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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999
Industrial Relations (Tribunals) Rules 2000

NOTICE

The following Agreements have been certified by the Commission:–

No/s	Title	Date certified	Cancelling
CA494/01	Mater Misericordiae Hospital Townsville Ltd - Maintenance Staff – Certified Agreement 2000	2/11/01	CA278/99
CA503/01	Bartter Enterprises - Ipswich Engineering Maintenance - Certified Agreement 2001	14/11/01	CA458/00
CA504/01	Bartter Enterprises - Ipswich Processing and Clerical - Certified Agreement 2001	14/11/01	CA74/93 CA116/96 CA596/97 CA215/00
CA505/01	Undara Experience - Certified Agreement 2001	14/11/01	CA295/98
CA511/01	Darling Downs Bacon Abattoir Operations - Certified Agreement 2001	14/11/01	CA88/99
CA512/01	Darling Downs Bacon Processing and Clerical - Certified Agreement 2001	14/11/01	CA88/99
CA513/01	Subway Hervey Bay - Certified Agreement 2001	14/11/01	
CA515/01	Advance Work Force Pty Ltd Enterprise Agreement 2001 - Certified Agreement	14/11/01	
CA516/01	QBSA Enterprise Development Agreement 2001 - Certified Agreement	14/11/01	CA74/98
CA517/01	Goodman Fielder Baking, Mackay - Certified Agreement 1	14/11/01	
CA518/01	Sunlouvre Pty Ltd t/a Shutterflex - Certified Agreement	14/11/01	
CA519/01	Denny Pty Ltd t/a Pratt Applicators - Certified Agreement	14/11/01	
CA520/01	Waratex Pty Ltd t/a R Dunn and Sons - Certified Agreement	14/11/01	
CA521/01	Concept Building Services (Qld) Pty Ltd - Certified Agreement	14/11/01	CA413/99
CA522/01	SK Page t/a Page Painting - Certified Agreement	14/11/01	
CA523/01	G & L Dunnett t/a G & L Dunnett Plasterboard Contractors - Certified Agreement	14/11/01	

No/s	Title	Date certified	Cancelling
CA524/01	Lemont Properties Pty Ltd T/A I & H Contract Fixing - Certified Agreement	14/11/01	CA300/97
CA525/01	Madad Pty Ltd - Certified Agreement 2001	14/11/01	
CA526/01	Regency Stone Pty Ltd - Certified Agreement	14/11/01	
CA527/01	Total Tiling Concepts Pty Ltd - Certified Agreement	14/11/01	
CA528/01	Kevin Brown t/a Fit-A-Mould - Certified Agreement	14/11/01	
CA530/01	Cairns Port Authority - Certified Agreement No. 3 2001 – 2003	14/11/01	CA41/99
CA534/01	QIEU Clerical Staff Enterprise Bargaining - Certified Agreement	14/11/01	CA354/97 & CA518/99
CA535/01	CSR Construction Materials Sunrock Quarry - Certified Agreement 2001	14/11/01	CA363/99
CA536/01	St John's Cathedral Completion Project - Certified Agreement 2001	14/11/01	CA187/00
CA514/01	EGR Extrusion Line - Certified Agreement	15/11/01	CA331/00
CA531/01	Lions Haven Residential Support Staff - Certified Agreement 2001	16/11/01	
CA509/01	Castlemaine Perkins Pty Limited - Certified Agreement	19/11/01	CA77/00

The following Agreement has been amended by the Commission:–

		Date amended
CA409/99	Australian Building Services Association - Queensland Division – Certified Agreement 1999	9/11/01

E. EWALD
Industrial Registrar

##

INDUSTRIAL COURT OF QUEENSLAND

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

Mount Isa Mines Limited AND The Australian Workers' Union of Employees, Queensland (No. C76 of 2001)

Mount Isa Mines Limited AND Ian Michael Reeves (No. C77 of 2001)

PRESIDENT HALL 20 November 2001

DECISION

The appeals presently before the Court arise out of an incident which occurred at the copper smelter operated by Mount Isa Mines Limited on 23 March 2001. The incident involved the members of the night shift operations crew. At the commencement of the shift the crew members were advised by their supervisor (Ms Cunningham) that they were required to assist the shift fitter with the installation of a Throat Transition Piece. The crew did not act upon the supervisor's advice. As the night wore on, the advice became a direction to the crew collectively and (later) a direction to each member of the crew as an individual. No member of the crew complied. After investigation and consideration by senior management, the appellant (in both appeals) decided to issue a final warning to each of four members of the crew, *viz* Messrs Young, Smith, Fabrellas and Patch. One member of the crew, *viz* Mr Reeves, was stood down on full pay. Mr Reeves was stood down on full pay because a fair treatment hearing in relation to an existing final warning had not been completed. The issues about that final warning were subsequently resolved adversely to Mr Reeves. Mr Reeves was then dismissed. Subsequently, The Australian Workers' Union of Employees, Queensland – an employee organisation with coverage of the operations crew at the smelter – brought an application for reinstatement on behalf of Mr Reeves (No. B747 of 2001) and sought arbitration of an industrial dispute about the appellant's decision to issue a final warning to the four crew members previously named (No. B1051 of 2001). The matters were heard together. In the end result, the Queensland Industrial Relations Commission ordered that the appellant "re-employ Mr Reeves to his former position (or nearly as is possible) and further, as referred to in s. 78(4)(a) of the Act, that continuity of [Mr Reeves'] service be maintained" and ordered that the final warnings issued to Messrs Patch, Smith Fabrellas and Young "should have a final life and that they should remain in force until the first day after the twelve month anniversary of the issuing of the final warnings". Case No. C76 of 2001 is an appeal against the order about the final warnings. Case No. C77 of 2001 is an appeal about the order to re-employ Mr Reeves. The appeals were heard together. It is convenient to deal first with No. C76 of 2001.

It is unnecessary to rehearse the facts in any detail. The evidence is subject to a lengthy review in the decision of the Commission at 168 QGIG 201. It is sufficient to record that the Commission concluded that each member of the crew failed to obey a lawful and reasonable direction given by the employer to each of them. Ordinarily, such a finding would ensure that the employer would have a successful defence of justification in a common law action for unlawful dismissal. In fairness, the Commission seemed to recognise that, observing "Ordinarily, that finding by the Commission to use the vernacular could well mean that for the applicants in this matter 'that it is all over Red Rover' in that the disciplinary procedures implemented by MIM in terminating the employment of Mr Reeves and issuing final warnings to the other four (4) applicants, would be seen as an appropriate response to what is regarded generally by the Commission as a serious form of misconduct". It is, however, important to emphasise the word "ordinarily". The authorities are usefully collected together in the Judgment of Wootten J in *Scharmann v APIA Club Limited* (1983) 6 IR 157 at 165-166:

> "It is in relatively recent times that the law relating to dismissal has come to be clearly seen as part of the general law of contract, and not as part of a special branch of law relating to master and servant. (Freedland, *The Contract of Employment* (1976) 3-4, 212-219). Some of the older cases virtually treated it as a rule of law that disobedience to a lawful order gave the employer a right to dismiss, but the modern view is that: 'One act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or

one of its essential conditions. . . . The disobedience must at least have the quality that it is "wilful": it does (in other words) connote a deliberate flouting of the essential contractual conditions.' (*Laws v. London Chronicle Ltd* [1959] 2 All E.R. 285 at 288.) In *Adami v. Maison De Luxe Ltd* (1924) 35 C.L.R. 143 at 148-9, Isaacs A.C.J. said: 'It was contended that in all cases of employer and employee, irrespective of the nature of the employment – from messenger to manager, from domestic servant to commercial or scientific service, whether it be the case of a housemaid or seaman on the one hand or the headmaster of a school or a hospital surgeon on the other, whether the duties be the well understood and universally implied household duties or those arising for the first time under a complicated written contract – the phrase "wilful disobedience of a lawful order" means simply conscious disobedience of an order obedience to which is found after litigation to be in fact and in law within the range of duties. The proposition asserts that, provided ultimately the order is found to be within the scope of the contract, it matters not how isolated and trivial the occasion may have been, how unimportant the disobedience in relation to the employer's affairs, how doubtful in fact or law the legality of the order may have been, how bona fide and reasonable may have been the contention of the employee or how clearly his action was intended and explained at the time as defence only and not in any way as defiance. That is a proposition I find it impossible to accept.

Had the matter rested simply on the common law I would have had no difficulty in finding that the plaintiff's refusal to go to Canberra on this one occasion in the assertion of a bona fide belief in his right to refuse did not constitute a ground for dismissal. I would have been fortified in this conclusion by the authorities which show that in other contexts a bona fide adherence to a mistaken view of interpretation of the contract does not amount to a repudiation (*James Schaffer Ltd v. Findlay Durham and Brodie* [1953] 1 W.L.R. 106; *Sweet & Maxwell Ltd v. Universal News Services Ltd* [1964] 2 Q.B. 699).".

It is understandable therefore that the Commission might, probe the facts further to ascertain whether the case was one of *bona fide* and reasonable adherence to a mistaken interpretation of the contracts of employment held by each of the crew, or whether there was other material to give the refusal the flavour of an act of repudiation. It must also be observed that the circumstance that an employer has a good defence at common law provides no guarantee that a dismissal is fair for the purposes of s. 78(1) of the *Industrial Relations Act 1999*. Indeed, it is not uncommonly the case that applicants for relief under Part 2 Chapter 3 of the Act have been given the correct period of notice and have been quite lawfully (in the common law sense) dismissed. Even if satisfied that the refusal was a repudiation, it would be necessary for the Commission to go further and evaluate whether the dismissal was unfair. It seems to me that the Commission did do that and concluded that the dismissal was unfair. The following passage in the Commission's conclusions seems to me to be critical:–

"However, during the course of the proceedings, there was sufficient evidence before the Commission to bring into question the level of the disciplinary punishment afforded to each of the applicants.

Once it became apparent to Ms Cunningham that B crew were going to refuse her instructions to carry out the task as directed, contact was made quickly with Mr Murdoch (the Superintendent) and he arrived on site a short time later.

Such was the concern of the company that Senior Management in the form of Mr Wardle (Manager of the Copper Smelter) and Mr McPaul (General Manager of the Metallurgical Operations) also presented themselves to site.

The evidence provided by the respondent was that discussions involving Ms Cunningham, Mr Murdoch, Mr Wardle and Mr McPaul, took place and that Mr Wardle and Mr McPaul were both instrumental in determining the response of the company on that evening, eventually deciding that it would be Ms Cunningham and Mr Murdoch that dealt directly with B crew.

That is not to suggest that Mr Wardle or Mr McPaul "washed their hands of the matter" on the night, in fact on the contrary, the evidence is clear that they each observed the particular work task in question being carried out, and each formed views as to the ability and competence of B crew to perform the tasks which had been requested of them.

Whilst acknowledging that Mr Wardle and Mr McPaul were each to play a role in the fair treatment processes that were instigated by the company in respect of the applicants, the Commission believes that it would not have been unreasonable for a more direct involvement of persons more senior in rank to Mr Murdoch in the meetings that were held with the crew on the night. Had that happened, then the disputation between the parties may have been resolved then and there.

In the case of B crew, it would appear that they fully adopted the "team" concept that existed in the workplace, and is very much an accepted part of the current employment culture in that they adhered to a collective view and, even when confronted by Mr Murdoch, were indisposed to reverse that decision.

It is therefore the view of the Commission that the circumstances of the evening of 23 March 2001 was such that the actions of the applicants, whilst wrong, were not taken for the purposes of causing harm or detriment to the company, but for reasons the applicants regarded as sufficient to justify their position.

It is therefore my intention to now examine the levels of discipline that were afforded to each of the applicants.".

Three comments may properly be made.

The passage "the actions of the applicants, whilst wrong, were not taken for the purposes of causing harm or detriment to the company, but for reasons the applicants regarded as sufficient to justify their position" is at least a finding that there was no element of turpitude in the conduct of the crew, and, arguably, a finding that the members of the crew entertained a *bona fide* belief that the position which they had taken up was justified under the contracts which they held with the appellant. The reference to the "team concept" is an indication of an available source for that belief.

The reference to the "team concept" raises another issue. The law about estoppel in the law of contract has been re-written since the decision of the High Court in *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387. However, it is not so long ago that lawyers entertained a notion that a contracting party might be prevented from insisting on his or her strict contractual rights if, having regard to the dealings which had taken place between the parties, in particular assurances about how the contract would proceed or be insisted upon, it would be inequitable to allow such insistence, see e.g. *Central London Property Trust v High Trees House Limited* [1987] KB 130, *Stephens v Standard Chartered Bakers Australia Limited* (1988) 53 SASR 323 and *Update Constructions Pty Ltd v Rozelle Childcare Centre Limited* (1990) 20 NSWLR 251. The proposition, commonly known as promissory estoppel, was not thought in all cases to extinguish rights, but in some cases to suspend them merely. For example, in credit transactions, an assurance allowing the paying party not to meet the periodic deadlines was interpreted to mean that the debtor's obligations were suspended (not extinguished), and that the deadlines might be revived by reasonable notice, see *Ajayi v RT Briscoe (Nigeria) Limited* [1964] 1 WLR 1326. Whilst I doubt this promissory estoppel was a concept present to the mind of the Commission and entertain some reservations about its application to a contract of employment – a type of contract with which equity had little or no concern – I can see no reason why the Commission might not enquire whether there had been conduct by the servants and agents of the appellant leading the members of the crew to an erroneous understanding of their rights and obligations. If the Courts were prepared to look at such conduct to determine if the assertion of a right was conscionable, why should not the Commission look at such conduct to

determine if the assertion of a contractual right to dismiss was fair. It is submitted by Mr Murdoch SC for the appellant that the supervisor had made it clear that the matter was not one for collegiate and team decision, and that the employer was insisting on obedience to the direction. I am content to accept that reasonable persons in the situation of the members of the crew would have concluded that the direction was one to be obeyed. However, I am at a loss to understand why the members of the crew would have conducted themselves as they did if they had (in fact) reached such a conclusion. Importantly, a finding that the members of the crew were aware that the directive was one to be obeyed sits ill with the Commission's conclusion that "the actions of the applicants, whilst wrong, were not taken for the purpose of causing harm or detriment to the company, but for reasons the applicants regarded as sufficient to justify their position.".

