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No. 14

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
CA507/01	St Vincent's Hospital and Health Service Robina - Certified Agreement 2001 16/11/01		
CA547/01	Kolan Shire Council Enterprise Bargaining - Certified Agreement 2001	20/11/01	CA482/00
CA548/01	Perry Shire Council Enterprise Bargaining - Certified Agreement 2001	20/11/01	CA115/99
CA549/01	Ormiston College Limited - Certified Agreement 2001	20/11/01	CA313/96 CA514/98
CA533/01	Ingham Parents Support Group -Kirkcaldy - Certified Agreement	21/11/01	
CA539/01	Leighton Contractors Pty Ltd Queensland - Civil Construction - Certified Agreement 2001	21/11/01	CA152/99
CA540/01	W&R Concrete Pumping Pty Ltd - Certified Agreement	21/11/01	
CA541/01	Berlin Holdings Pty Ltd T/A Superior Scaffolds - Certified Agreement	21/11/01	CA612/97
CA538/01	Mission Security - Certified Agreement 2001	22/11/01	
CA542/01	Steve Parish Publishing - Certified Agreement 2001	22/11/01	
CA532/01	Innisfail District Flexi Respite Association - Certified Agreement 2001	23/11/01	
CA546/01	Private Health Services - Certified Agreement	23/11/01	CA177/97
CA559/01	IGA Distribution Pty Ltd & Australian Liquor Marketers Pty Ltd Loganlea - Certified Agreement	23/11/01	CA597/98

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 342(1) – appeal against decision of industrial commission

King Pie (Brisbane Central) Pty Ltd AND Dru Elliot Powell (No. C75 of 2001)

PRESIDENT HALL

23 November 2001

DECISION

This is an appeal against a decision of the industrial commission now reported at 168 QGIG 164. The matter before the Commission was an application by Dru Elliot Powell, an "inspector" within the meaning of s. 278, to recover wages said to be due but unpaid to Adele Margaret Sodeau by the appellant. The matter was a simple one.

The appellant is the proprietor and operator of a shop in a food court at 300 Queen Street, Brisbane. As the appellant's name suggests, the appellant sells pies. It is a takeaway shop. Ms Sodeau was for a period employed by the appellant as a junior food and beverage attendant. On the face of it, the engagement fell within the application clause of the Retail Take-Away Food Award – South Eastern Division. The case for the appellant was that Ms Sodeau's employment was removed from the field of operation of the Retail Take-Away Food Award – South Eastern Division by the Training Wage Award – State. It wasn't. At all material times the Training Wage Award – State applied to trainees bound by a traineeship agreement made in accordance with the requirements of the (now repealed) Vocational Education, Training and Employment Act 1991 and registered under that Act with the State Training Council. There was no such agreement. No step required by s. 70 of the Vocational Education, Training and Employment Act 1991 had been complied with. Indeed, it is not contended for the appellant that any of the steps required by s. 70 had been taken. The contention is that the appellant had always intended to enter into a traineeship agreement of the type described in the Training Wage Award – State, and that it should not be held against the appellant that the appellant had been let down by other people. That, of course, is not the law. If the appellant's contention be correct, and on the evidence before the commission there is room for argument about that, some regard might (perhaps) have been paid to the contention if he had been found guilty on a prosecution for breach of the Industrial Relations Act 1999 in failing to pay Ms Sodeau the wages due to her. This is not a criminal prosecution. It is a civil proceeding to recover monies due and owing. The Training Wage Award – State not being applicable, the Retail Take-Away Food Award – South Eastern Division is applicable. Ms Sodeau was under paid.

It is contended that the Commission erred in law in declining the appellant's request for an adjournment so that Telstra might be required to produce records of the appellant's telephone calls. The purpose of the evidence was to establish that the appellant had tried to arrange a traineeship agreement. As previously pointed out it was immaterial whether the appellant tried to arrange a traineeship agreement. The evidence was inadmissible. The Commission was right to refuse the adjournment. The Commission also refused an adjournment in order that the appellant might require Telstra to produce the telephone records of Ms Sodeau's father. The purpose of the exercise was to attack the credit of Ms Sodeau's father. The evidence was not admissible for that purpose, compare Cooper v Queensland Theatre Company (1996) 67 IR 138 at 139. The Commission was right to refuse the adjournment.

The respondent seeks costs. The appellant had no objective prospect of success. The Queensland Industrial Relations Commission has always been reluctant to award costs against a lay person seeking to act for her/himself. The position of the Court is rather different. The appellant chose to litigate his case in the Court in the knowledge that the Commission had already held that his case was without substance. I do not see why a litigant who chooses not to take professional advice with such a warning about the strength of his case but to conduct his own appeal should be protected against what is shown to be folly. In my view the case falls within s. 335. The discretion to order costs to be paid should be exercised. I order the appellant to pay the costs of the respondent of and incidental to the appeal, assessed as those costs would have been assessed if the matter had been heard in the Supreme Court of Queensland.

Dated this twenty-third day of November, 2001.

D.R.HALL, President.

Appearances:-
Mr M. Ganter of King Pie (Brisbane Central) Pty Ltd for the applicant.
Mr C. Murdoch instructed by Crown Law Limited for the respondent.

Released: 23 November 2001

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 342 (2) – appeal against decision of industrial magistrate

Hartnell Pty Ltd AND Dru Elliot Powell (No. C74 of 2001)

PRESIDENT HALL

23 November 2001

DECISION

On 7 February 2001 the respondent, an inspector within the meaning of s. 278(3) of the Industrial Relations Act 1999, filed an application under s. 278 to recover unpaid wages. On 7 August 2001 the Queensland Industrial Relations Commission remitted the matter to the Industrial Magistrates Court at Brisbane. On 9 October 2001 the appellant made an application to the Industrial Magistrates Court for an order joining the application pursuant to s. 278 with a civil matter, viz M15184/01, filed in the civil jurisdiction of the Magistrates Court at Brisbane the previous day. In the alternative, the appellant sought adjournment of the application pursuant to s. 278 until the matter in the civil jurisdiction of the Magistrates Court was heard and determined. The Industrial Magistrate refused to make either of the orders sought by the appellant. The Industrial Magistrate's decision is now subject to appeal to this Court.

