. Neither had worked (except for an overlap period) with Mrs Hill. Each testified to working set hours of work (one stated that she had family responsibilities and needed to finish work at a specific time each day). One witness, Mrs Hockey stated that at some point in time she had performed the type of duties described by Mrs Hill but that those duties had later been subsumed by Ms Purvan. I have considered this evidence in the context within which it was given.

Mr Churven gave evidence and challenged the applicant’s claim that she should have been classified at a Grade 5 level within the Award. He also challenged her claim that she in fact worked overtime. He stated that he was often at the premises at night and did not see Mrs Hill working the hours claimed. Mr Churven also claimed that as a consequence of previous discussions with the Department of Industrial Relations around the issue of time and wages matters, he was fully aware of the employer’s obligations in this regard.

The only ex-employee of the respondent who had actually worked with Mrs Hill (Ms Wardle) stated that:–

“In the morning when we turned up for work we’d go down to the laundry area and Michelle would hand us all a couple of sheets of paper with our work for the day written on it and she’d written on it, you know, any special instructions as well.”.

This, together with Mrs Hill’s evidence, supports the fact that Mrs Hill’s duties were consistent with those of a Grade 5 employee under the Award.

Within the Award, at Part 3, subsection 3.1(e) the Hospitality Services Grade 5 employee:–

“shall mean an employee who has the appropriate level of training and who is primarily engaged in one or more of the following:–

- (i) (A) solely responsible for other cooks and other kitchen employees in a single kitchen establishment where no other trade qualified cooks are employed;
- (B) supervising, training and coordinating food and beverage staff including maintenance of service and operational standards, preparation of operational reports and staff rostering;
- (ii) (A) general or specialised cooking duties including the training and supervision of other cooks and kitchen staff and relieving Hospitality Services Grade 6 employees on their rostered days off or when on annual or other leave;
- (B) **supervising, training and coordinating the work of employees engaged in the housekeeping area.”.**

From the applicant’s description of her duties and from the corroborative evidence of Ms Wardle, there is little doubt that she should have been paid as a Grade 5 employee (see (ii)(B) above). I believed the applicant when she stated that she had been told not to use the “bundy clock” for recording her hours. I believed the applicant when she stated that she had approached Ms Purvan for her overtime pay and had been “fobbed off” on a number of occasions. It was up to the employer to ensure that appropriate time and wages records for employees were kept. (See ss. 366 and 367 of the Act).

Were it true, and I don’t believe it is, that the applicant refused to use the “bundy clock”, then the employer should have acted immediately to rectify the situation. It didn’t. Mrs Hill’s evidence was blunt and truthful. It is not for me to speculate as to why the employer (allegedly through Ms Purvan) sought to act in the manner in which it did but I can state that by so doing, it deprived Mrs Hill of her rightful wages.

Regarding the circumstances surrounding the cessation of her employment, Mrs Hill states that:–

“The facts surrounding my termination are that I had a meeting with Ms Purvan at 9:00 a.m. on Monday 13 November 2000, where I requested payment for all the overtime I had worked. Ms Purvan said she would pay me overtime if I went back to being a casual employee when I declined she asked me to think about it. I left her office to think about it as requested but decided I would resign. I gave my written resignation to Ms Purvan’s secretary at about 10:00 a.m. to finish on Wednesday 22 November 2000.

At 3:00 p.m. Kim phoned me and told me to finish today and I then left the premises. I was not given any notice of such termination and was not paid for any wages in lieu of notice of termination. I claim that I was underpaid wages/overtime when employed as an Executive Head Housekeeper (permanent). I claim an underpayment in relation to pro rata annual leave owed by the respondent to me on termination. I claim that as I was terminated without notice that the respondent owes me wages in lieu of notice of termination of employment.”.

On all of those claims, I find in favour of the applicant.

There was some attempt made to besmirch the character of Mrs Hill by Mr Churven. The claims, which do not require repeating in this decision, were either not substantiated or, where contested through evidence, I preferred the evidence of Mrs Hill.

The employer is to pay to Mrs Hill the amount of \$5,103.68 within 22 days from the release of this decision.

Order accordingly.

D. A. SWAN, Commissioner.

Appearances:-

Mr D. Powell of the Department of Industrial Relations on behalf of the Applicant.

Released: 30 October 2001

Mr P. Churven on behalf of the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 – s. 21 – application to amend order

Retailers’ Association of Queensland Limited, Union of Employers AND Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and Others (No. B1380 of 2001)

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

VICE PRESIDENT LINNANE
COMMISSIONER SWAN
COMMISSIONER BLADES

1 November 2001

ORDER

FURTHER to the decision of the Full Bench on 19 September, 2001, this Commission doth order that the said Order be amended as follows as from the nineteenth day of September, 2001:-

1. By deleting subclause 3.3(3) and inserting the following in lieu thereof:-

“(3) Notwithstanding the provisions of subclause (1) hereof, the following trading hours shall apply in all the areas specified in clause 3.2 for the following date each year:-

	Opening Time	Closing Time
23 December	8.00 a.m.	12 midnight

except for the following trading hours which shall apply for the calendar year 2001:-

Area	Day	Opening Time	Closing Time
All of the State, (except the Inner city of Brisbane, including the Area of the City Heart of Inner City of Brisbane, Woolloongabba Central Business District, Rockhampton Central Business District, and Townsville Central Business District)	Thursday 20 December 2001	8.00 a.m.	12 midnight
The Inner City of Brisbane, (including the area of the City Heart of Inner City of Brisbane), Woolloongabba Central Business District, Rockhampton Central Business District, and Townsville Central Business District.	Friday 21 December 2001	8.00 a.m.	12 midnight”

Dated this first day of November, 2001.

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

Operative Date: 19 September 2001
Order – Trading Hours – Non-Exempt Shops Trading by Retail – State
Released: 1 November 2001

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1990, s. 142, &
Industrial Relations Act 1999, s. 713 (2)*

SPOTLESS CATERING SERVICES LIMITED**AND****THE AUSTRALIAN WORKERS' UNION OF EMPLOYEES, QUEENSLAND****WEIPA INDUSTRIAL CATERING INDUSTRIAL AGREEMENT****NOTICE OF INTENTION TO RETIRE FROM INDUSTRIAL AGREEMENT**

TO: The Industrial Registrar, Industrial Registry, Level 14, Central Plaza 2, 66 Eagle Street, (Corner Creek and Elizabeth Streets), Brisbane 4000, GPO Box 373, Brisbane Q 4001.

TAKE NOTICE that **Spotless Catering Services Limited** of 15 James Street, Cnr McLachlan Street, Fortitude Valley, Queensland 4006 one of the parties to the industrial agreement made between **P & O Catering Services Pty Ltd** and **The Australian Workers' Union of Employees, Queensland** and dated 13 December 1991, filed at the registry and given the registered No. A59 of 1991, and that expired on 8 September 1994, will retire from the agreement and cease to be a party to the agreement at the expiration of 30 days from the date of this notice is filed.

FURTHER TAKE NOTE that a copy of this notice has also been served on each of the original and any later parties to the agreement.

Signed for:

SPOTLESS CATERING SERVICES LIMITED**Gary Mark
General Manager Eastern Australia**

In the presence of:

Louise Lubcke

Filed in the Industrial Registry on: 19 October 2001.

E. EWALD,
Industrial Registrar.

Form 19 R.191.