The third matter is the presence of Mr Wardle (Manager of the Copper Smelter) and Mr McPaul (General Manager of the Metallurgical Operations). It seems to me that in assessing whether the appellant took reasonable steps to make the crew members aware that the "team concept" was no longer operative and that obedience was being demanded, it was legitimate for the Commissioner to consider whether such persons, being present on the site, should have taken a more active role than they did. Mr Murdoch SC is correct to say that the appellant does not need to involve such senior staff in the issuing of directions to a crew on night shift. But the fact is that the two gentlemen did come to the site and did participate in what was plainly a deteriorating situation by giving directions as to how the crew was to be dealt with. It was open to the Commission to conclude that if, being on the site, the two gentlemen had dealt directly with the crew, they would by their presence have forced the crew to confront the reality of what they were doing. There is also another reason why it was not irrelevant to pay regard to the level of activity of the two senior management staff. Part 2 Chapter 3 of the *Industrial Relations Act 1999* is a difficult set of provisions. Section 77 particularises matters to which regard must be had in determining if the dismissal was "harsh, unjust or unreasonable". At s. 78(1) the three adjectives are shrunk into one, *viz* "unfairly". There is an issue as to whether a dismissal must be tested against each of the adjectives at s. 77 or whether the phrase "harsh, unjust or unreasonable" is to be treated as an incantation summoning up notions of industrial justice. That issue has been neither confronted nor resolved in these proceedings. But on the latter view of s. 77, and assuming that the dictum of Commissioner Manuel made famous by the decision of Sheldon J *In Re Lotte and Holloway and The Australian Workers' Union* [1971] AR (NSW) 95 at 99, that the duty of the Commission in determining an unfair dismissal case is to ensure "a fair go all round", the Commission was in my view entitled to consider whether the appellant was as much to blame as the crew for what had occurred.

It is put against the Commissioner that, in the case of Mr Reeves, he proceeded on the view that "it would have been more appropriate for a lesser form of discipline to have been applied" in circumstances in which there was no lesser form of discipline. On the Commissioner's findings the criticism is not legitimate. The Commissioner found on the basis of the document* (Exhibit 33) entitled "process to ensure effective personal behaviour "that '. . . events . . . were considered for disciplinary procedures, with "Category 3" being at the top end of the scale in terms of misconduct and identified disobeying instructions as a Category 3 offence.' ". The Commissioner found that the final warning which had been issued to Mr Reeves prior to 23 March 2001 was a final warning for a Category 1 offence. On that view of the matter there was another disciplinary step available. The employer might have issued Mr Reeves with a Category 3 final warning. That is plainly what the Commissioner had in mind. It may be ungrammatical to talk of more than one "final warning" but after 10 years of experience with legislative schemes dealing with unfair dismissals I am prepared to take judicial notice that more than one final warning is commonly given.

[*The document places a gloss on the *Metallurgical Plants Area Mount Isa Mines Limited – Certified Agreement 2000* but it is the appellant's document.]

The Commissioner was criticised for taking into account the level of trust between Mr Reeves' immediate supervisor (Ms Cunningham) and himself. In my view the Commissioner considered that matter only on the issue whether reinstatement was or was not "impracticable". The Commissioner observed:–

> ". . . it is acknowledged that the level of trust that existed between Ms Cunningham and B crew has been somewhat damaged. However, I am not of the opinion that it has been damaged to the extent that the consideration of reinstatement to his former position should not be considered for the reason that it would be impracticable.".

The Commissioner was entitled to take the matter of trust between Mr Reeves and Ms Cunningham into account on that issue.

In all the circumstances I am not satisfied that the Commissioner took account of irrelevant matters. I must confess, that if I heard the matter at first instance and had found the dismissal to be lawful, having regard to the objective gravity of the crew's conduct, I should probably not have found the dismissal of Mr Reeves to be unfair. However, it is in the nature of the test propounded at ss. 77 and 78 of the Act that reasonable people properly instructed as to the law and taking account of the same factors will reach different results. In my view the Commissioner's decision was open to him.

The actual order made to restore Mr Reeves to his employment is the cause of a little angst. The order was that "MIM re-employ Mr Reeves to his former position (or nearly as is possible) and further, as referred to in s. 78(4)(a) of the Act, that continuity of the applicant's service be maintained.". There is an argument that it is the effect of s. 78(2) and (3) that the Commission has power to order reinstatement to an employee's former position and, if that is impracticable, has power to order re-employment "in another position that the employer has available and that the Commission considers suitable", but has no power to order re-employment in the employee's former position. However, in circumstances in which there is no cross-appeal, it would be imprudent to explore those issues.

Case No. C76 of 2001 may be more simply disposed of. The Commissioner proceeded on the view that the final warnings imposed by the appellant operated indefinitely. That is not so. Under the *Metallurgical Plants Area Mount Isa Mines Limited – Certified Agreement 2000*, such warnings are to be retained in an employee's file for a period of two years after which time they are to be revoked. In fairness, I should add that the Commissioner was unaware of the provision of the Certified Agreement because he had not been taken to it. (The reason that the Certified Agreement may be referred to on the appeal though it was not tendered below is that it was cited in the decision of the Commission and, in consequence by s. 109(1)(j) of the *Industrial Relations (Tribunals) Rules 2000,* became part of the record for the appeal.)

The Commissioner having proceeded on the basis of a demonstrable mistake about the facts, the appeal in Case No. C76 of 2001 should be allowed. The issue is what to do with application No. B1051 of 2001. It is contended by Mr Murdoch SC that, because there is no power to amend a certified agreement, there is no point in remitting the matter to the Commissioner. It may be accepted that there is no power to amend a certified agreement. However, I can think of no reason why the two-year life span of a final warning, being a condition for the benefit of the appellant, might not be waived by the appellant. In those circumstances, I can see no reason why the Commission might not order the appellant to waive the condition and revoke a final warning within the two-year period. Whether, in the circumstances of this case, the Commission would wish to depart from the standard two-year warning is of course a matter entirely for the Commission. (Whilst I accept that the Court has power to substitute an order of its own, I have refrained from doing so because in fairness to those subject to the final warnings the modification (if any) of the final warnings should be considered by the Commission, which took a rather more benign view of the crew's conduct than I have taken on the appeal.)

I allow the appeal in No. C76 of 2001. I remit the matter to the Commissioner who dealt with the matter at first instance to hear and determine the matter according to law.

I dismiss the appeal in No. C77 of 2001.

Dated this twentieth day of November, 2001.

D.R. HALL, President.

Released: 20 November 2001

Appearances:–
Mr J. Murdoch, SC, instructed by Mr D. O'Brien, Legal Officer, of MIM Holdings Limited for the appellant in both matters.
Mr B. Swan of The Australian Workers' Union of Employees, Queensland for the various respondents.

##

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(2) – appeal against decision of industrial magistrate

David Francis Cox AND Lesleigh Maree Daley (No. C53 of 2001)

PRESIDENT HALL 20 November 2001

DECISION

The respondent is the proprietor and operator of a shop known as Fico's Boutique and Accessories situated at Ashmore City shopping centre. As the name suggests the shop is a retail clothing shop. From on or about 13 February 1997 to on or about 5 May 1999, Kathleen Phyllis Evans was employed by the respondent as a shop assistant on Sundays and on Thursday night. The engagement was regulated by the Retail Industry Interim Award – State.

By s. 123(1)(b) of the *Industrial Relations Act 1999* the Award has the force of law throughout the state. Omission by the respondent to discharge obligations cast upon her by the Award, including the obligation to pay wages at the rates prescribed by the Award, exposed her to the risk of conviction for a criminal offence, s. 666. Additionally, by s. 399, unpaid wages may be recovered by civil proceedings before an Industrial Magistrate. Such proceedings may be instituted by persons other than the employee to whom the monies are due and owing. Indeed, in this case, the proceedings were brought not by Ms Evans but by an inspector within the meaning of s. 399(2)(d). The proceedings failed.

The Industrial Magistrate found that by agreement the respondent paid Ms Evans an amount which was less than the amount required to be paid by the Award by way of the cash-in-hand payment, and that no PAYE deductions were made and passed on to the Australian Tax Office. (Is not clear whether the Industrial Magistrate found that the arrangement formed part of a contract of employment or found that it was a collateral arrangement about how the obligations under the contract of employment might be discharged.) In those circumstances the Industrial Magistrate dismissed the proceeding on the ground of "illegality".

It may well be that if Ms Evans had taken proceedings against Ms Daley in the Magistrates Court (not the Industrial Magistrates Court) to enforce payment of the lower sum under the cash in hand arrangement, illegality may have been available as defence. However, in the proceeding in which the Industrial Magistrate was actually concerned, so far from attempting to enforce an illegal transaction the inspector was attempting to enforce the respondent's statutory obligation to give affect to an award which had the effect of law. It was necessary for the inspector to prove the existence of the contract of employment. It was not necessary for the inspector to prove the terms of the contract. The cash in hand arrangement formed no part of the case mounted by the inspector. With respect to the Industrial Magistrate, the reality is that His Worship allowed the respondent to plead the illegal arrangement and gave full force and effect to that arrangement.

The Industrial Magistrate seems to have entertained the view that it was the effect of the decision of Drummond J in *Igaki Australia Pty Ltd v Coastmine Pty Ltd*, No. QG 103 of 1991, unreported, 2 November 1994, that the contract of employment was void. With respect *Igaki Australia Pty Ltd* v *Coastmine Pty Ltd*, ibid, was not a contract case. The case involved an action for misleading or deceptive conduct within the meaning of s. 52 of the *Trade Practices Act 1974.* Drummond J held that the principles applicable where illegality was raised as a defence to such an action where analogous to those applicable in tort. The appeal, I should add, did not deal with the point, see (1995-1996) 34 IPR 37.

I hasten to acknowledge that illegality may renderer a contract void or (more commonly) unenforceable, the generally *Nelson* v *Nelson* (1995) 184 CLR 538. However, whether a contract prohibited by statue is void is a matter of statutory construction. In *Yangao Pastrol Co Pty Ltd* v *First Chicago Australia Ltd* (1978) 139 CLR 410 at 423 Mason J observed:

> "It is perhaps more accurate to say that the question whether a contract prohibited by statue is void is, like the associated question whether the statue prohibits the contract, a question of statuary construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statue itself is silent upon question. Primarily, then, it is the matter of construing the statue and in construing the statue the Court will have regard not only to its language, which may or may not touch upon the question, but also of the scope and purpose of the statue from which inferences may be drawn as to the legislative intention regarding the extent and effect of the prohibition which the statue contains.".

There is nothing in the *Industrial Relations Act 1999* to indicate that a contract to pay less than the award rate is to be void. One the contrary, there is express indication at ss. 135 and 399(5)(b) that the award is simply to override the agreement and to be enforceable as previously described. That legislate intention is made manifest notwithstanding that in agreeing to accept less than the award rate the employee commits an offence, see s. 667(1).

I note that the Industrial Magistrate refers in a general way to Federal Legislation about income tax. No particular section is identified. The respondent has not identified any particular section. It cannot be assumed that the Federal Legislation displays an intention to make an enforceable the obligations to observe awards arising under the *Industrial Relations Act 1999*. In any event, such an argument would raise issues arising under the Constitution or involving its interpretation. Since notice has not been given pursuant to s. 78(B) of the *Judiciary Act 1903* neither the Industrial Magistrate nor this Court may lawfully consider the matter.

The Industrial Magistrate was also of the view that because proper records of the monies paid to Ms Evans had not been kept, it was not possible to calculate the outstanding wages. It may be conceded that it is not possible to calculate the outstanding wages with any measure of precision. However, it seems to me that the evidence would allow an Industrial Magistrate to conclude that it could be safely said that Ms Evans worked x Sundays and y Thursdays (and an indeterminable number of additional Sundays and Thursdays) and to make findings about the number of hours worked which were safely within the actual hours worked whatever the actually hours might have been.

In all the circumstances I set aside the decision of the Industrial Magistrate. I remit the Matter to the Industrial Magistrate Court to be heard and determined according to Law.

Dated this twentieth day of November, 2001.

D.R.Hall, President.

Released: 20 November 2001

Appearances:–
Mr C. Murdoch, instructed by Crown Law, for the appellant.
The respondent in person.

##

INDUSTRIAL COURT OF QUEENSLAND

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

WorkCover Queensland AND Farrant James Howgego (No C62 of 2001)

PRESIDENT HALL 21 November 2001

DECISION

On 15 June 2001 the Industrial Magistrate at Brisbane upheld the respondent's appeal against the decision of WorkCover Queensland to cease payment of compensation from 18 March 1999. WorkCover Queensland now appeals against that decision.

At all material times the definition of injury at s. 34 was in the form which it took between 1 February 1997 and 1 July 1999. It is sufficient to reproduce ss. (1), (4) and (5).

"Meaning of 'injury'

34.(1) An 'injury' is personal injury arising out of, or in the course of, employment if the employment is the major significant factor causing the injury.