The Industrial Magistrate was right to refuse to join the proceedings. There can be no joinder of proceedings where the proceedings must be heard by different courts. By s. 278(7) an industrial magistrate must hear and determine an application for unpaid wages remitted to it by the Queensland Industrial Relations Commission "as if it had been brought before the Commission, and the Magistrate's decision is taken to be a decision of the Commission." There is no basis upon which it might be said that the proceedings in the civil jurisdiction of the Magistrates Court, in essence proceedings by the appellant and a related entity against the person to whom the unpaid wages are said to be owing (a former employee of the appellant) together with a former client of the appellant, might be heard and determined in the Queensland Industrial Relations Commission. In any event, the Industrial Magistrates Court is not the Magistrates Court. An Industrial Magistrate has only the jurisdiction described at s. 292. There is nothing at s. 292 or in any other Act (see s. 292(1)(b)(B)) to vest the Industrial Magistrates Court with jurisdiction over the matters raised in M15184/01.

The appeal against the decision of the Industrial Magistrate not to grant an adjournment is an appeal against the exercise of a discretion in dealing with an interlocutory application about a matter of practice and procedure. *In House v The King* (1936) 55 CLR 499 at 504-505 the High Court summarised the circumstances in which an appellate court might legitimately interfere with the exercise of discretion by a tribunal of first instance as follows:-

“The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the Judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case although the nature of the error may not be discoverable, the exercise of discretion is reviewed on the grounds that substantial wrong has in fact occurred.”.

Where the discretion exercised relates to a point of practice or procedure raised on an interlocutory application the restraint required of an appellate Court is even greater. In delivering the judgment of the Full Court of the Supreme Court of NSW in *In Re The Will of F.B. Gillbert (dec)* (1946) 46 SR (NSW) 318 at 323, Sir Fredrick Jordan said:

“... I am of opinion that, ... there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous for the proper administration of justice. The disposal of cases could be delayed interminably, and the costs heaps up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal.”.

See also *Brambles Holding Limited v Trade Practices Commission* (1979) 28 ALR 191 at 193, *Dougherty v Chandler* (1946) 46 SR (NSW) 370 at 374 and *Adam P Brown Male Fashions Pty Ltd v Phillip Morris Incorporated* (1981) 148 CLR 171 at 177 per Gibbs CJ, Aickin, Wilson, and Brennan JJ.

Here there is no basis for interference. The matters could not be heard together. Inevitably, one matter will be heard before the other. The wages matter had been on foot for nine months. Time was available to hear it. The civil matter started the day before the application to the Industrial Magistrate. The pleadings had not closed. It will be a very considerable time before the matter will be ready for trial. In my view, the Industrial Magistrate was right to use the time available to hear a wages matter which was already long delayed.

The respondent asks for costs. In ordinary circumstances I should have awarded costs. Objectively viewed, both appeals were made “vexatiously or without reasonable cause”. There is, however, cause for concern that the remission of the matter by the Commission to the Industrial Magistrates Court occurred in circumstances in which it might have encouraged the belief that the wages claim and the civil action might be joined. In circumstances where the respondent is publicly funded I have decided not to award costs.

Dated this twenty-third day of November, 2001.

D. R. HALL, President.

Appearances:-

The appellant in person.

Released: 23 November 2001

Mr C. Murdoch instructed by Crown Law office for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

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

Michael George Sturm AND WorkCover Queensland (C64 of 2001)

PRESIDENT HALL

27 November 2001

DECISION

It is common ground that in late 1998 the appellant was suffering from a congenital degenerative condition to his ankle which was quite asymptomatic. It is also common ground that in early October 1998, whilst working as a furniture removalist for Mini Movers Pty Ltd of Rocklea in the State of Queensland, the appellant rolled over onto his right ankle while carrying furniture down a path-way. The ankle became symptomatic. The appellant was incapacitated for work. He claimed Workers Compensation. The claim was recognized. The appellant was paid compensation for the period 20 October 1998 to 6 December 1999. Payment ceased because WorkCover was of the view that by 6 December 1999 any aggravation of the underlying degenerative condition caused by the incident when the appellant rolled on his ankle had dissipated, and that the incapacity for work attributable to the continuing pain in the appellant’s right ankle was caused by the natural progression of the degenerative condition. The appellant sought a review of that decision. The review officer upheld the decision of WorkCover Queensland. From that decision the appellant appealed to the Industrial Magistrate’s Court at Sandgate. The matter was heard on 26 July 2001. By decision released 9 August 2001 the Industrial Magistrate dismissed the appeal. The appellant now seeks relief in this court.

The issue before the Industrial Magistrate was a simple one. The issue was whether or not as at 6 December 1999 the appellant’s on-going incapacity for work, attributable as it was to the condition of his right ankle, was the result of a work related injury or was due to a pre-existing congenital condition in circumstances in which the appellant’s employment was not the major significant factor causing the degenerative condition and was no longer the major significant factor causing the condition to be symptomatic and painful. The Industrial Magistrate concluded that the underlying degenerative condition had first become painful because of the aggravation caused by the appellant rolling on his ankle, but that over time the affect of that aggravation should have ceased. The Industrial Magistrate found that the ankle continued to be painful because the progression of the degenerative condition had caused the ankle to become symptomatic. There was ample evidence, both in written opinions and in oral testimony, by an orthopaedic surgeon, Dr Farmer, to support the Industrial Magistrate’s decision. Indeed, Mr McGhie who appears for the appellant does not contend otherwise. Rather, the contention is that another orthopaedic surgeon, Dr David White, had submitted written opinions and given oral evidence in support of the conclusion that the major significant factor causing the appellant’s problem with his right ankle continued to be the incident of rolling over. It is put that the evidence of Dr White should be accepted because on a fair evaluation of the evidence of Dr Farmer and Dr White, the evidence of Dr White is inherently more probable than that of Dr Farmer.

The submission about “inherent probability” is based on the appellant’s age. The appellant is getting on in years. At the time of the trial before the industrial magistrate he was almost forty. The submission is that if the underlying degenerative condition was going to cause the appellant’s right ankle to become painful it would have done so prior to October 1998. It is said that in those circumstances the medical opinion which attributes the ongoing pain to “something that happened” is to be preferred to a medical opinion which can not identify why the condition became painful after October 1998 but not before October 1998.

I accept that the submission gives a measure of creditability to the opinion of Dr White. However, it does less than justice to the opinion of Dr Farmer, whom I should add was of the view that patients requiring treatment for a tarsal condition would normally present for treatment in adolescence or early adulthood and that the appellant was at the outer range of ages at which patients might be expected to present for treatment. The point is that having the benefit of an MRI scan and x-rays (which he read differently after the MRI scan) Dr Farmer had formed the view that whilst some people might have asymptomatic tarsal condition for a whole of a life time, it was likely that at some stage the appellant’s condition would become symptomatic. Dr Farmer was not drawing conclusions about the cause of the appellant’s difficulties with his ankle from a general understanding of the development of the degenerative condition from which the appellant suffered. He has taken into account identifiable signs that the appellant’s right ankle would become symptomatic as the degenerative condition progressed. Dr Farmer’s opinions are entirely coherent.