(4) 'Injury' does not include a personal injury, disease, or aggravation of a disease sustained by a worker if the injury is a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances –

(a) Reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

(b) the worker's expectation or perception of reasonable management action being taken against the worker;

(c) action by WorkCover or a self-insurer in connection with the worker's application for compensation;

(d) circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury.

(5) For subsection (4), in deciding in a particular case whether management action was reasonable or whether management action was taken in a reasonable way –

(a) regard must be had to what action or way of taking action would have been reasonable for a worker of ordinary susceptibility to psychiatric or psychological disorder; and

(b) regard must not be had to a particular worker's susceptibility to a psychiatric or psychological disorder.".

The case made by WorkCover Queensland was that Mr Howgego was predisposed to the development of the psychiatric or psychological disorder manifested as a severe somatoform pain disorder which he developed as a result of (1) a motor vehicle collision in the course of his employment and (2) a lifting incident in the course of his employment. The Industrial Magistrate dealt with the submission as follows:–

"In sub-section (5), as pertaining to the management action clauses in sub-section (4), it states, 'regard shall not be had to a particular worker's susceptibility to a psychiatric illness or a psychological disorder.'

But this wording does not apply to s. 34(4)(d). Instead, the legislature chose the language of:

'Reasonable person in the same employment as the worker, would not have been expected to sustain the injury.'

This distinction is crucial, and I find that the legislature chose not to restrict the class of worker entitled under s. 34(4)(d) only to those who did not have a particular psychological susceptibility. In other words, Mr Howgego's eligibility is to be determined simply in the context of a 'reasonable person in the same employment.'

One is not rendered 'unreasonable' simply because one has had the misfortune of suffering from traumatic experiences predisposing a person to a psychiatric illness.

. . .

I reject the necessary contention in the respondent's case that a 'worker of ordinary susceptibility' is to be equated to the expression 'a reasonable person in the same employment.' <u>The legislature chose not to exclude</u> workers individual <u>susceptibilities for psychiatric and psychological illnesses other than in management action case, (known as stress cases)</u>.". (emphasis added)

I entirely disagree. I adhere to the view which I expressed in *Preddle v Workcover* (1999) 162 QGIG 170 at 170:

"The second passage emphasised (being the above passage) is directed at (d). However, reading the passage as a whole, it seems to me to be tolerably plain that the exclusion of paragraph (d) is not to be limited to the case of circumstances operating on a pre-existing disposition to psychiatric or psychological disorder. It seems to me that the paragraph should be read so as to exclude workers from the protection of the scheme in all cases where, for whatever reason, a reasonable person would not in fact have been expected to sustain the injury.".

In my view the purpose of ss. (5) is to ensure that in assessing whether management action is “reasonable management action taken in a reasonable way” one has regard to the circumstances of the worker other than the susceptibilities referred to at ss. (5).

The circumstance that ss. (4)(d) has now been repealed says nothing about its original intent, compare *Queensland v Murphy* (1990) 95 ALR 493 at 498 (High Court). I was taken by counsel, not to the Minister’s Second Reading Speech, but to the speech of the gentleman who was the Minister when the 1996 Bill was introduced, made upon the repeal of ss. (4)(d) when the Honourable gentleman was in opposition. Put aside the question whether submission takes the extrinsic materials beyond all proper limits, the simple proposition is that (as is sometimes the case) the passage is itself entirely ambiguous. The passage is –

> “The second change is the removal of the ‘reasonable person’ or ‘ordinary susceptibility’ tests in the current legislation.”.

The use of “or” rather than “and” favours the submission of WorkCover Queensland. The use of the plural “tests” rather than the singular “test” favours the submission made on behalf of Mr Howgego. It may be accepted that as a general proposition, workers compensation legislation is to be treated as remedial legislation given a beneficial interpretation (not only when there is an ambiguity). The principle can not prevail against the clarity of the drafting at s. 34(4).

The difficulty in this matter is that because of the way in which the Industrial Magistrate construed ss. (4)(d) Her Worship did not consider whether a reasonable person in the same employment as Mr Howgego would have been expected to sustain the injury. The appeal is by way of a rehearing. I have considered determining the matter for myself. To do that, it would be necessary to re-list the matter in order that I might be taken to the relevant passages in the transcript. Since the Industrial Magistrate in any event had the advantage of hearing the expert witnesses, I have decided that the proper course is to remit the matter to the Industrial Magistrates Court.

I allow the appeal. I remit the matter to the Industrial Magistrates to hear and determine the matter according to law. I remit to the Industrial Magistrate all questions about costs in respect to proceedings in the Industrial Magistrate Court.

Dated this twenty-first of November, 2001.

D.R.Hall, President.

Released: 21 November 2001

Appearances:–
Mr P. Major, of Counsel instructed by WorkCover Queensland.
Mr M. Grant-Taylor, SC, and with him Mr S. Farrell, instructed by Murphy Schmidt, Solicitors, for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Damian Lorraway AND Indooroopilly Golf Club (No. B498 of 2001)

COMMISSIONER BLOOMFIELD 15 November 2001

Reinstatement – Dismissal – Termination of Employment – Club employee – Left Club without permission – Arbitrated Matter – Previous warnings – Dismissal not harsh, unjust or unreasonable – Application dismissed.

DECISION

Background

This is an application by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU) which seeks the reinstatement of Mr Damian Lorraway to his former position with Indooroopilly Golf Club (the Club).

Mr Lorraway was dismissed on 13 March 2001 because he left the Club’s premises without permission during working hours on the afternoon of Friday 9 March 2001 to collect his girlfriend from Queensland University.

Mr Lorraway had previously received a number of warnings and counsellings from management at the Club. In particular, he had allegedly been spoken to and warned on several occasions about taking unauthorised breaks.

Counsellings and warnings were said to have been given to Mr Lorraway as follows:–

- 21 March 1999 – Written warning for leaving the bar in an untidy state with drip trays and beer trays still wet.
- Unknown date but believed to be June 1999 – Written warning for not de-gassing five kegs and not putting beer in Fairways Room up to water.
- 3 June 1999 – Written warning for advising of inability to attend for duty and subsequently found to have been drinking at a local hotel during the nominated shift time.
- 9 November 1999 – Final warning for mixing a cocktail when there were no clients in the bar. Warning letter also referred to other issues previously raised including: failure to follow directions from supervisors, changing rosters without notice, cancelling a shift (3 June) and failure to attend a staff meeting on 4 November 1999.
- 15 August 2000 – Verbal final warning for failing to attend for a rostered shift on 11 August.
- 22 September 2000 – Letter informing Mr Lorraway of the reduction in his working hours because of his unacceptable behaviour monitored over an extended period of time. The letter followed an incident where Mr Lorraway had allegedly demonstrated an unwillingness to perform minor laundry duties.

- 10 November 2000 – Spoken to by the House Manager about taking a break on 5 November without permission during a wedding reception. Told he had to seek permission.

- 16 November 2000 – Spoken to during the course of a meeting with a representative of the ALHMWU about a number of matters including the need for him to improve his performance levels and about taking unauthorised breaks. [Note: This issue was addressed during the course of the meeting. The meeting had actually been convened as a result of the 22 September letter advising Mr Lorraway of a reduction in his hours. The outcome of the meeting was that Mr Lorraway's hours were to be reinstated.]

- 30 November 2000 – Told during a staff meeting addressed by Mr Mills, the General Manager, Mr Olsen, the Operations Manager and Mr Durant, the House Manager, that all staff were required to seek permission from a manager or supervisor prior to taking any breaks or leaving their work station. [This issue was raised by management following a number of recent incidents where staff had taken it upon themselves to take breaks without consultation with their supervisors. One such incident referred to was 5 November (above)].

The Applicant's case

Mr J. Martin, of ALHMWU, who represented Mr Lorraway, took issue with a number of the counsellings and warnings referred to above. He said a number of the incidents were trivial and that several of the warnings were not warranted based upon the facts. In particular, Mr Martin challenged the warnings given to Mr Lorraway for leaving drip trays out; not degassing the kegs; mixing the cocktail; failing to attend for his shift on 11 August 2000; and, demonstrating an unwillingness to perform minor laundry duties on 22 September 2000.

Mr Martin concentrated on the event which ultimately led to Mr Lorraway's dismissal, namely his absence from work for a short period on Friday 9 March 2001.

Mr Martin said the Certified Agreement which covered the employees at the Club gave Mr Lorraway an entitlement to a ten minute rest pause under the Award. He said Mr Lorraway had simply availed himself of that entitlement and, in doing so, had used the time to collect his girlfriend from the nearby Queensland University. Mr Martin also said special circumstances existed on that day in the form of a very severe approaching thunderstorm. Mr Lorraway's girlfriend had asked him to come and collect her because they only had one motor vehicle. Mr Martin said Mr Lorraway had attempted to find Mr Durant – his immediate supervisor – but had been unable to do so. After unsuccessfully trying to locate Mr Durant, Mr Lorraway informed one of the secretarial staff he was taking his rest pause and was leaving the club for a short while.

Mr Martin said Mr Lorraway had simply followed custom and practice in informing one of the staff where he was. Mr Lorraway was absent for only a few minutes in excess of his entitlement and had returned to his normal duties immediately upon his return. His absence had not disrupted the employer's operations.

Mr Martin also said the employer seemed to have relied upon the applicant's previous history in deciding to terminate Mr Lorraway's services following the incident on 9 March 2001. He said the employer was not entitled to take that course of action because there were serious doubts about the validity of many of Mr Lorraway's previous warnings and counsellings.

Mr Martin also said that Mr Lorraway had been a thorn in the side of the Club because he had challenged some of its rostering practices where friends and relatives of management had been given priority.

Mr Martin said one had to ask the question "Had there not been warnings on file would an employer dismiss someone for taking a rest pause and collecting their girlfriend when a storm is impending?". He said the answer should be "No". He sought Mr Lorraway's reinstatement or, failing that, appropriate compensation.

The Respondent's case

Ms K. de Lange, who represented the Club, said the Club had acted in a fair, just and reasonable manner. She said Mr Lorraway had received a number of warnings and reprimands from a variety of managers who had been employed by the Club during the period of Mr Lorraway's employment – a number of them overlapping with each other. She also dealt with the evidence given in relation to each of the warnings/counsellings, stating that the evidence clearly showed each of the warnings was warranted.

Ms de Lange said the evidence also showed that the Club had treated Mr Lorraway with fairness and had given him every opportunity to amend his behaviour. Mr Lorraway had attempted to improve his performance after the November 2000 meeting between the Club's management and the ALHMWU but it was disrupted by "a very critical and very important event which occurred on 9 March". On that date Mr Lorraway left his place of work without permission when he had previously been warned on several occasions that he could only take breaks after gaining authority from his supervisor.

Ms de Lange also said Mr Lorraway had been given an appropriate opportunity to explain his version of events and why he had left the Club without seeking permission from Mr Durant or some other manager.

In responding to the assertion that it was custom and practice for employees to take breaks at their own behest, Ms de Lange questioned why the employer would have raised that issue on so many occasions, and at so many meetings, if the practice had been condoned.

She said Mr Lorraway's own evidence that he went to seek permission from Mr Durant before he left the Club clearly indicated that he knew that he needed to gain permission before he could take his break or leave the place of employment.

Ms de Lange also challenged Mr Martin's submission that the Club had inappropriately relied upon Mr Lorraway's personnel file in deciding its course of action. She said it was normal practice to keep a personnel file and to pay regard to its contents when deciding what action to take in respect of any employee.

Ms de Lange said the employer did not act in a harsh, unjust or unreasonable manner. Mr Lorraway had been paid all of the statutory entitlements – including notice – that he was entitled to. She urged the Commission to dismiss the application.

Findings

I have considered the evidence and have grouped my findings into two categories. Firstly, my findings in relation to the validity of the various warnings and counsellings referred to above and, secondly, my findings in relation to the incident of 9 March 2001 and the employer's subsequent decision.

The challenge to the counsellings and warnings

With the exception of the written warning dated 22 September 2000 I am satisfied, from the whole of the evidence, that the Club was entitled to counsel or warn Mr Lorraway with respect to the other incidents referred to above.

I also record that whilst Mr Lorraway was not formally warned in writing about taking unauthorised breaks, he was clearly informed on 10 November, 16 November and again on 30 November 2000 what the Club's expectations were. I am also satisfied the Club's management made it clear to Mr Lorraway on the first of those two occasions, and to all employees on the third of those occasions, that all staff were required to seek permission from a manager or supervisor before taking a break or leaving their work station. In that regard, I do not accept Mr Lorraway's evidence that he and the other staff were simply told they had to inform another member of staff they were taking their break. Mr Lorraway's evidence that that was the case severely dented his credibility.

Each of Mr Mills, Mr Olsen and Mr Durant were very clear that they had given specific instructions to Mr Lorraway, and to the other employees, that problems had arisen because staff were taking it upon themselves to take breaks and that Mr Lorraway (on two specific occasions) and all staff (on 30 November) were told that they **must** seek permission from a supervisor or manager before taking a break or otherwise absenting themselves from their work station. I have accepted their evidence.

In considering the evidence about the various incidents which led to Mr Lorraway being cautioned or warned I record that I found Mr Lorraway prone to exaggerating or enhancing his evidence in a way which he thought would assist his case. Such an example was his evidence about union membership material and how it came to be at the Club. He was not a very credible witness.

He was inclined to portray himself as a victim of overzealous management and that his victimisation arose simply because he spoke his mind about certain matters, including his expectations for more rostered hours. He seemed to assume – and this is reflected through his evidence – that he was entitled to make his own decisions about his work routine and his availability for work. He generally disputed management's right to take issue with any of his misdemeanours.