It was the Industrial Magistrate who had the advantage of hearing the two orthopaedic surgeons, albeit over the telephone. The Industrial Magistrate had some advantage, which I do not have, in assessing, in the case of each doctor, whether the doctor was confident or dogmatic giving considered opinions or being dismissive of alternative hypothesis. He has assisted in that assessment by the very vigorous cross-examinations of Dr Farmer in which a wide range of hypothesis were put to him. In my view the Industrial Magistrate was entitled to prefer the evidence of Dr Farmer on the basis (which the Industrial Magistrate expressly articulated) that Dr White first saw the appellant in July 2001, whereas Dr Farmer first saw him on 1 December 1998 and had seen him on other occasions.

Some reliance is placed upon medical certificates reporting to be signed by a general practitioner which are said to be consistent with the evidence of Dr White. What the certificates do is to state what the appellant told the general practitioner on the occasion of a particular visit, and indicate an opinion by the general practitioner that in his view what the appellant had told him was consistent with the general practitioner’s observation of him. In circumstances where the evidence of two specialists was available the medical certificates were weightless. The Industrial Magistrate seems to have so treated them.

I dismiss the appeal.

The respondent seeks costs. In my view the appellant’s case was a weak one. However, having regard to the considered way in which it was put by a solicitor who obviously had made great efforts to familiarise himself with the transcript and the exhibits, I am not prepared to conclude that the appeal was made “vexatiously or without reasonable cause” within the meaning of s. 335 of the *Industrial Relations Act 1999*. I dismiss the application for costs.

Dated this twenty-seventh day of November, 2001.

D.R. HALL, President.

Released: 27 November 2001

Appearances:-

Mr S. McGhie of Richardson McGhie solicitors for the appellant.

Mr S. Sapsford instructed by WorkCover for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 347(1) – application for stay of decision.

**Australian Sugar Milling Association, Queensland, Union of Employers, Queensland Union of Employers
AND The Australian Workers' Union of Employees, Queensland; The Electrical Trades Union of Employees of Australia,
Queensland Branch; Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees,
Queensland (No. 1)(No. C81 of 2001)**

PRESIDENT HALL

28 November 2001

REPORT ON DECISION

(as edited)

In giving a decision from the Bench on 22 November 2001 the President stated:-

“This is a most unusual application. It is apparent that because of the view which the applicants for a stay (the appellants in the appeal) hold of the operation of the decision of the Full Bench in case number B1206 of 1999 in a situation where an engagement is governed by a certified agreement, because of the views which the various applicants/appellants hold of particular certified agreements to which they are parties, and because of the logistical difficulties of calculating in terms of percentages instead of flat amounts, that whether or not a stay is issued this afternoon, no moneys in fact will be paid between now and the hearing of this matter on Wednesday of next week.

The stay is not being sought to protect the subject matter of the appeal.

In the presence of a decision capable of being understood as allowing an increase in shift allowances to employees and an omission to either stay the decision or pay money, there either has been industrial action or threats of industrial action by disaffected employees. Those matters are being dealt with by Commissioner Swan.

As I understand it, the real effect of the stay would not be to achieve purpose normally achieved by a stay, but to confer a forensic advantage on the applicants/appellants in the proceedings in the Commission. I am not disposed to grant a stay for that purpose. It may be that factual matters will dramatically change between now and Wednesday. If they do there is no reason why an application for a further stay may not be pressed on the Wednesday or indeed on or any of the days between now and next Wednesday.

In all circumstances I propose to dismiss the application for the stay and I do.”.

Dated this twenty-eighth day of November, 2001.

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

Appearances:-

Mr J. Murdoch SC instructed by Minter Ellison solicitors, for the appellant.
Mr A. Herbert (directly instructed), with him Mr J. Sharpe, on behalf of the The Australian Workers' Union of Employees, Queensland.
Mr K. Inglis for the The Electrical Trades Union of Employees of Australia, Queensland Branch.
Mr B. Burton for the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland.

Released: 28 November 2001

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INDUSTRIAL COURT OF QUEENSLAND

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

Muhammad Alamzeb AND Education Queensland (No.1) (No.C55 of 2001)

PRESIDENT HALL

28 November 2001

REPORT ON DECISION
(as edited)

In giving a decision from the Bench on 15 November 2001, President Hall stated:-

“I have in this matter determined to allow fresh evidence to be given pursuant to s. 348(2). One is necessarily reluctant to take such a course but it seems to me to be unavoidable. In terminating the employment of Mr Alamzeb Education Queensland proceeded on the view that he was a probationary employee. The processes of the review and the decision making steps were those appropriate for a probationary employee. Had Mr Alamzeb been a teacher on tenure the review process and the decision making steps would have been different.

Mr Alamzeb vigorously contends that he was not a probationary employee. He develops a number of arguments. The first argument is that he was in fact reviewed twice by the head of the department of mathematics and by the principal in 1999, that his performance was satisfactory, that his initial probationary period was eight months and that in those circumstances Education Queensland had a duty to appoint him to a permanent position at the end of the eight months. It is contended that Education Queensland having failed to do so, Mr Alamzeb should be treated (constructive) as having tenure from that point.

An alternative argument is that it is the effect of the regulations made under the *Public Service Act 1996* that when at the expiry of the eight month period Mr Alamzeb was neither told that his position was confirmed nor told that his probation had been extended, he was deemed to have tenure. Further and in the alternative, it is argued that in the circumstances of Mr Alamzeb's employment the maximum period of probation was twelve months. The twelve month period having expired and Mr Alamzeb having been neither told that he was confirmed nor told that he was dismissed he was deemed to have been confirmed from the end of the twelve month period.

I do not at this time rule on any of those submissions. It is with a fourth submission that I am concerned. It is put, in reliance of s. 73 of the *Public Service Act 1996*, that in any event at the expiry of thirteen months, by operation of law, Mr Alamzeb's position became a tenured position. At that point the evidence becomes critical. The thirteen months ran out at or about the time Mr Alamzeb's termination.

The application for reinstatement filed by Mr Alamzeb variously nominates 1 June 2000 and 2 June 2000 as the date of termination. With the benefit of hindsight it is now apparent that from about halfway through the trial that was not Mr Alamzeb's contention at all. The difficulty is of course that the now respondent acted on the basis of the pleadings. It was not remiss of them to do so. Ultimately on the very last day Mr Alamzeb sought leave to amend his pleadings. If that application had been refused it would seem to me that on a normal application of the rule in *House v The King* (1936) 55 CLR 499, the matter being one of the exercise discretion about practice and procedure, one would not have interfered with the decision. If the amendment had been allowed once again it seems to me one would not have interfered.