For example, he claimed he had done nothing wrong by failing to attend for duty on 3 June 1999 stating that he had told his manager he was not available. He failed to recognise that consequences arise if an employee simply chooses not to make themselves available for a rostered shift. Similar comments can be made in respect of the incident of 11 August 2000 where Mr Lorraway believed that telling a manager he was not available for a particular shift meant that that was the end of the matter. In that regard I do not accept Mr Lorraway's evidence that the duty manager at the time, Mr Barns, agreed he could be absent. Mr Lorraway's evidence on the whole matter was inconsistent and I have not accepted his version of events. I prefer the evidence of Mr Olsen.

Further, if another example be needed, Mr Lorraway saw nothing wrong with practicing the mixing of cocktails without authorisation and without supervision and attempted to justify the legitimacy of his action. Even if he was mixing a cocktail – which I do not accept [the evidence discloses that he was making a Baileys and ice in a spirit glass] – he was not entitled to decide that he would practice the mixing of a cocktail without receiving the permission of a supervisor.

In respect of the warning letter of 22 September 2000 I found that there was sufficient confusion about Mr Lorraway's actual starting time, the starting time of Ms Philips and what Mr Lorraway was seeking to do at the commencement of his shift, to cause enough doubt that that warning letter should have been issued.

In any event, the subsequent intervention by ALHMWU effectively reversed the hours reduction which was put into effect by that letter. However, whilst that part of the letter might have been reversed, I am satisfied Mr Mills made it clear at the meeting attended by the Union on 16 November that the Club still had concerns about Mr Lorraway's overall performance and attitude and that he would need to improve his performance if this employment with the Club was to continue.

Accordingly, it is my finding that Mr Lorraway was issued with a valid written warning about leaving the bar in an untidy manner on 21 March 1999; a valid written warning about not de-gassing the kegs in June 1999; a valid first warning for failing to attend a rostered shift on 3 June 1999; a valid final warning for having mixed a cocktail without authorisation and without being under supervision; and, a valid repeated final warning for failing to attend for duty on 11 August 2000.

It is also my finding that Mr Lorraway was spoken to on three occasions in November 2000 when it was made clear to him that he had to seek the permission of a supervisor or manager before taking a break or leaving his work station. I also accept that he was spoken to about the same matter by several supervisors before that date.

The incident of 9 March 2001

It is common ground that Mr Lorraway left the Club's premises at around 3.30 p.m. on Friday 9 March 2001 to go to the University to collect his girlfriend because there was an approaching storm.

On behalf of Mr Lorraway it was argued that is actions were completely justifiable given the circumstances. Firstly, it was said that the approaching storm, and the fact that Mr Lorraway and his girlfriend only had one motor vehicle, constituted a special circumstance.

Secondly, it was argued that Mr Lorraway was simply taking a ten minute rest break to which he was entitled under the Certified Agreement which covered the Club's operations.

Thirdly, it was argued that Mr Lorraway had attempted to locate his immediate supervisor to inform him of his intentions and that when the supervisor had not been found Mr Lorraway informed another staff member, as was the custom and practice at the Club, that he was leaving the Club.

It was also argued that the Club's decision to terminate Mr Lorraway in all of the circumstances, was harsh, unjust or unreasonable.

I turn to my findings in relation to each of those matters.

1. Justified absence/Special circumstances

It is a matter of history that the storm on the afternoon/evening of 9 March 2001 was one of the fiercest to have hit Brisbane for many years. However, the intensity of the storm which developed throughout the afternoon and into the evening cannot be relied upon post-event to justify Mr Lorraway's unilateral decision to leave his work place and travel to the Queensland University to collect his girlfriend and then return to work.

If Mr Lorraway felt the circumstances justified it, he would have been entitled to seek permission to go to the University for the purposes intended. If he had approached his supervisor or manager, that supervisor or manager would have been required to consider Mr Lorraway's request after weighing up the competing urgencies facing him/her. Firstly, there was the uncompleted mailout that Mr Lorraway was working on and which he knew was urgent. Secondly, the arrival of the approaching storm at the Club would almost certainly have resulted in the return of the corporate golfers to the sanctuary of the clubhouse. Mr Lorraway would have been required to serve them in the bar. Against that would have been Mr Lorraway's request that he be allowed to take some time to travel to the University to collect his girlfriend and to return.

The manager would have been required to assess those competing priorities and to make his/her decision. It was not for Mr Lorraway to make that decision alone.

In my view, there were no special circumstances which justified Mr Lorraway's decision to leave the Club without permission. His girlfriend was not ill or injured. She was merely wanting to have access to Mr Lorraway's car. There were other ways that could have been arranged.

2. Entitlement to rest pause

The Certified Agreement certainly provides Mr Lorraway, and other employees, with the benefit of a rest pause in certain circumstances. However, it is clear that Mr Lorraway knew from the instructions previously issued to him and the other staff that he was not empowered to decide when he could take his rest pauses. Any rest pause had to be with the permission of the supervisor or manager. It is clear that Mr Lorraway did not obtain permission to take his rest pause.

In any event, the Certified Agreement entitles Mr Lorraway to a ten minute rest pause. On his own admission he took at least twelve minutes – a figure which is not conceded by the Club. The Club did not take significant issue with the fact that Mr Lorraway, on his own admission, took a twelve minute break. Rather, the Club was concerned about the fact he took the break without permission.

Mr Lorraway was not entitled to unilaterally decide to take his rest pause.

3. Custom and practice

Whilst I have doubts about the truthfulness of Mr Lorraway's evidence that he attempted to locate Mr Durant before leaving the Club to travel to the University, the fact he claimed to have done so indicates to me that he clearly knew it was necessary for him to seek permission from his immediate supervisor before he could take a rest pause or leave his work station.

Mr Lorraway's evidence that he attempted to locate Mr Durant is inconsistent with his other evidence, and the arguments presented on his behalf, that it was accepted custom and practice that an employee could leave his/her work station and take a break as long as he/she informed another employee. If there had ever been any such practice it was certainly stopped in November 2000.

There was no custom and practice of the type claimed in operation on 9 March 2001. Mr Lorraway and all other employees were required to seek permission before taking a break or leaving their work station.

Mr Lorraway simply failed to make the necessary attempts (if he made any at all) to locate Mr Durant or another senior manager to request permission to take his break and/or go to the University.

Was the termination harsh, unjust or unreasonable?

After considering all of the evidence in the matter I have reached the conclusion that the Club's decision to terminate Mr Lorraway's services was not harsh, unjust or unreasonable.

Viewed in isolation the incident of 9 March 2001 would not have been sufficient to warrant Mr Lorraway's dismissal. However, when the whole of Mr Lorraway's employment history is considered, the incident of 9 March can be seen to be simply another occasion where Mr Lorraway has taken it upon himself to consider his own interests to the exclusion of those of his employer.

In deciding to take an unauthorised break and to leave the Club's premises without permission (and without telling any employee where he was going) Mr Lorraway completely disregarded the very clear and specific warnings and instructions which had been given to him on a number of occasions – most particularly on 10, 16 and 30 November 2000.

Further, in taking it upon himself to leave the Club Mr Lorraway failed to consider: the urgency of the mailout and the necessity to complete it that day; the workplace health and safety implications associated with the fact that no-one knew where he was; the implications for his WorkCover because he had not been authorised to leave the Club; the fact that he had failed to seek permission to take a break; and, the possibility that the corporate golfers might return to the Club themselves because of the approaching storm and that he would be needed to serve them.

I am satisfied that Mr Lorraway was given an appropriate opportunity to explain his version of events at the meeting on 13 March 2001 and that the Club properly investigated his responses before it made the decision to terminate his employment.

I am also satisfied that the Club's decision was based upon Mr Lorraway's conduct, capacity or performance and that he had been warned about the Club's concerns about taking unauthorised breaks, and the possible consequences, well prior to the ultimate incident.

I dismiss the application.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

Appearances:–

Mr J. Martin, of Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees, for Mr D. Lorraway.

Ms K. de Lange, of The Registered and Licensed Clubs Association of Queensland, Union of Employers, for the Indooroopilly Golf Club.

Released: 15 November 2001

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 230 – application for action on industrial dispute

The Australian Workers' Union of Employees, Queensland AND
Mount Isa Mines Limited (No. D256 of 2001)

MINING AREA - MOUNT ISA MINES LIMITED - CERTIFIED AGREEMENT 1996

COMMISSIONER BECHLY 16 November 2001

DECISION

The matter before the Commission concerns the proposed introduction of a new shift roster in the ageing lead mine at Mt Isa.

Since 1996 lead mine employees have been working a four panel 42 hour average week roster. That arrangement was negotiated at that time when a new certified agreement was entered into. Some sections of the company worked this roster prior to the certified agreement negotiations.

The company proposed and has now introduced a three panel 48 hour roster into the lead mine.

The matter has been the subject of conferences pursuant to s. 230 of the *Industrial Relations Act 1999* (the Act) and restraining orders (No. B1613 of 2001) which were turned over on appeal (No. C65 of 2001).

Prior to the appeal decision a process had been put in place for the Commission to inquire into the issues in dispute. The appeal decision raised some questions about the capacity of that process to resolve those issues. Notwithstanding objections by the company to a continuation of the process it was determined to move to Mt Isa to hear evidence from employees and the company and to hear argument as to the entitlements of the parties to move to or reject a move to the new roster.

The union presented evidence from Mr Roy Harris, AWU organiser and eight employees who are currently working the new roster. Evidence was given by the mine manager, Mr Gary Varley for the company.

The background for the stated need to introduce a new roster lies in a decision taken some two years ago not to close the lead mine as originally anticipated but to extract the remnants of lower grade lead ore left behind over the years as being not worth mining because of high costs and difficulty in extraction. Economic extraction of that ore now requires a reduction in operation costs, including labour costs. One means to effect these savings was the introduction of a program entitled the Mining Labour Redistribution Program which involved two crucial steps:

(a) transfer of labour from the Isa lead mine to the George Fisher lead mine and the Hilton lead mine where, unlike the Isa lead mine, production is increasing;

(b) change the roster at the Isa lead mine from a four panel 42 hour roster to a three panel 48 hour roster to maintain production levels.

The introduction of the three panel 48 hour roster enables a reduction of 25% in the Isa lead mine labour force, a reduction in the equipment used to operate the Isa lead mine which further enables equipment maintenance in the most economic time frame.

The evidence is that these changes would produce a saving of $2.15 per tonne or $2.616 million annually.

The company takes the position that it has acted quite properly in accordance with clause 5.6 of the *Mining Area – Mount Isa – Certified Agreement 1996* which is in the following terms:–

> "5.6
>
> Introduction of New Rosters.
>
> New rosters must satisfy Health and Safety, employee needs and business needs. Agreement to introduce new rosters shall not be unreasonably withheld.".

The company commenced consultation with employees in May 2001 and continued that process over a period of four months. This consultation process dealt with the following:–

(i) implementing the program meant that redundancies would be avoided;

(ii) there would be a labour transfer of approximately 40 employees;

(iii) a three panel 48 hour roster would be implemented;

(iv) employees could apply to transfer to George Fisher if they wished to remain on a conventional 42 hour four panel roster system, with preservation of grades and salary for those transferred to lower level activities, and consideration would be given to anyone who had a genuine issue with working 48 hours;

(v) health and safety would continue to be a priority and the company would continue to look towards ensuring employees' health and safety above production; and

(vi) the company would consider other roster patterns that may be proposed.

(Exhibit MIM 10 Witness G. Varley)

On 20 August 2001 the company notified the Commission of an impending dispute concerning a stop work meeting to be held to consider the introduction of the new roster. In addition to the general background the Commission was informed that:–

- alternative rosters would be considered by the company if they met the new requirements for the lead mine;
- an alternative had been proposed by some employees which adopted the pattern proposed by the company but moved the roster by one day so as to pick up weekend penalties; and
- employees were concerned about a number of issues including leave benefits, salary support and lifestyle matters.

In accordance with the recommendation of the Commission meetings were held on plant on 23 and 25 August to consider a response to the new roster. A document prepared as a result of the issues of concerns raised in the conference of 20 August 2001 referred only to the following matters:–

- salary support (sick pay);
- annual leave;
- long service leave; and
- roster calculations

At the conclusion of the meetings the proposed new roster was rejected.

The company adopted the position that the rejection was unreasonable and proceeded to take steps to implement the roster. The pattern of the roster actually implemented differed from that originally proposed in that night shifts were put at the beginning of each roster cycle as a better way of managing fatigue. This change arose out of the consultation process which continued following the earlier Commission conferences. Some employees have expressed a preference to commence the cycle with day shifts. The company has stated that both cycles will be trialed to gauge a majority preference.

Putting aside the steps then taken to secure interim injunctions, the AWU then sought the following relief:–

"1. A declaration by the Commission that where clause 5.6 to the *Mining Area – Mount Isa Mines Limited – Certified Agreement 1996* (the certified agreement) refers to 'agreement', the term 'agreement' refers to the agreement of the Australian Workers' Union of Employees, Queensland (AWUEQ) as a signatory and party principle to the certified agreement.

2. A declaration by the Commission that the AWUEQ has the lawful right, in accordance with the terms of clause 5.6 to the certified agreement, to reasonably withhold agreement on the introduction of new rostering arrangements on the separate grounds of health and safety and employee needs.

3. A decision by the Commission that the AWUEQ is entitled, and was entitled, in the circumstances of this dispute, to withhold agreement to the introduction of the new rostering arrangements on the separate grounds of health and safety and employee needs in accordance with clause 5.6 to the certified agreement.

4. A decision by the Commission that Mount Isa Mines Limited (MIM) was not entitled, in the circumstances of this dispute, to unilaterally introduce new rostering arrangements in the Lead Mine without the agreement of the AWUEQ.