Unfortunately, having rejected the application, the Commission in its decision treated the matter of date of termination as being in issue and did decide it upon such evidence as had been led on that matter. It seems to me that at that point there was unfairness to the point of injustice to each of the appellant and the respondent. In particular the respondent is now put in the position of seeking to support the Commission's decision that the dismissal occurred on 9 June 2000 (the very last day) on the basis of what is on any view of it meagre and argumentative material.

I am told by the respondent, and I accept, that the respondent is in a position to call substantial evidence bearing upon the issue of date of termination. Equally from Mr Alamzeb's point of view his inability to understand the limitation which the application form imposed upon him meant that he was not able to pursue with witnesses, in the way that he might have wanted to do so, matters relevant to the date of termination.

In all those circumstances it seems to me that the only satisfactory course is to exercise the power to hear fresh evidence. The option of holding that the Commissioner erred in law on that narrow point and remitting a matter, which took 17 days in the first instance, to be heard yet again is, as I understand it, unattractive to all parties. To hold the appellant to his pleadings would be unfair to the appellant and unjust to tax payers who paid for a 17 day hearing. Further, it is plain from the transcript that the Commissioner rejected the application to amend because the Commissioner intended to decide the issue on the evidence which had been led. For those reasons I have decided to hear fresh evidence.”

Dated this twenty-eighth day of November, 2001.

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

Appearances:-

The appellant in person.
Mr C. Murdoch instructed by Crown Law for the respondent.

Released: 28 November 2001

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – application for unpaid wages***Queensland Independent Education Union of Employees AND
West Moreton Anglican Community Kindergarten (No. W235 of 2000)**

COMMISSIONER EDWARDS

22 November 2001

Unpaid Wages – Evidence – Employed 52 Weeks Per Year – Worked and Paid 42 Weeks Per Year – “Term-Time” Employee – Award Relevant Instrument – No Provision in Award for “Term-Time” Employees – Vacation Periods – Application Refused.

DECISION

The Queensland Independent Education Union of Employees has made application seeking an Order pursuant to s. 278 of the *Industrial Relations Act 1999* that West Moreton Anglican Community Kindergarten (the respondent) pay unpaid wages to Leanne Harding (the applicant). The claim is for an amount of \$13,688.80.

The applicant commenced employment with the respondent on 1 January 1998 as an Assistant, with the date of starting work being 19 January.

The letter of appointment states:–

“WEST MORETON ANGLICAN COMMUNITY KINDERGARTEN

LETTER OF APPOINTMENT

Dear Mrs Leanne Harding

I wish to advise that the committee of Management has approved your appointment as (Director/Teacher) of the West Moreton Anglican Community Kindergarten, your duties to commence 01 Jan 98.

Your remuneration for this appointment shall be as prescribed by the Early Childhood Education Award – State, and shall be at the rate of \$17570 pa (\$796. p.ft).

Your normal hours of duty shall be 37.5 hours per week, Monday to Friday, and your daily commencing and finishing times shall be 7.30 a.m. and 4.00 p.m. respectively.

The other conditions of your appointment shall be in accordance with the provisions of the Early Childhood Education Award – State, a copy which is available for your inspection at the centre.

Would you please confirm your acceptance of this appointment under the above terms by signing and dating the attached duplicate of this letter and returning it to the above address as soon as possible.

Yours sincerely

Signed S Burke
Secretary/President

I accept the offer of appointment under the terms and conditions herein contained.

Signed L. Harding
(Director’s/Teachers Signature)

4/3/98
Date.”.

The essence of the claim is the fact that Ms Harding was appointed as from 1 January 1998 and was employed full-time. She was paid for the number of weeks she worked each year, which was 42. It was the respondent’s view that she was employed under the concept of “term-time” and except for holiday pay was not entitled to payment for the period not worked.

The *Early Childhood Education Award – State* which the parties agree is the relevant instrument has operated since 1 December 1990 with amendment to include teachers as from 1 September 1991. This Award does not include provision for “term-time”.

The respondent referred the Commission to the following clauses of the Award:–

“3.1 (3) ‘Replacement employee’ is a person engaged for a specific period of time notified in a letter of appointment but is less than a full working year.”.

“4.5 Replacement Appointments

- (1) The Employer may appoint an employee for a defined fixed term period of employment. The letter of employment shall identify the period of employment and the purpose for which the employee has been employed.
- (2) The appointment shall be on a full time basis in accord with the salaries and scales prescribed herein and the employee shall be entitled to *pro rata* payment for recreation leave, schools vacations and statutory holidays in accord with clause 5.1 and 5.2.”.

The facts associated with the claim include:-

- (a) prior to employment with the respondent the applicant was employed by the West Moreton Anglican College as a before and after school care co-ordinator.
- (b) the salary of the applicant was annualised over 26 fortnights rather than a fortnightly salary at the full rate with no salary during term holiday periods except for the calculation for annual leave loading.
- (c) at meetings and discussions prior to or shortly after engagement the applicant accepted the proposal put to her regarding payment for holidays and "term-time".

It was the evidence of Ms F.A. Woodland, Assistant Dean of the West Moreton Anglican College who conducted the interview with the applicant prior to engagement that she could not remember reference being made to "term-time". It was her belief that the applicant was aware of such arrangements because of the traditional vacation periods of employees and furthermore that preparation work outside child contact hours was necessary.

Mr T. K. Kenny, Bursar, West Moreton Anglican College is responsible for providing financial services advice to the Kindergarten. After the applicant commenced duties he had a meeting with her to discuss pay and options available. At that time she chose to be paid an annualised salary.

The respondent requested determinations on the following issues:-

- (a) can the employee be engaged on a term-time basis under this Award?;
- (b) was the employee engaged on a term-time basis in this case?; and
- (c) if an employee can be employed on a term-time basis, what does that mean in relation to payment for vacation periods?

In relation to these three points the parties agree that there is no provision in the Award covering "term-time". Accordingly, an employee could not be engaged on a "term-time" basis.

No evidence was provided to support the concept of replacement appointments. The letter of appointment made refers to appointment as from 1 January 1998 without a defined fixed term. The Commission is satisfied the applicant is not a replacement employee.

The Commission is satisfied that the applicant was employed on a full-time basis in accordance with the provisions of her appointment letter. As such it is custom and practice for persons in the education industry of this status to be employed as from 1 January each year. Even though she was employed for 52 weeks by implication the Commission is of the view that she agreed to be on duty for 42 weeks of the year, have 10 weeks unpaid leave and have her 42 weeks' salary paid on a fortnightly basis calculated over a full year, commonly called in some industries an annualised salary. If she did perform work during the 10 weeks unpaid leave she would be entitled to be paid accordingly.

The application is refused.

I order accordingly.

K.L. EDWARDS, Commissioner.

Appearances:-
 Mr J. Spriggs on behalf of the Queensland Independent Education Union of Employees.
 Ms N. Taylor of Livingstones Australia on behalf of West Moreton Anglican Community Kindergarten

Released: 22 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

M.H. and J.E. Jensen (Partnership) AND Wridgeway’s The Removalists (No. B928 of 2001)

COMMISSIONER BECHLY

23 November 2001

DECISION

There are two central issues to be determined in this matter, these being firstly whether there was an element of goodwill involved in the purchase by the applicant of a vehicle, a pantehnicon, to enable it to engage in carrying household goods for the respondent, and secondly, whether the actions of the respondent in its dealing with the applicant are such as to give the applicant recourse under s. 276 of the *Industrial Relations Act 1999* (the Act).

There was no written contract between the parties. Work performed was paid for on an agreed hourly basis. There was no term in the contract which required the giving by either party of a specified period of notice to terminate. There was no term that guaranteed work would be provided each day. A contractor was permitted to sell a truck to a third party, who may then, by agreement with the respondent, contract to carry goods for the respondent.

Mr Michael Jensen was employed by the respondent in 1983 as a truck driver and furniture removalist. In 1997 he purchased a pantehnicon, in association with his wife as a partnership, from a Mr G. Armitage, an existing subcontractor.

Mr Jensen states that the purchase consideration was ten thousand dollars for goodwill and that the partnership took over the remainder of the leasehold payments which were paid out over the next four years. The partnership eventually became the owner of the vehicle.

Mr Armitage provided evidence by way of a statement to the effect that he sold the truck to the applicant for ten thousand dollars as goodwill and the applicant then took over the hire purchase commitments that Armitage had entered into with Australian Guarantee Corp. On cross-examination a somewhat different picture emerged. His recollection of events was somewhat rubbery.

What occurred was that Mr Armitage had traded another truck in, which he had purchased sometime previously for approximately twenty thousand dollars, to purchase the pantehnicon and had been making payments to Australian Guarantee Corp for some twelve to fourteen months before he sold that truck to Mr Jensen.

There were no contracts available either for the sale of the truck or the alleged sale of the "business" to the applicant. There was also no information available as to what might have constituted the alleged goodwill portion of the transaction and what might have been ascribed to that portion of the value of the truck which arose from the trade-in of the previous truck and the payments made over a period of some twelve months.

The applicant treated the ten thousand dollars as being for the purchase of the truck. The taxation return for the year 1986/87 reveals as a fixed asset one truck purchased for ten thousand dollars and depreciated to nine thousand one hundred and fifteen dollars. That vehicle remained as the only truck shown on tax returns to 1995 when it was almost fully depreciated.

It is obvious from the evidence that at the date of the sale of the truck to the applicant there was no consideration given to goodwill either as a concept or as a real value.

Some support for this can be gained from some later evidence that sale of goodwill has not and is not a feature of the furniture removal industry and that the respondent, where it has been associated with the sale of a truck, has had the vehicle valued at fair market value.

The second issue is the dealings between the two parties in November/December 2000 and in January/February 2001 and whether there was a termination of the contract and if so, whether the termination was unfair.

Prior to this time the applicant had disposed of the original truck and purchased a flat tray truck capable of carrying a container. This enabled a different and wider range of work to be performed. There was no claim that there was goodwill associated with this transaction.

The applicant had experienced regular work and income until September/October 2000 when work declined.

The evidence is that work in this sector of the transport industry is cyclical with busy periods during school holidays and in between periods having days, even up to a week or a little longer, with no work.

Unusually, by comparison with previous years, in September, 2000, the work available declined and remained very depressed until early in 2001. The applicant informed the respondent that he had difficulty in meeting his commitments.

In November 2000 a discussion occurred between the respondent's Customer Services Manager, Mr P. Hiscock, who was the applicant's brother-in-law, and the applicant and it was agreed that, in view of the limited work, that the applicant take two weeks' leave. He was due to return from leave on 27 November.

The lack of work affected all drivers, both contractors and those employed directly by the respondent and lasted into the January/February period. The evidence of the Queensland Manager Mr Ford and Mr Hiscock was that there was very little work available through to this period and an attempt was made to share it equally between all drivers.

There is some conflict as to the availability of work in the December/January period. Ms K. Marr, the Customer Services Representative who allocates work to contractors and employees was led in cross-examination to assume that there was plenty of work in December for the applicant and that during the ninety day period preceding 1 February the company had gone through a very busy period. Her responses were somewhat tentative. She assumed that there was plenty of work in December because it was usually one of the busiest months of the year.

The evidence of Mr Ford and Mr Hiscock was quite specific that the period in question was quite unusual. Mr Ford described the traditional busy period at this time of the year as building up to the end of November and peaking in the middle of December. In the year in question, 2000 and 2001, the work did not build up until towards the end of January 2001 and then ramped up and ran right through to March 2001 when normally it would go quiet in February.

This coincides with Mr Hiscock's evidence.

I accept that the evidence of Mr Ford and Mr Hiscock more accurately reflects the circumstances in 2000/2001 at the relevant time.

The applicants' gross earnings from Wridgeways had dropped to \$4354 in October and additionally he earned \$887 from Q Link. In November the gross earnings from Wridgeways dropped to \$455 and from Q Link increased to \$2096. Earnings from Q Link continued to rise to an average of \$4360 per month over the following nine months, peaking at \$5979 in April 2001.

In the context of the argument as to what transpired between the applicant and the respondent between November 2000 and early 2001 it is of some interest to note the movement in the applicants gross income from Q Link in late 2000 and early 2001.

December	\$2375
January	\$3128
February	\$5160
March	\$4420
April	\$5979

The applicant did not require the assistance of an offsider for this work and the offsider he previously required for the respondent's work was taken over and paid by the respondent.

During the period when Mr Jensen was on leave from Wridgeways in November 2000 he says that he was informed by other contractors that his fleet number had been removed from the work allocation listings. This advice emanated from a change that the respondent made to the grouping of vehicles by type on a white board installed about four years previously and used principally as a management tool for the sales department. The respondent removed the applicant's truck reference from the board at this time. Not all trucks operated by the respondent or contractors were recorded on the white board. Some of those not previously on the board were included at this time.