5. An order by the Commission reinstituting the rostering arrangements that existed and applied to underground operations in the Lead Mine immediately prior to the introduction of the 48 hour – three panel roster system by MIM, until such time as agreement is reached between the AWUEQ and MIM on the implementation of new rostering arrangements in the Lead Mine in accordance with clause 5.6 to the certified agreement.".

The company has argued that the Commission does not have the power to hear and ultimately determine the matter and that the Commission should refrain making a simplistic declaration as sought. It raises the matter that there are other unions, parties to the agreement, which have not been represented in any of these proceedings who would be affected by the relief sought and the prospect that the making of the orders as sought would require a close analysis of the representation as orders made by the Commission with respect to union membership at Mt Isa hinder mining operations.

It was also argued that the relief sought involves an interpretation of the Agreement and that process requires the parties to present agreed facts to the Commission (Rule 77). No set of agreed facts have been presented.

I intend to deal with the matter by examining the actions of all the parties with respect to clause 5.6 of the Agreement.

That clause requires that, for the introduction of new rosters, health and safety, employee needs and business needs must be satisfied and that agreement to introduce new rosters shall not be unreasonably withheld.

The last sentence of that clause raises the issue of what is reasonable with respect to agreement to introduce new rosters. It is axiomatic that, when considering the three elements of health and safety, employee needs and business needs that must be satisfied, what must be considered is what is reasonable.

In the order of progress of events business needs were first addressed through a lengthy and detailed explanation to employees. Much evidence has been presented during these proceedings representing that which was explained to employees. It has not been put in opposition to the new roster that what the company proposes does not satisfy its business or reasonable business needs.

The emphasis of the opposition lies in employee needs and health and safety issues.

The new roster proposed involves an increase in work hours of six with associated increase in salary. An increase in work hours results naturally in reduction in private hours.

For those whose lifestyle was genuinely committed to the 42 hour four panel roster alternative employment at the George Fisher mine was offered on the same roster arrangements together with a salary preservation arrangement. Sixteen lead mine employees have commenced in these positions. There are twenty-eight positions remaining to be filled and available to employees of the lead mine who may have a genuine need to remain on the 42 hour four panel roster system.

The company has informed all affected employees that if they have any problems with working the new roster they should approach the company and every effort will be made to resolve the problem.

Only four employees of the seventy-one employees affected responded to this offer of the company. One employee who was to provide evidence in this matter later reconsidered and transferred to the Enterprise mine on a 42 hour roster. Another employee transferred to the George Fisher mine on a 42 hour roster.

Two other employees who did approach the company about the offer requested a transfer but then elected not to move to other work areas on a 42 hour roster but to remain at the lead mine on the new roster. Another employee approached the company about the offer but did not request a transfer to a 42 hour roster.

On 1 September fourteen of the lead mine employees, together with ten other employees, after voluntarily applying, commenced working on the George Fisher upper mining block working a 52 hour roster.

The concerns raised in the evidence of employee witnesses falls into three broad catagories:–

- Management practices;
- Lifestyle issues; and
- Occupational health and safety.

Management practices involving plant and equipment logistics are being addressed in the reorganisation of the mine. While there has been some criticism about some logistical matters there has been no evidence put to support an apparent belief that implementation of change to the timeliness of plant and supplies at the workface would produce the outcome now required by the company for the extraction of the ore remnants.

Lifestyle issues appear to have been first raised with the company as a matter of concern by those employees who provided evidence when their affidavits were filed on 9 October 2001.

None of the employees at that time had approached the company as invited and sought access to alternative arrangements to enable them to continue on a four panel 42 hour roster and maintain their existing lifestyle patterns.

Cross-examination on this aspect of their evidence tempered the reality of their concerns.

All of the witnesses were long-term shift workers who had worked a variety of shift patterns and rosters over a long period. There was an acknowledged capacity to adapt to new rosters both in fatigue management and lifestyle issues. One witness acknowledged working six to seven night shifts, well beyond the three now in question, when working for a subcontractor prior to employment with MIM.

Another witness, a single man with no dependants living with him opposed the new roster because he values the time off he already had to do household things. He did not seek any assistance, although he knew it was available, to remain on a four panel 42 hour roster. He did not raise any specific health or safety issues or employee needs issues. He worked at the lead mine for twenty years on a variety of shift rosters.

A witness who had three young children involved in seasonal sport and cultural activities stated that he elected not to remain on a four panel 42 hour roster by working at another site on the lease because he wanted to see the lead mine out after eighteen years working in it with the prospect of securing a redundancy pay out.

Another witness, a single man, opposed the new roster because, “I think that it will have an impact on my health and safety.”. The issue he referred to was fatigue management which has been the subject of considerable education by the company. The other issue raised concerned plant and equipment logistics at mine faces, a matter currently under review with the new mine arrangements and a matter which he was willing to assist the company overcome present teething problems.

Another single witness who has regular but not constant responsibility for care of a young son and raised this as one reason for rejecting the new roster was offered a transfer on the same roster to a new mine on a salary preservation package but rejected the offer because it was not the same job and his job satisfaction would be less.

Another witness who had worked underground for twenty years thought it was possible that it might just be scare tactics that the lead mine could close down and did not have any interest in moving to George Fisher mine on the same roster. He acknowledged that the grown up children who live with him and his wife had busy social lives and two jobs each. The concern he expressed that he would see less of them if he worked the new roster has to be viewed in that light.

Another witness with two young children whose wife was seeking to re-enter the workforce stated that the new roster might inhibit her opportunity to do so. He conceded that she had been looking around for work under the four panel 42 hour roster but had been unsuccessful. She presently works from home selling cosmetics and that appears to be more compatible with her needs. He had recently invested six hundred dollars in sporting equipment with the intention of joining a club which he thought only provided activities on a Sunday. He does not get a clear Sunday off. He hasn’t asked if the club has activities on other days. However he spoke to the company the day prior to giving evidence about the possibility of alternative work in development mining which would give him a free weekend.

Another employee with family responsibilities and who enjoys physical training activities elected not to seek alternative work arrangements on the old roster because he had become familiar with the lead mine and may not be able to adapt to another site and there were no guarantees that he would get the same job at another site.

Another witness whose wife works as a casual nurse with her working hours tailored to the 42 hour roster indicated that her working hours now fit around the new roster. The extra six hours per week limits the time he can spend with his family. He also raised occupational health and safety aspects of working underground in heat and dust but acknowledged that chilled air is delivered to the workface and dust controls are in place. Along with most of the witnesses he raised fatigue management as a concern as well as supply logistics underground and expressed the belief that if there were no supply problems, “we could get the job done in a better way.”. The occupational health and safety issues raised by the witnesses related only to fatigue management.

Occupational health and safety issues were not raised in the issues of concern put to the company and in the document listing issues of concern or for further explanation for the meetings on 23 and 25 August which rejected the proposal. That occupational health and safety issues would be a contended issue was not raised with the company until 6 September 2001.

The company has had in place a fatigue management program for many years. In relatively recent times a new program with detailed training was introduced following consideration by a joint union management committee of a report titled the Coleman report.

There was an erroneous belief that that report stipulated that the safest or most appropriate roster for night shifts was for there to be no more than two nights in a row. That finding could not be shown in the report.

Employee witnesses were questioned about their past experiences on different shifts and agreed that when roster changes were experienced they could adapt to the change and accommodate any fatigue issues which arose.

There are and have been, as earlier indicated, a variety of shift patterns in operation on the lease, including rosters where three nights in a row are worked. These roster patterns also exist at other mining sites. Longer rostered hours also exist within the company's operations and are worked by employees members of the union.

Subsequent to the successful appeal against the issue of restraining orders a considerable body of material was put to the Commission during the period from May 2001 when the need for change was put to employees and was not put prior to the date the company first proposed to introduce the new roster. Factors in that material dealt with fatigue management, an issue which has been comprehensively dealt with by the company and in the latest instance, in association with union/management representation in an investigation and implementation process through the "Safe To Work" committee.

CONCLUSIONS

Of the three issues raised in clause 5.6 I am satisfied that occupational health and safety issues have been properly met. I am further satisfied on the evidence of the company that the reasonable needs of the business will be met by the roster change.

Taking into account the whole of the evidence of employee witnesses I am satisfied that the reasonable needs of employees have also been met.

In coming to this conclusion I do not discount the lifestyle desires of employees. However what must be considered is what is reasonable in the circumstances. In the absence of the alternatives offered by the company the change proposed would have had greater difficulty in being found to be reasonable or acceptable.

For those who wish to maintain lifestyle patterns the opportunity still exists to remain on a four panel 42 hour roster on a salary preservation arrangement.

Any consideration employees wish to give to this opportunity would no doubt be tempered by the fact that the new roster is on trial for six months. The company must take the necessary steps to ensure that the opportunity to change, in cases of demonstrated genuine need, remains until at least the conclusion of the trial and a more permanent decision is made as to the shift roster to be used to extract the remains of the lead ore body.

The only finding necessary is that the refusal by the employees to accept the implementation of the new trial roster was unreasonable. I make this finding based upon all of the evidence and other material put during a consideration of the matter at all stages before me.

It follows that the implementation of the new roster by the company is permissible under the terms of the Agreement.

R.E. BECHLY, Commissioner.

Released: 16 November 2001

Appearances:–
Mr B. Swan, with him Mr R. Harris for The Australian Workers' Union of Employees, Queensland
Mr J.E. Murdoch SC (instructed by Allens Arthur Robinson) for Mount Isa Mines Limited.

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 276 – application for amending or voiding contract

Peter William Reilly and P.W. & G.P. Reilly (a partnership) AND
TDG Logistics Pty Ltd (No. B979 of 2000)

COMMISSIONER BECHLY 16 November 2001

DECISION

This matter has been referred back to the Commission following an appeal on an earlier issued decision.

The short point of the appeal was that the earlier decision was determined on a ground that was not pleaded, that ground being that the imposition of a month by month term to the contract was unfair.

In the present proceedings the respondent did not resist the introduction of further evidence and argument on that point. However the applicant elected not to further pursue the matter other than to say that it does not submit that the imposition of the month by month term was not unfair but rather that the imposition of the month by month term into the contract was incidental to the unfairness pleaded in the amended application.

The matter is now to be determined on the original pleadings.

Certain findings of fact were made in the earlier decision.

One fact found was that the 1998 contract was not unfair.

It was argued by the respondent that on the face of that finding and in the absence of any issue over the month by month term, that it cannot be advanced that the contract between the parties under consideration was unfair on the basis of the failure to provide contractual terms requiring the respondent to have regard to goodwill paid by the applicant.

The 1998 contract was not unfair. Each of the parties to that contract recognised the existence of goodwill within that contract. That goodwill flowed from the 1993 contract when arrangements between the parties were renewed in 1998.

The respondent in these proceedings adopted the terms of the 1998 contract, informing the applicant (and others) on the purchase of the business from the previous other party to the contract that there would be no change in employment conditions other than a month by month basis, and that the respondent would honour the FFS contracts.

What was not said was that the respondent did not intend to honour that aspect of the 1998 agreement that related to goodwill. For whatever reason it did not recognise that goodwill resided in the contract. It says that the contract made no provision for goodwill.

The contract became unfair when entered into between the applicant and the respondent because the respondent failed to recognise and in doing so rejected, without advice to the applicant, the entitlement to the goodwill residing in the earlier contract which it adopted and stated it would honour.

It further became unfair because the respondent, at termination, as a result of the failure to recognise the goodwill element of the contract, failed to provide a process to establish a value and reimburse the applicant for the goodwill component.

There are other aspects of unfairness which are dealt with in the original decision on this matter and which are unrelated to the month by month term which stand but which do not require repetition in this decision.

The applicant has sought an order declaring the contract void, save and except for those provisions of the contract which entitled the applicant to remuneration.

The respondent argues that, in the absence of any value that might be placed on that component of the contract relating to goodwill, no order should be made until whatever value that component of the contract now has, if any value at all, is determined.

The most appropriate course seems to be that of hearing the parties on the issue of compensation in the first instance and then determining the order.

The matter will be relisted on request when the applicant is in a position to proceed on the matter of compensation.

R.E. BECHLY, Commissioner.

Released: 16 November 2001

Appearances:–
Mr M. Brady (instructed by Reidy and Tonkin) for the applicant.
Mr A. Horneman-Wren (instructed by Deacons Lawyers) for the respondent.

###

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees AND Hervey Bay RSL and Services Memorial Club Inc. (No. W92 of 2001)

COMMISSIONER ASBURY 19 November 2001

Clubs Etc. Employees' Award – South East Queensland – Classification Structure – Meaning of the phrase "general cleaning duties" – Meaning of the phrase "specialised chemicals and equipment" – Insufficient evidence to determine whether employee used specialised chemicals – Employee used specialised equipment – Mixed functions – Effect of exclusion of casual employee from mixed functions clause – Comparison with classification structures in other awards and agreements – Application granted to the extent that payment ordered for work performed using specialised equipment.

DECISION

Background

This is an application by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU) (the applicant), alleging underpayment of wages to Mr Kenneth Sims, by the Hervey Bay RSL and Services Memorial Club Inc. (the respondent). The applicant contends that the underpayment has arisen as a result of the incorrect classification of Mr Sims under the relevant Award.

Facts

The uncontested facts in relation to this application are as follows:–

- Mr Sims was employed by the respondent from 8 May 1996 until 7 October 1999;
- Mr Sims was employed on a casual basis during this period; and
- Mr Sims was classified as a Grade 1 House Attendant under the *Clubs Etc. Employees' Award – South East Queensland* (the Award).