It is apparent that over a period of years contractors used the information on the board to get information of work likely to be available, in the form of cubic metreage, over a time frame of fourteen days forward and it was argued that removal of a contractor's truck from the board was an indication that the contractor had been terminated.

I accept the evidence that the information on the white board was designed purely as a management tool to assist sales persons in the performance of their duties. I also accept that it was not an "up to the minute" accurate record of future work and that information on the board could change daily, overnight or not be updated for several days.

I also accept that over a period, contractors used the white board to get an indication of work within the next fourteen days. However this could be an indication only, not necessarily accurate which only provided information as to cubic metreage booked by sales persons. No other details as to customer name, address etc. were kept on the board.

The applicant states that "once the allocation of the fortnightly period was written up on the white board, I would record this in my diary for the next two week (sic) and undertake each job as indicated on the white board".

It would seem to be impractical to diarise at a point in time for fourteen days ahead, the information on the board, as it was subject to constant change which may or may not be transferred to the board on a daily basis.

Removal of the applicant from the board, in the circumstances described in this matter could not be considered as a termination of the contract. The applicant's details were retained in the respondent's computer system, the only record used to provide full details of work to be performed in accordance with the contract between the parties and apparently also the tool used to actually allocate work. Also, at various times, the applicant was informed by the respondent that the contract had not been terminated. The first time he was so advised was when he rang to inquire as to the removal of his name from the white board and to advise of his availability for work after the holiday. He was similarly advised by the Queensland Manager in December.

There was little work available at that time for the contractors and employed drivers.

The applicant continued to obtain work at Q Link while the respondent allocated the little work that did become available to other contractors and drivers.

The applicant formed the belief that he had been retrenched by stealth. He so advised the Chief Executive of the respondent by mail on 19 December. In doing so he advised the Chief Executive that he recognised that the fact that he had only received ten days work in October was the result of the economic climate at that time.

The applicant was contacted by the Queensland Manager in late December as a result of the letter to the Chief Executive and told that if he made himself available for work then available work would be allocated to him. He states that he was also told that he should bring his representative in so that the matter could be discussed.

A later telephone call was made by the respondent to the applicant on 11 January to arrange a meeting. The applicant determined not to attend the meeting because of a call for work with Q Link.

During the December discussions between the applicant and the Queensland Manager the applicant alleges that he was accused of having been drinking that morning. The Manager denied making that accusation and explained that what had been said was that the applicant ought not believe what he was told about his employment status over a beer by another contractor. This appears to be more consistent with the tenor of the conversation at the time.

The applicant was then contacted by the respondent's Brisbane office on 1 February and offered work. He rejected the offer and shortly after rang back, apparently after considering the matter, and gave the following reasons for refusal:-

- The respondent had not paid insurance;
- The applicant had not been offered work for ninety days;
- The fact that the respondent had a lot of work now available as a reason for offering him work was not good enough.

One of the issues between the parties is the process by which contractors were advised as to work to be performed and on which party the responsibility fell to initiate contact.

It is contended by the applicant that the white board provided that information and additionally the respondent rang or personally advised drivers of the next day's activities on return to the premises for a debriefing at the end of the previous days work.

The respondent asserts that it is the responsibility of the contractor to contact the respondent each afternoon to advise of availability so that instructions can be given as to the next day's work. If work is allocated but cancelled overnight then the contractor is paid for four hours if he turns up as earlier instructed. It would seem from the evidence that a combination of all of the above is what occurred in practice.

The white board and the practice of staff ringing contractors is an innovation introduced over the past approximately four years. It would seem that prior to that contractors were required to phone in and advise whether they were available the following day or to advise of periods when they were not available because of vehicle maintenance needs, personal reasons or annual leave, provision for which was built into the contract rates.

The least reliable basis of information was the white board. The respondent witnesses state that, in recent years, as a courtesy, they sometimes rang some contractors to advise them of work allocated but otherwise contractors were required to phone in.

While there was little examination of historic communication requirements and processes it is understandable that, prior to modern methods of communication, the requirement be placed on contractors to initiate the contact. With current use of mobile telephones etc., it is easier now to contact contractors directly than previously.

The non-allocation of work to the applicant is the issue now between them. The applicant says that it was available for work but none issued. The respondent says that there was little or no work available when the applicant went on leave and for some time afterwards and that the applicant did not advise of its availability for work at a later time and that when it was later allocated work it was rejected.

What appears from the evidence to be the case is that late in 2000 there was little work available from the respondent for any of its contractors or employed drivers.

The applicant secured some other work with Q Link in October. Contrary to the applicant's evidence as to prohibition from driving for others it was permissible for contractors to obtain other work, termed as "looseys" as long as the vehicle was made available to the respondent if needed.

In November the lack of work continued and the applicant took leave and secured further work from Q Link. At the projected date of return there was still little or no work available with the respondent.

Several conversations took place between the applicant and Mr Hiscock who says the consensus was that the applicant would be better served continuing to work for Q Link as the prospects for regular work and greater income were better with Q Link at that time. If the applicant made himself available and

sought work from the respondent it was likely it would only receive a day here and there and that would limit the prospect of securing additional work with Q Link which seemingly also had certain requirements on contractors to commit themselves to availability.

Mr Hiscock says he agreed to the applicant's name coming off the white board to enable a reshuffle because of his conversations with the applicant but if the situation were to change the applicant was to inform the respondent that it again wanted to restart to enable then available work to be allocated to him.

The applicant's case is that it was never contacted by the respondent and offered work, except on 1 February 2001.

I prefer the evidence of Mr Hiscock as being the more realistic representation of what occurred in the conversations with the applicant.

There is a difference between the respondent's witnesses as to when the white board was adjusted. The manager, Mr Ford swears in his affidavit that this occurred on 23 November 2000. On what basis he makes this assertion he does not know. His evidence in some respects was careless.

Other of the respondent's witnesses suggest that the reshuffle was in December but were unable to be specific as to a date.

The date of removal would be of some significance to the applicant's case except for the finding that removal does not constitute dismissal.

The respondent's work allocation staff acted in the honest belief that the applicant was not available for work for the time being and would notify when he was at some future date. That never occurred.

What also occurred was the conversation between another contractor and the applicant informing him of the removal of his name which prompted a conversation between Mr Jensen and his brother-in-law when it was stated that the contract had not been terminated; a later letter to the Chief Executive in December complaining about the situation and making depreciating comments about the Queensland Manager, Mr Ford: a subsequent conversation with Mr Ford where the applicant was advised that work would be allocated if sought and then later the refusal to attend a meeting to discuss the matter as proposed by Mr Ford.

There then followed the initiation of legal action over the matter and the offer of work in early February which was rejected.

At some stage there was another rejection of work when Mr Hiscock spoke to the applicant with the reason being given by the applicant that to accept work would affect with the legal action underway.

CONCLUSION

I prefer the evidence of Mr Hiscock as to the outcome of discussions about the course of action to be adopted by the applicant both in seeking work from Q Link and later with the respondent.

In these circumstances I am unable to make a finding that the contract was unfair when entered into or became unfair after it was entered into because of the conduct of the parties.

The Act at s. 276(4)(b) enables the Commission to make a finding that a contract is unfair or becomes unfair for any reason it considers sufficient.

On the material before me there was no covert or overt action by the respondent to do anything to harm the applicant.

Its business fell upon hard times and, apparently all contractors suffered loss of work. The applicant was, to a degree, fortunate, in that he had a vehicle capable of being used in other sectors of the transport industry and was able to secure alternative work.

The applicant formed a mistaken belief that the contract had been ceased by the respondent by stealth. This may have been fed at the time by the business decision of the respondent to purchase additional vehicles and employ another contractor in preparation for a large expected build-up of work which did not occur. There also appears to have been some antipathy between the applicant and the respondent's manager over past occurrences and misunderstood comments made in communications over this matter.

The applicant appears to have been faced with two choices. Either it stipulated to the respondent that it wished to be allocated work and thereby reduce the capacity to secure work from Q Link, or stay with Q Link which seemed to offer more secure prospects of income in the short-term when the respondent had virtually no work to offer.

Later, in February it again was faced with a similar choice but in a circumstance where the respondent's business had "ramped up" as described by the Queensland Manager, but where legal action had been initiated. The applicant's income from Q Link was also building up.

The respondent states in these proceedings that work is still available to the applicant if it chooses to offer his vehicle. Again the applicant is faced with the choice of working for the respondent or electing to continue to secure income from elsewhere.

What should occur in these present circumstances is a meeting between the parties to consider the detail of availability of work so that an informed decision can be made.

This is a process that would have been more appropriate to follow in January when proposed by the respondent.

There is nothing that has occurred which would enable me to find a sufficient reason to declare the contract unfair.

R.E. BECHLY, Commissioner.

Released: 23 November 2001

Appearances:-

Mr J. Murdoch S.C. (instructed by June Anstee and Associates for the applicant.

Mr J. Merrell of Counsel (instructed by Ebsworth and Ebsworth) for the respondent

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 156 – application to certify agreement**Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Employees of Sporting Wheelies and Disabled Association and Another (No. CA429 of 2001)****SPORTING WHEELIES AND DISABLED SPORT AND RECREATION ASSOCIATION OF QUEENSLAND INC – CERTIFIED AGREEMENT 2001**

COMMISSIONER FISHER

23 November 2001

Application to certify agreement – Sunday penalty rates – Amended agreement certified – Union bound by order.

DECISION

On 24 October 2001 I released a decision referring the Sporting Wheelies and Disabled Sport and Recreation Association of Queensland Inc – Certified Agreement 2001 back to the parties pursuant to s. 158 of the *Industrial Relations Act 1999* (the Act). The issue of concern to the Commission was Sunday penalty rates.

At the request of the Association, the Commission relisted the agreement for further hearing on 30 October 2001. Prior to that date the Commission received correspondence on behalf of the Association attaching a proposal about Sunday penalty rates. At the hearing the Association put submissions in respect of its proposed amendment. The employees supported the Association's position. The Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees (AMACS) expressed concern about the proposed amendment but after discussions between the parties agreement was reached on the two clauses in dispute.

Having considered the proposed amendment and having heard from the parties, the Commission was satisfied that its earlier concerns had been addressed and that consequently the no disadvantage test had been met. Accordingly, the Commission was prepared to certify the agreement as amended.

Once its concern had been resolved, AMACS sought to be bound by the Agreement pursuant to s. 166 of the Act. The Union notified this position to the Association and the Commission in writing on 26 October 2001. This action was taken after the Commission had referred the matter back to the parties for further consideration. It was however taken before the Agreement was certified, as required by s. 166(2) of the Act.

Both the Association and the employees opposed the Union being bound by the Agreement. Their opposition stemmed from their experiences of trying to enter into a shift work agreement with AMACS. The Act obliges the Commission to bind an employee organization where certain requirements are met. The opposition of the parties to the Agreement cannot override the legislative provisions.

The Commission was satisfied that the requirements of s. 166(2) of the Act had been met by the Union. Accordingly, the Union was to be bound by the agreement. The next step was to decide how this ought to be recorded.

The Commission as constituted recently considered a similar situation in the *Queensland Breweries Certified Agreement* [(2001) 168 QGIG 77]. In that decision, the Commission referred to the decision of Hall, P in *Rihga International Australia Pty Ltd trading as Rihga Colonial Club Resort v The Australian Workers' Union of Employees, Queensland* [(2001) 167 QGIG 181] where it was found the Commission had the power to insert a clause binding a Union into a certified agreement. The question is whether that power should be exercised.

In the *Queensland Breweries* case (supra), the Commission decided that in the face of the opposition by the agreement parties and the reasons for that opposition, the insertion of a clause in the agreement would not be the most desirable course of action. It was important however to record that the Union was bound as this identifies that the Union, like the employer and the employees, is a party to the agreement. Under the Act, the parties to an agreement have particular obligations and responsibilities. Accordingly, the Commission decided to issue an order binding the Union that would be attached to the Registry file.

For the reasons expressed in the *Queensland Breweries* decision on this point, the Commission in this matter decided to adopt the same approach. The Commission advised that an order binding the Union would be issued and it would form part of the Registry file. The order accompanies this decision.

The Agreement was certified on 30 October 2001.

Order accordingly.

G.K. FISHER, Commissioner.

Appearances:-

Mr M.A. Brady and Mr T. Reynolds for the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees.

Mr S. Pawlowski for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and with him Mr A. Epstein and Mr N. Teskey for the applicant.
Mr J. Boyle and Ms C. Marshall on behalf of the employees.

Released: 23 November 2001.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 156 – application for approval of certified agreement**Ormiston College Limited AND Queensland Independent Education Union of Employees (No. CA549 of 2001)****ORMISTON COLLEGE LIMITED – CERTIFIED AGREEMENT 2001**

COMMISSIONER BLADES

23 November 2001

Certified agreement – Employee/employer agreement – Whether reasonable opportunity given to employee organisation to represent employees in negotiating – Union seeking to negotiate with employees and employer – Union objection to absence of employee representatives in proposed meetings – Union seeking Union agreement under s. 142(b)(i) of the *Industrial Relations Act 1999* – Held Act provides for no preference – Employer has the choice of party – “Reasonable opportunity” in s. 144(3) to be viewed in the light of what is in issue – Union in general agreement with employer/employee agreement provisions – Held reasonable opportunity provided.