Mr Sims performed cleaning duties using a variety of equipment including:–

- a window cleaning pole capable of extending over a distance of two building stories known as a "Tucker Pole";
- a duplex floor scrubber known colloquially to staff as "Charlie" used to scrub floors;
- a wet/dry vacuum cleaner known colloquially to staff as "Rex" used to clean carpets and upholstery on chairs and stools; and
- a polishing machine known colloquially to staff as "Bertha" used for polishing and occasionally stripping floors, including a dance floor.

The Case for the Applicant

In addition to the equipment used and the duties which the parties agreed were undertaken by Mr Sims, the applicant contended that he performed the following work:–

- handling and use of specialised chemicals, including emptying of drums and screwing taps into drums;
- mixing and dilution of specialised chemicals;
- use of a gherni for high pressure cleaning of concrete areas and a large industrial bin;
- handyman duties such as repair of toilet seats, replacing screws in stools and chairs, repairing toilet roll holders and replacing tap washers;
- cleaning and servicing of vacuum cleaners; and
- training other staff in use of equipment.

Evidence for the applicant was called from Mr Sims, and Mr David Pullen an organiser with ALHMWU. It was contended by the applicant that the chemicals and equipment used by Mr Sims were specialised. Accordingly Mr Sims should have been classified and paid as a House Attendant, Grade 2 under the Award. Further, Mr Sims said in his evidence that he spent at least half of his 30 hours of working time each week, using specialised chemicals and equipment. Mr Sims disputed evidence of the Club's witnesses about the time spent by him performing various duties, saying that he had spent more time on the duties in question than estimated by the Club's witnesses.

The Case for the Respondent

The case for the Club was essentially that the chemicals and equipment used by Mr Sims were not specialised. Accordingly, Mr Sims was correctly classified as a House Attendant, Grade 1.

Evidence for the Club was called from the following persons:–

- Helen Gay Marxsen, Human Resource Manager of the Club;
- Rodney David Nipper, Director Sharman Property Services Pty Ltd, provider of contract cleaning services; and
- Theresa Coral Young, Cleaning Supervisor at the Club.

Ms Marxsen's evidence related to endeavours to resolve Mr Sims' claim for reclassification to House Attendant, Grade 2, and correspondence with ALHMWU and The Registered and Licensed Clubs Association of Queensland, Union of Employers in this regard.

Ms Young's evidence was that all staff had been instructed in the basic servicing of upright vacuum cleaners. Further, on commencing employment with the Club, Ms Young said that she was informed that only supervisors were to restock, decant and dilute chemicals. All cleaners would use some form of chemicals. Ms Young agreed that Mr Sims had conducted training of staff on operating various cleaning equipment as he had used the equipment the most and was familiar with it.

Ms Young also said that she had expressed concern to Mr Sims that pursuit of his claim could be the deciding factor in management contracting out the work of the housekeeping department, and could cost jobs. From 30 June 2001, the Club had contracted out cleaning work, and Ms Young had been employed by the contractor at that time.

Ms Young conceded that the breakdown of Mr Sims' work prepared by the Club underestimated the time spent on window cleaning. However, Ms Young maintained that carpet cleaning had been performed by contractors and Mr Sims was required to perform spot cleaning and cleaning of small areas only.

Mr Nipper also gave evidence about the contract cleaning industry in which his company is engaged, and the Certified Agreement applicable in that industry, between ALHMWU and Australian Building Services Association (ABSA).

Mr Nipper gave evidence about the training provided in the cleaning industry. Further in Mr Nipper's opinion vacuum cleaners, carpet spotting machines, upholstery cleaning units, polishing and scrubbing machines and water pressure units in simple applications are not specialised items. These machines and the chemicals used with them do not require extraordinary skills, and the tasks they are used to perform are basic.

Award Classifications

The classifications provided for in the *Clubs Etc. Employees' Award – South East Queensland* relevant to this application are as follows:–

"5.1.4 *House*

(a) **Wage Level 1**

'House Attendant Grade 1' shall mean an employee who performs any of the following:

(i) laundry and/or linen duties which may include minor repairs;
(ii) collection and delivery of guests personal dry cleaning and laundry, linen and associated material to and from accommodation areas'
(iii) general cleaning duties;
(iv) parking guests vehicles.

(b) **Wage Level 2**

'House Attendant Grade 2' shall mean an employee who has not received the appropriate level of training and who is engaged on any of the following:–

(i) servicing accommodation areas and cleaning thereof;
(ii) receiving and assisting guests at the entrance to the establishment;
(iii) driving a passenger vehicle of courtesy bus;
(iv) cleaning duties using specialised equipment and chemicals;
(v) providing basic food and beverage service with personalised guest service (room service).".

Conclusions

The central point for determination in this case is whether the duties performed by Mr Sims can be termed "general cleaning duties" as provided in the definition of a House Attendant Grade 1 at clause 5.1.4(a)(iii) of the Award, or whether by virtue of the chemicals and equipment used, the work was "cleaning duties using specialised equipment and chemicals", as provided in the definition of a House Attendant Grade 2 in clause 5.1.4(b)(iv). In my view, the argument put forward on behalf of the respondent, that equipment and chemicals are not specialised because they are used by almost all cleaners, misses the point. It is not the numbers of cleaners who use particular chemicals and equipment which is relevant, but rather whether those chemicals and equipment are specialised.

The Award definitions do not require that an employee undertake the specified work for a majority of their working time. This can be compared with the definitions contained in the *Australian Building Services Association – Queensland Division – Certified Agreement 1999* (CA409 of 1999), which require that a person be employed "for the greater part of their shift" on specified work, for the person to be classified at a particular level. There is no alignment in terms of relativities between the classification structure in that Agreement, and the classification structure contained in the Award. However, both structures provide for a Level 1 and a Level 2 and also have a level below Level 1.

A number of duties performed by Mr Sims, would place him within Level 2, were he employed under the Certified Agreement, if those duties were performed for the greater part of his shift, e.g. carpet cleaning and operation of pressure washing equipment. This point was conceded by Mr Nipper who gave evidence about the Certified Agreement on behalf of the respondent.

No evidence or submissions were put to the Commission by the parties, about the history of the classification structure in the Award or their intention with regard to the inclusion of "specialised chemicals and equipment" at Level 2. Further there is no definition of "specialised chemicals and equipment" in the Award. A perusal of the Commission's files indicates that the classification structure was inserted into the Award by consent following a hearing before Fisher, C on 15 March 1993 (R12-3 of 1990 (1993) 142 QGIG 521).

In my view, the phrase "specialised chemicals and equipment" should be given its ordinary meaning. The term "specialise" is defined in the *Oxford Dictionary* as to render special or specific; to invest with a special character or function. A reasonable approach to the distinction between "general cleaning duties" in Level 1 and use of "specialised chemicals and equipment" in Level 2, is whether the chemicals and equipment are commonly used in a general application, or whether they are used for more specialised purposes in the cleaning industry, by persons who require training. I am also of the view that chemicals and equipment commonly used in a domestic application would come within the meaning of the phrase "general cleaning".

Machinery or equipment which is multi-function, uses pressure or operates at high speed, is in my view specialised equipment. In contrast, general cleaning with a product and an implement such as a cloth, mop, bucket, broom, "squeegie", brush or duster, is general cleaning. Similarly, the use of single function equipment such as upright vacuum cleaners or window cleaners attached to poles, is general cleaning.

I am unable to be reasonably satisfied that the Tucker Pole is specialised equipment. The evidence, establishes that the use of the Tucker Pole requires very little if any training, and that any complexity associated with this piece of equipment is limited to the length of the handle. Similarly, there was no evidence of any training being required to use the upright vacuum cleaner, and I am also satisfied that it does not constitute specialised equipment. Further, both pieces of equipment are of a type commonly found in a domestic situation and do not operate at high speed, use pressure or have multiple functions.

Performing basic maintenance and upkeep on equipment which is not specialised, does not constitute grounds for an employee to be classified at Level 2. There was no evidence that the maintenance performed on the upright vacuum cleaner was anything other than that ordinarily performed by an operator.

There was no evidence to suggest that Mr Sims had not handled a number of chemicals in the manner he claimed, and I accept his evidence on this point. Cleaning products which require dilution may be utilised to perform general cleaning or they may be products which are specialised. I have no evidence before me as to the nature and composition of the chemicals used by Mr Sims. For reasons which appear below, this matter can be determined without a finding about whether the chemicals used by Mr Sims were specialised. However, the respondent's own witness Ms Young gave evidence that she had been instructed that only supervisors, who were paid at Level 3 were to deal with chemicals and that supervisors were required to understand Material Safety Data Sheets relating to chemicals.

I have reached the conclusion that some of the equipment used by Mr Sims was specialised. In my view, the wet/dry vacuum cleaner; the stripping/polishing machine, the duplex scrubbing machine and the gherni are specialised equipment. I am satisfied that each of these machines is either high speed, performs multiple functions or uses pressurised water.

It is clear from the evidence that training in the use of this equipment is required and that Mr Sims provided that training to other employees, on the basis of his knowledge and experience. Further, this equipment was used to undertake specialised tasks such as carpet and upholstery cleaning and stripping and polishing a dance floor. Mr Sims also said that his duties differed from those of most of the other cleaners, who were engaged in cleaning and washing tables, cleaning poker machines and cleaning behind the bar, which Mr Sims considered to be general cleaning. I agree with this proposition. Under cross-examination, Mr Sims also said that his role was distinct from that of other cleaners, and agreed with Mr White's proposition that he was required to do heavier work than that performed by the other cleaners. Finally, Mr Sims assertions about the maintenance and repair work he did were not challenged, and in my view such work is not general cleaning.

I have also given consideration to the classification structure in the Award as a whole. That structure is based on a common framework which applies across classification streams for employees in the areas of Food and Beverage, Kitchen, Cooking, Leisure Activities and House Attendants. The framework provides for an introductory level with a relativity set at 78% of the tradespersons rate. Level 1 of the classification structure, which provides for a relativity of 82% of the tradepersons rate, incorporates the classification of House Attendant Grade 1, while Level 2 with a relativity of 88%, incorporates the classification of House Attendant Grade 2.

The decision I have made about the equipment which would entitle an employee to be paid at the Level 2 rate, maintains consistency between the classifications under other streams in the Award, when a comparison is made between duties performed at Level 2 by employees in other streams.

Given that the respondent referred me to the classification structure in the *Australian Building Services Association – Queensland Division – Certified Agreement 1999* (CA409 of 1999), I have also considered the Award which underpins that Agreement, which is known as the *Contract Cleaning Industry Award – State.* That Award has a classification of cleaner which has a relativity of 87.4% for a cleaner and which is defined as follows:–

> " 'Cleaner' (relativity to trade equivalent – 87.4%) means a person employed for the greater part of their working time in cleaning work of any description on any premises or in bringing into or maintaining premises in clean condition, whatever may be the nature of such employee's other duties.

For the purposes of this Award, 'cleaner' shall be deemed to mean a domestic worker engaged to perform work in a private residence that is of a household nature, including but not limited to cleaning and washing.".

The next classification level in the Award is a Building Service Employee – Grade 1, with a relativity of 92.4%, which is defined as follows:–

" 'Building Service Employee – Grade 1' (relativity to trade equivalent – 92.4%) means an employee performing duties of a Cleaner, who is in addition is (sic) engaged for the greater part of each day or shift on any of the following tasks, or a combination of such tasks:–

- Ordering supplies and receiving deliveries and/or the responsibility for the distribution and maintenance of toilet and other requisites and cleaning materials in buildings or establishments and/or employee performing customer or public relations or other duties as required.
- Carpet cleaning: Operating equipment used in any or all of the following methods – powder systems of liquid shampoo systems or hot water injection and extraction systems (commonly called 'steam cleaning').
- Cleaning windows on the exterior of multi-storied buildings from swinging scaffolds, bosun's chairs, hydraulic bucket trucks or similar devices.
- Operating 'Ride On' powered sweeping machines.
- Operating steam cleaning and pressure washing equipment on the exterior of buildings.".

I am also of the view that the approach I have adopted with respect to the Award which covered Mr Sims, is consistent with the classification structure applicable in the *Contract Cleaning Industry Award – State.*

I am not prepared to accept the respondent's evidence on the issue of the time spent by Mr Sims undertaking various tasks, because it was conceded by Ms Young when giving evidence for the respondent, that the estimates appended to Ms Maxwell's statement, did not accurately reflect the time spent by Mr Sims using the Tucker Pole. On the evidence available to me, I am reasonably satisfied that Mr Sims spent one third of his working time on cleaning using specialised equipment and chemicals.

The final issue for determination is whether Mr Sims has been underpaid in terms of the Award. As previously noted, the Award covering Mr Sims provides that employees are to be classified at a particular level if they perform any of the work at that level. There is no minimum or proportion of working time specified. It is also the case that clause 4.2 Mixed Functions, excludes casual employees. Further, there are no legislative provisions in relation to mixed functions or higher duties.

I do not accept Mr Martin's argument for the applicant, that clause 4.2 is rendered obsolete by the inclusion in the Award of a skills based classification structure. To accept this argument would be contrary to established principles of statutory interpretation, to the effect that an award provision must not be read so that it has no effect or is rendered void.

I am of the view that when the Award is read as a whole, casual employees are employed on an hourly basis, and are entitled to be paid for each hour worked at the appropriate rate applicable for work performed. Where casual employees perform work at a higher level, they are entitled to be paid for that time, at the higher rate. Casual employees are excluded from the provisions of clause 4.2 which requires payment to an employee who works more than two hours on a grade of work attracting a higher rate, to be made at the higher rate, for the entire period worked on a day. The exclusion from what is in effect a minimum payment at the higher rate, does not mean that a casual employee is not entitled to be paid for each hour spent performing work attracting a higher rate, at that higher rate.

I have found that Mr Sims spent one third of his working time performing the work of a House Attendant Grade 2.

Accordingly, Hervey Bay RSL and Services Memorial Club Inc is to pay to Mr Kenneth Sims the amount of $1068.00. The amount is to be paid within twenty-one days of the date of release of this decision. I order accordingly.

I.C. ASBURY, Commissioner.

Released: 19 November 2001

Appearances:–
Mr J. Martin, for the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.
Mr R. White of the Registered and Licensed Clubs Association of Queensland, Union of Employers for the Respondent.

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees AND Hemley Pty Ltd t/a Didgeridoonas (No. W151 of 2001)

COMMISSIONER BLADES 21 November 2001

Unpaid wages – Casual employee – *Clothing Trades Award – Southern and Central Divisions* – Employee working more than 30 hours per week as permitted by clause 21 – Whether entitled to be paid overtime – Held overtime payable.

DECISION

This is an application by the Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees (the Union) seeking the payment of unpaid wages from the respondent Hemley Pty Ltd t/a Didgeridoonas on behalf of an employee Dorothy Carlson. The applicant seeks an order for the payment of $6,563.22.

The application alleges that Ms Carlson was employed as a sewing machinist, performing sewing machinist and table hand work under the provisions of the *Clothing Trades Award – Southern and Central Divisions* (the Award). There has been an admission as to the duties performed by Ms Carlson. It is alleged that the applicant was underpaid her hourly rate of pay from the time of the commencement of her employment as a casual from 27 July 1999 until her termination on 19 March 2001 and that she never received overtime penalties. It is alleged that as a casual, she should have been paid overtime for hours worked in excess of 30 per week.

It has been accepted that the applicant was employed by the respondent under the Award as a casual employee and it is not sought to argue that she was anything other than a casual. However, the respondent alleges that the Award specifically excludes the payment of overtime rates for casual employees.

It is alleged that Ms Carlson was paid the flat rate to which she was entitled under the Award. There is evidence from Ms Barbara Hemming in her written statement that each time the employer contacts *Wageline* regarding the matter of overtime for casual employees, it is given a different answer.

No oral evidence was adduced in these proceedings as there was no dispute with relevant facts. It was admitted by the respondent that if the Commission finds that overtime is payable for a casual employee who worked in excess of 30 hours per week, then the calculations of the applicant as to the amount payable are correct.

There is no doubt that overtime is payable for casual employees under various Awards – see e.g. *Farrar v Nationwide Oil Pty Ltd* 167 QGIG 103 and *Metal, Engineering and Associated Industries Award, 1998 – Part 1* Australian Industrial Relations Commission, Print T4991.

The *Clothing Trades Award – Southern and Central Divisions* defines in Clause 6 when overtime is worked. Under clause 6(1), all time worked by a weekly employee in excess of 38 hours in a week generally, shall be paid for at the rate of time and a-half for the first three hours and double time thereafter. Clause 6(2) refers to employees paid under a system of payment by results. Under clause 6(3), an employer may require **any employee** to work reasonable overtime at overtime rates (emphasis added). The use of the phrase "any employee" indicates that more than weekly employees and employees paid under a system of payment by results are included and, in my view, extends to casuals.

Clause 21 refers to casual workers. The clause was amended as from 27 July 2001, but for the relevant period provided:–

"Employees may be employed in any week as casual employees for less than 30 hours (exclusive of overtime) but shall be paid as follows:–

(a) If on time work - The ordinary rate plus 33⅓ per cent.

(b) If on any system of payment by results - The appropriate rate plus 33⅓ per cent.".

Under clause 14(2), a casual employee is one engaged and paid as such and whose services may be terminated by an hour's notice. There is no question that Ms Carlson was a casual employed on "time work" which term appears simply to differentiate workers from those employed on any system of payment by results.

The Union made submissions that the employer adopted an intentional course of Award avoidance. It was an inappropriate submission for which there was no basis. It was claimed that the employer had honestly and fairly endeavoured to apply the provisions of the Award and there is no evidence to suggest otherwise. The interpretation of clause 21 is not without difficulty. Employers endeavouring to honestly apply these provisions must attract some sympathy when it comes to understanding what clause 21 means. It is understandable that differences of opinion exist within *Wageline*. The form of clause 21 has existed in the forerunners to this Award since 1942. It is not clear what the words "(exclusive of overtime)" mean. However, as with the interpretation of any instrument, the words that appear must be given some effect and not treated as superfluous – *Commonwealth v Baume* (1905) 2 CLR 405 at 414.

Casuals are not permitted to work beyond 30 hours in any week. For those hours they are paid 33⅓% loading. What if they work 50 hours in a week? If the words "exclusive of overtime" were absent, an employer would simply be in breach of the Award or s. 9 of the *Industrial Relations Act 1999* (the Act) by employing casuals for more than the 30 hours. (Section 9, unless the Award otherwise provides, prohibits work outside the permitted hours unless overtime is paid.). If the words "exclusive of overtime" imply that a casual can be worked for any number of hours but such hours are not overtime, they are contradictory. The submission is that no matter what hours are worked, overtime is not payable. It is my respectful view that the provision requires that casual employees working in excess of the permitted hours be paid overtime at the ordinary rate plus 33⅓%. Whatever is the "ordinary rate" has not been put in issue in this case because of the admissions made by the respondent. Casual employees may be employed in any week as casual, but only for less than 30 hours. If the casual employee is employed for longer than 30 hours, then clause 21 can only mean that excessive hours be regarded as overtime. I think clause 6(3) is also significant in that it provides that an employer may require **any employee** (emphasis added) to work reasonable overtime at overtime rates. The phrase "any employee" means something more than a weekly employee or an employee paid under a system of payment by results and must, in my view, include casuals. It also recognises that casuals can work overtime.

If a casual works more than 30 hours, the nature of the employment still remains casual employment in accordance with clause 14(2) of the Award because the employee was engaged as such and paid as such [compare *Farrar v Nationwide Oil Pty Ltd* (supra)].

The respondent strongly submitted that because of the high rate of casual loading, that loading must have included an overtime component. It was submitted that the high loading is the reason why overtime rates do not apply to casuals under this Award.

In a recent case before the Queensland Industrial Relations Commission relating to casual loadings, *QCCI v Crown and Others* 166 QGIG 389 (the Casual Loading Case), a number of reasons for casual loadings was identified. There was also a recent Federal case dealing with casual loadings in the *Metal, Engineering and Associated Industries Award, 1998 – Part 1* (supra). In neither of those cases was it identified that an overtime component had any part to play in the calculation of casual loadings. Compensation for lack of entitlement to annual leave, sick leave and the benefit of statutory holidays and for the element of time lost in following the occupation of a casual worker were identified in *Re Loading of 12½% for Casual Workers* (1964) 56 QGIG 162.

There is no doubt that the loading of 33⅓% is higher than usual. There is only one other Award identified in the Casual Loading Case where the loading is higher than 25% and that is the *Club Employees' Award – State (Excluding South East Queensland)* where the casual loading is 50%. A perusal of that Award, by reference to clause 8 prescribing ordinary hours of work for **all employees** (emphasis added) and clause 9 providing that overtime is to be paid for all time worked in excess of ordinary working hours with further specific provisions that casuals are excluded from week-end penalty rates and late work penalty rates, indicates that overtime is also payable to casual employees under that Award. The fact that the loading is as high as 50% appears to have no relevance to the payment of overtime.

The first reference to a percentage increase to a minimum rate in the forerunners to this Award appeared in the *Order and Ready-Made Clothing Trade Award – Southern Division* as from 3 April 1924 Vol CXXII QGG 1167 where clause 59 provided for an addition to the ordinary rate for male pieceworkers at 39% and for female pieceworkers at 31%. The note at the end of clause 59 reads:–

"*The said rates have been fixed, after allowing an additional percentage on the weekly rates to cover extra lost time, and also in consideration of pieceworkers not receiving payment for holidays fixed by this Award.*".

Following on from that Award, the *Clothing Trades Award – Southern Division* which replaced the *Order and Ready-Made Clothing Trade Award – Southern Division* was gazetted on 7 July 1942 at Vol CLIX QGG 35. Clause 36 in that Award was obviously the precursor to the modern day version. It provided:–

"***Casual Workers***

36. Should any presser-off in Groups 1 to 3 be employed in any week as a casual employee for less than thirty hours (exclusive of overtime) he shall be paid as follows:–

(1) If on weekly wages - the ordinary time rate plus 33⅓ per cent;

(2) If on piece-work - the ordinary piece-work rate plus 33⅓ per cent.".

Thus whether resort is made to the 1924 note or to the statements of the Full Benches in either the Casual Loading Case or the Federal *Metal, Engineering and Associated Industries Award, 1998 – Part 1* case, it seems to be clear that the casual loading did not contain any component for overtime.

As previously indicated this Award was recently amended by the Commission. Included among those amendments was an amendment to clause 21, the effect of which was to raise the hours of casuals from 30 per week to 38 per week. The Award now provides that employees may be employed in any week as casual employees for up to 38 hours (exclusive of overtime). It was submitted that if there was any doubt about the meaning of clause 21 in relation to the payment of overtime to casuals, there was the opportunity to clear it up.

The answer is that it appears from the transcript that the parties to that hearing had no doubt that overtime was payable to casuals. Mr De Brenni, on behalf of the Union told the Commission on 27 July 2001 that:–

"*This clause has been amended to allow casual employees to perform work on an hourly basis up to 38 hours per week before moving to overtime rates, whereas previously hours in excess of 30 were to be paid at overtime rates.*".

Mr Guymer on behalf of the Retailers' Association of Queensland Limited, Union of Employers, told the Commission:–

"*The amended application also includes an increase in the ordinary hours able to be worked by a casual employee ...*".

Mr Crimmins on behalf of the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers echoed the submissions made by Mr Guymer.

These statements properly answer the submission that there was an opportunity to clear up any ambiguity. It is obvious that the parties did not consider there to be an "ambiguity" and if there was, it was not brought to their attention or to the attention of the Commission. Had Mr Guymer or Mr Crimmins disagreed with the statement of Mr De Brenni, I would have expected a correction to have been made. It can be taken I think that there was agreement with what Mr De Brenni had stated. There was a submission that the view of the Advocates in that hearing as to the state of the law is not binding on the Commission. That may be so but in *Motor and Trolley Bus Drivers, Conductors, Etc Award – Brisbane City Council* (1984) 34 QGIG 500, Birch C stated that:–

"*It is also well settled that, if in practice, parties have given a meaning to words in an Award which is reasonably capable of being attributed to them, then such meaning is to be preferred to another meaning of which the words in question are capable of bearing.*".

Overtime is paid for periods worked outside any of the periods mentioned in s. 9(2) of the Act. According to **Butterworths Employment and Law Dictionary**, overtime is work done outside, or in addition to, the standard hours fixed for an employee by an industrial award or agreement, or by legislation. In this case, the standard hours fixed by the Award for a casual employee is 30. For any hours worked beyond that, overtime is payable.

I am of the view that a casual employee, at the relevant period of time, was required to be paid overtime for work performed in excess of 30 hours per week. In accordance with that ruling, the sum of $6,563.22 is admitted to be due and unpaid. I order that the amount be paid to the applicant, one half within one month and the balance within two months.

I order accordingly.

B.J. BLADES, Commissioner.

Released: 21 November 2001

Appearances:–
Mr M. de Brenni for the Textile, Clothing and Footwear Union of Australia, Queensland Branch, Union of Employees.
Mr S. Alexander, of Carroll Alexander and Associates, on behalf of Hemley Pty Ltd.

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Jeremy John Robinson AND The Crown in the Right of the State of Queensland (Commissioner of Police) (No. B1736 of 2001)

COMMISSIONER BLADES 21 November 2001

Unfair dismissal – Applicant a Police Recruit – *Police Service Administration Act 1990* – Jurisdiction of Industrial Commission – Applicant employed on contract – Section 5.11 *Police Service Administration Act 1990* – Section 686 of the *Industrial Relations Act 1999* – Conditions of employment not subject to determination of an industrial authority – Conditions of employment include grounds on which employment may be discontinued – Held no jurisdiction – Application dismissed.

DECISION

The applicant was a Police Recruit in the employ of the Commissioner of Police when he was dismissed on 11 September 2001. He alleges the dismissal was harsh unjust or unreasonable and seeks reinstatement. The respondent alleges that the Commission lacks the jurisdiction to hear the matter because the applicant was employed pursuant to a contract of employment dated 21 May 2001 and the Commission's jurisdiction is excluded by the following provision of the *Police Service Administration Act 1990* (the PSA Act):–

"*5.11. (1)* ***Conditions of employment of police recruits***

The conditions of employment of a police recruit –

(a) are as approved by the commissioner and accepted by the person who is, or is to be, the recruit; and

(b) are to be governed by a contract of employment made, or taken to be made, between the Crown and the recruit; and

(c) are not subject to any award or industrial agreement or any determination or rule of an industrial authority.

(2) If an offer of a contract of employment as a police recruit on conditions in writing approved by the commissioner in relation to the appointment, including the grounds on which the employment may be continued and discontinued, is made to a person before that person's appointment as a recruit, the person, on accepting appointment as a recruit, is taken to have made with the Crown (and the Crown is taken to have made with the appointee) a contract of employment that accords with the contract last offered to the person before the appointment was made.".

The term "industrial authority", as defined by s. 1.4 of the PSA Act, "means the Industrial Commission or Industrial Court.".

The contract of employment provides that the conditions of employment contained in Parts B and C apply to the appointment of police recruits. The contract further provides in Part B in clause B.4.4.3 that among the sanctions that may be imposed by the Commissioner by way of disciplinary action is termination of the contract. Clause B5 provides that the contract may be terminated by the Commissioner if, among other reasons, the Commissioner determines that the recruit is unsuitable for appointment as a police officer. The termination was affected on the grounds that the applicant had possession of study notes during an examination.

The respondent argued that by the application of the provisions of s. 5.11 of the PSA Act and s. 686 of the *Industrial Relations Act 1999* (the Act), the applicant is excluded from the unfair dismissal provisions. Section 686 of the Act provides:–

"*(1) This Act binds the State, other than in relation to –*

(a) . . .

(b) a matter about which another Act excludes –

(i) the jurisdiction of the court or commission about the matter; or

(ii) . . .".

The applicant submits that s. 5.11(1)(c) only applies to the *conditions of employment* of a police recruit as opposed to and distinct from the *dismissal or termination of employment* of a police recruit. The respondent says that the conditions of employment are defined in s. 5.11 and include "the grounds on which employment may be continued and discontinued".

The applicant makes reference to an amendment to the PSA Act in June, 2001 where s. 9.1A was inserted. That section provides:–

*"**9.1A Relationship with Industrial Relations Act 1999***
The industrial court and the industrial relations commission do not have jurisdiction in relation to a matter that has been, is being, or may be reviewed under this part even though it may be, or be about, or arise out of, an industrial matter within the meaning of the Industrial Relations Act 1999.".

The submission is that a police officer, as distinct from a police recruit, enjoys an internal right of review of a decision relating to, *inter alia,* a dismissal. Section 9.1A had the effect of taking away the right of a police officer to have recourse to the Commission. That part of the PSA Act in which the section is located did not and does not apply to a police recruit. If it was the intention of the Legislature to exclude police recruits from having recourse to the Commission, it could also have expressly said so in s. 5.11.

It was submitted that because the police recruit did not have a right to an internal review as did police officers, any determination limiting the application of s. 5.11 would leave a police recruit without any relief at all. It was submitted that the provision should not be interpreted to achieve that result. The respondent conceded that police recruits have no right to internal review but submitted that there are sound policy reasons why that should be so.

A reference was made to a decision of Commissioner Dempsey in *Queensland Police Union of Employees v Commissioner of Police* (1990) 155 QGIG 947 and both parties relied upon various passages from the decision.

I accept the argument that a termination of employment of an employee without supervision by or access to an authority is not that unusual. Section 72 of the Act sets out a number of categories of employee denied access to any relief. I agree with the submission that this particular contract of employment which sets out the "conditions of employment" and includes in those "conditions", disciplinary action and terminations cannot be used to interpret the provisions of the PSA Act. However, I accept the submission that the "conditions of employment" are defined by s. 5.11 and resort to the contract is not really necessary.

Section 5.11(1) provides that the conditions of employment are as approved by the commissioner and accepted by the recruit. Those conditions of employment are to be governed by a contract of employment. They "are not subject to any award or determination of an industrial authority".

Section 5.11(2) recognises that the conditions can include the grounds on which the employment may be continued and discontinued and that those conditions can be included in the written contract.

Those conditions of employment were detailed in the contract signed by the applicant recruit and set out in Part B. They were approved by the commissioner in writing and included provisions relating to disciplinary action, including termination.

I am unable to conclude that the conditions of employment of a police recruit do not include the recruit's dismissal or termination. Under the PSA Act s. 5.11(1)(c) and by the application of s. 686 of the Act, the conditions of employment including dismissal and termination, are not subject to the determination of an industrial authority. The Queensland Industrial Relations Commission does not have jurisdiction.

There is also the provisions of s. 5.15 of the PSA Act which provides that an officer is taken to be an employee of the Crown and to be within the application of the *Industrial Relations Act 1999*. An officer is defined as a police officer and a police officer does not include a police recruit. This suggests to me that a police recruit is not "taken to be within the application of the *Industrial Relations Act 1999"* which is entirely consistent with the provisions of s. 5.11(1)(c).

In my view, the application for reinstatement must fail. I rule there is no jurisdiction for the Queensland Industrial Relations Commission to entertain the application. The application is dismissed.

I order accordingly.

B.J. BLADES, Commissioner.

Released: 21 November 2001

Appearances:–

Mr P.J. Woods, Counsel, instructed by O'Keefe Mahoney Bennett, for the applicant.
Mr G. Martin, Senior Counsel, for the respondent.

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 87(4) – application for severance allowance
Industrial Relations Act 1999 – s. 90 – application for extension of time

Raymond Walter Bosch AND Project Constructions (Aust) Pty Ltd (No. B1619 of 2001)

COMMISSIONER BLADES 21 November 2001

Severance allowance – Application under s. 87 *Industrial Relations Act 1999* – Extension of time under s. 90 – Principles applicable – Extension of time granted.

DECISION

On 13 September 2001, the applicant Mr Bosch applied for an order under s. 87 of the *Industrial Relations Act 1999* (the Act) for the payment of severance allowance. Upon a preliminary hearing before the Commission on 25 October 2001, he was informed that his application may be out of time as prescribed by s. 90 of the Act.

Subsequent to that hearing, Mr Bosch made an application for an extension of time under that section which reads as follows:–

"***Time within which application under this part must be made***

90. An application for an order under this part must be made –

(a) before, or within 21 days after, the dismissal takes effect; or

(b) within a further period the commission allows on an application made at any time.".

The dismissal took effect on 10 January 2001. In the original application, it was alleged that between Friday 22 December 2000 and 10 January 2001 some 30 personnel were dismissed.

There would appear to be no cases dealing directly with the principles relevant to the grant of an extension of time under s. 90. However, principles similar to those that apply to the grant of extensions of time under s. 74 are probably generally relevant to all situations where there is a discretion for an extension of time from a statutory limitation in the absence of statutory guidance. It is appropriate for principles to be extracted from decided cases under s. 74 to be applied to the provisions of s. 90.

The discretion to extend the limitation period is unfettered. What is to be considered include the length of the delay, the explanation for the delay, the hardship to the applicant if the action is dismissed, the prejudice to the respondent if the action is allowed to proceed and the conduct of the respondent. There may be other matters of relevance, including that the statutory provision be respected and that an applicant clearly without any prospects of success should not be let in. These principles are conveniently summarised in *Fisher v Q Electrical Services Pty Ltd* 162 QGIG 175. The onus remains on the applicant – *Rich v Chubb Protective Services* 167 QGIG 159.

The applicant claims that on 3 January 2001 he was advised by the Company Accountant that the approximate amount of the redundancy/severance/annual leave payment would be about $7,950.00 (with $6,055 being redundancy). It was not until 12 June 2001 that he was informed by the Liquidators that he would receive no redundancy/severance payment. The Company Accountant of course did not act on behalf of the Liquidator. He alleges that he then commenced negotiations with the Liquidators to find out why the payments were different. In reply to a letter he wrote on 17 June, the Liquidator advised on 25 July that because he was a non-award employee, he was not entitled to redundancy payments. The last correspondence was dated 6 August 2001 and it was then that he made enquiries with the Commission prior to lodging his application on 13 September 2001.

The delay in this matter is substantial being some 7½ months out of time. However, up until 12 June 2001, Mr Bosch had reason to believe that he was entitled to redundancy payments because of the information supplied to him by the company accountant. There was no reason to lodge any application in the Commission prior to then as he was simply waiting receipt of his cheque.

From 12 June, he explains the delay that he was negotiating with the Liquidator. He did not advance ignorance as a reason for the failure to lodge his claim but that would appear to be the likely explanation as it was the Commission which pointed out to the parties, the need for an extension of time application. Even so, ignorance does not mean that an automatic extension should be granted – *Christie v Austotel Management Pty Ltd* 159 QGIG 108.

In *Rich v Chubb Protective Services* (supra) President Hall said:–

"*It is not the case that once an application for an extension of time within which to make an application about alleged unfair dismissal is made, the Commission is to exercise a broad discretion about whether to refuse or to grant the extension. The task confronting the Commission is to exercise a power to grant upon the footing that the interests of the Queensland industry and of those who work in it are best served by the 21 day limitation period at s.74(2)(a).*".

There are two main relevant issues in this case that bear some attention. The success of the application under s. 87, provided an extension of time be granted, depends upon the exercise of the Commission's discretion which in my view, is unpredictable. That fact might well place the Liquidator in an unenviable position, a considerable time after the dismissal has taken effect. A Liquidator is appointed to wind up a company. Winding up is the process whereby a company is prepared for deregistration at which time, the company's name is struck off the register and the company goes out of existence. The winding up is sometimes a complicated and prolonged affair, "confused sometimes by protracted litigation" – see generally in this regard **Australian Business Law 20th Edition** para 9-600. An absence of delay is obviously important in the process.

The second issue is the reason for the delay and the explanation that goes with that. The conduct of the Liquidator cannot be disregarded. The delay from the date of the dismissal to 12 June when he finally told the applicant there was no entitlement was entirely of the respondent's own doing. There was then an unexplained lack of efficiency in the reply to applicant's letter of 17 June. To delay a reply to that letter until 25 July indicates to me that the Liquidator himself was not too concerned about time and to now hold that delay against the applicant would be an exercise in hypocrisy.

It was not as though the applicant's pursuit of his claim was revived after the happening of some event long after the claim arose. He actively pursued the matter as soon as he became aware there was a problem and the Liquidator, who stands in the shoes of the Directors, was well aware of that.

It would also seem to me that there would be little precedent value in an extension being granted. The applicant alleges that there were 30 or so employees terminated at the time. While there was no evidence called by the respondent, the applicant did not disagree with a suggestion that there were others awaiting the outcome of this application. There is however, no evidence that other applications have been filed or might be filed and there is nothing to suggest that if they were, an extension would be granted.

The 21 day limitation period must be respected. That time limit reflects the policy of the Legislature. The applicant must persuade that the discretion to extend the time should be exercised in his favour. Absence of delay is important to the winding up process but the delay in this case was substantially contributed to by the Liquidator.

I am of the view that in all the circumstances of the case, justice requires that an extension of time be granted.

I order that the time to file the application be extended to 13 September 2001.

I order accordingly.

B.J BLADES, Commissioner.

Released: 21 November 2001

Appearances:–
Mr R.W. Bosch, on his own behalf.
Mr S. Bennett, Solicitor, Deacons Lawyers, for the respondent.

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application to amend

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. B1634 of 2001)

CAR PARK ATTENDANTS AWARD – SOUTH EASTERN DIVISION

VICE PRESIDENT LINNANE 12 November 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 12 and 22 October, and 12 November 2001, this Commission orders that the said Award be amended as follows as from the twelfth day of November, 2001:–

In clause 6.5.1 (Rest Pauses) –

(a) by deleting subclause (a) and inserting the following in lieu thereof:–

"(a) Employees Working a Full Shift – An employee who works at least 7.6 hours in one day shall receive a rest pause of ten minutes duration in the first half and second half of exch day worked.".

(b) by deleting the word "eight" from where it appears in subclause (b) and inserting "7.6" in lieu thereof.

Dated this twelfth day of November, 2001.

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

Operative Date: 12 November 2001
Amendment – 38 hour week
Released: 16 November 2001

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application for amendment

Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch, Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B1517 of 2000)

CIVIL CONSTRUCTION, OPERATIONS AND MAINTENANCE GENERAL AWARD – STATE

COMMISSIONERS EDWARDS
COMMISSIONER SWAN
COMMISSIONER BROWN

8 November 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 20 November and 11 December 2000, and 19 June, 13 August and 8 November 2001, this Commission orders *by consent* that the said Award be amended as follows as from the eighth day of November, 2001:–

By deleting subclause (7) of clause 1.2 (Award Coverage) and inserting the following in lieu thereof:–

"(7)(a) All classes of engine drivers, crane drivers and any other workers for whom rates of pay are prescribed in clause 3.3 engaged upon or assisting in work incidental to the use of earthmoving machinery; and

(b) Building Sites other than (site preparation) – The Conditions and Allowances of the *Building Construction Industry Award – State* shall apply to all classes of engine drivers and mobile crane drivers engaged in operations on Building Sites (other than site preparation) as defined in the *Building Construction Industry Award – State*, with exception of pay rates. Pay rates shall continue to be governed by clause 3.3 of this Award.

For the purpose of this clause Site Preparation is as defined in Decision B1074 of 1998. (Bulk earthworks, roadworks, civil drainage, internal roadworks, the preparation and laying carparks).".

Dated this eighth day of November, 2001.

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

Operative Date: 8 November 2001
Amendment – Award Coverage
Released: 15 November 2001

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

TOWNSVILLE CITY COUNCIL

AND

THE AUSTRALIAN WORKERS' UNION OF EMPLOYEES, QUEENSLAND

EMPLOYMENT OF TRUCK OWNER/DRIVERS TOWNSVILLE CITY COUNCIL 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 the **TOWNSVILLE CITY COUNCIL** of 103 Walker Street, Townsville Q 4810 one of the parties to the industrial agreement made between **TOWNSVILLE CITY COUNCIL** and **THE AUSTRALIAN WORKERS' UNION OF EMPLOYEES, QUEENSLAND** and dated second day of August 1976 filed at the registry and given the registered No. A90 of 1976 and that expired twelve months from the date thereof will retire from the agreement and cease to be a party to the agreement at the expiration of 30 days from the date 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: Townsville City Council:

BRIAN GUTHRIE
CHIEF EXECUTIVE OFFICER

In the presence of:

LES HAUFF
HR MANAGER

Filed in the Industrial Registry on: 20 November 2001

E. EWALD,
Industrial Registrar.

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