DECISION

This is an application by Ormiston College Limited (the College) for the certification of the Ormiston College Limited – Certified Agreement 2001. The Queensland Independent Education Union of Employees (QIEU) appears and seeks to be bound by the agreement under the provisions of s. 166 of the *Industrial Relations Act 1999* (the Act), the appropriate notifications having been given. QIEU does not formally object to the certification but has made submissions that the College has not complied with the provisions of s. 144(3) in that a reasonable opportunity to represent the employees it represents in negotiating with the College before the agreement was made was not extended to QIEU. QIEU has left the determination of the issues raised for the Commission to form its own opinion but it is difficult to regard QIEU's position as other than raising an objection to the certification.

Needless to say, the applicant for certification must satisfy the Commission, *inter alia*, that the provisions of s. 144 have been complied with before the Commission is empowered to certify – *vide* s.156. That is the only issue in this matter, the Commission being satisfied that all other requirements of s. 156 have been complied with and that there are no other impediments to certification.

This is an employer/employee agreement where 85% of employees voted for its approval.

On 17 May 2001, QIEU gave notice pursuant to s. 143 of the Act to the College of its intention to make a certified agreement to cover all employees. That notice was ignored except that the College commenced proceedings to make a certified agreement with its employees. It held meetings on 22 August, 29 August, 3 September, 10 September, 17 September and 8 October 2001. They did not include Union involvement. The College has made no secret of its resistance to being a party to any agreement with QIEU.

On 10 and 18 October 2001, in response to a dispute notification D306/01, conferences were held before the Commission. QIEU sought various orders. In an unreported decision dated 18 October, the application for orders was refused by the Commission as currently constituted.

There is little in the agreement eventually reached with employees that QIEU does not agree with. Any differences are of a minor or technical nature. It is obvious that it was QIEU's purpose to secure an employer/union agreement in lieu of an employer/employee agreement.

Under s. 142 of the Act, a certified agreement can be made between the employer and **either** an employee organisation **or** the employees. The Act does not provide that a particular type of agreement is to be given preference and there is **nothing** in the Act which suggests that the College must make an agreement with the Union. In *MIM Holdings Limited v Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland* 164 QGIG 316 Hall P pointed out that if s. 142 stood alone, the question of which of the organisations capable of representing a group of employees was to be a party to a proposed certified agreement would be answered by the unfettered choice of the employer. In that case, the President held that s. 156(1)(j) played an important part in that process. Section 156(1)(j) has no relevance here. It is my view that, as between an employee organisation and employees, it is the unfettered choice of the employer which determines who that party will be.

Section 144(3) provides:–

“If a relevant employee does ask a relevant employee organisation to represent the employee, the employer must give the organisation a reasonable opportunity to represent the employee in negotiating with the employer about the agreement before it is made.”

I think it is reasonably arguable that what is a reasonable opportunity is a question of degree which has to bear some relationship to the differences between the parties in regard to the proposed terms of any agreement. In other words, significant differences would provide for greater debate leading to greater opportunity being extended for the purpose of debate and negotiation.

At the conference held on 10 October, in response to suggestions in an endeavour to settle the matter and by way of a compromise, Mr Burke on behalf of QIEU acceded to my suggestion and agreed to a meeting with all employee representatives at which he could attend. This was refused by the College which indicated it was prepared to hold a meeting at which two employee representatives would be present, one from the senior school and one from the junior school. That proposed meeting was scheduled for 12 October. The conference was adjourned to give Mr Burke some time to consider his options.

Mr Burke then forwarded to the College a proposed certified agreement between QIEU and the College (which was not received by the College until 12 October). He requested that it be made available to all staff. Mr Burke advised in his dispute notification of 15 October that the text of the agreement was essentially that which the Union understood had been negotiated at the school level negotiations. The College indicated to Mr Burke on 12 October that it did not intend to enter into any discussions with QIEU on the terms of the Union certified agreement. Because QIEU did not utilise the opportunity to attend the meeting scheduled for 12 October to discuss the employee agreement with the College and the two employee representatives, the College distributed the employee agreement to the employees for consideration prior to the ballot.

That ballot was conducted on 29 October.

Other historical matters that need mentioning are:–

20.9.01 In response to correspondence from QIEU dated 17 September, the College proposed a meeting with QIEU on 25 September to discuss terms of proposed agreement to provide QIEU with an opportunity to represent members in the negotiations which, they said, in a letter of 24 September, “are quite advanced and an ‘in principle’ Agreement has been reached.”

25.9.01 Meeting held in QIEU's offices. Employee representatives not present, no specific areas of concern raised by QIEU.

- 3.10.01 QIEU wrote to the College rejecting that the 25 September meeting constituted an "opportunity to represent our members in the negotiations". QIEU also complained that it had not had the opportunity to consult with its members on the proposed provisions.
- 5.10.01 The College wrote to QIEU acknowledging that QIEU had not had an opportunity to consult with members and proposed that a further meeting be held on either 10 or 11 October. The College acknowledged QIEU's right to represent its members.
- 8.10.01 QIEU declined that invitation and responded with a dispute notification to the Commission and also wrote to the College complaining that the proposed meeting on 10 or 11 October appears to be "again in the absence of other employee representatives".
- 10.10.01 Conference held in Commission. Orders sought by QIEU. A suggestion made by Commissioner for a compromise.
- Mr Burke forwarded to College a proposed agreement.
- 12.10.01 College received the proposed agreement after the scheduled time of the meeting. Responded that it would not enter into any discussions with QIEU on the terms of QIEU's certified agreement.

At the 10 October conference, QIEU sought from the Commission orders that further negotiations be conducted with the College, employee representatives and QIEU representatives in attendance and that the replacement agreement be certified under s. 142(b)(i), that is, a Union agreement. Other orders were sought at the conference on 18 October. It is obvious that at all times QIEU was seeking a meeting between the College and the employee representatives as its primary objective.

It was submitted by QIEU that the meeting on 25 September was not to participate in the negotiation process but was an attempt at feigning a process of negotiating the agreement to satisfy the requirements of the Act. QIEU also complains that it had been specifically excluded from the negotiating process which had been established between the College and the employees. Because there was an absence of employee representatives, QIEU was not a part of a *bona fide* process of negotiation.

I think it is significant that s. 144(3) does not require the employer to give an employee organisation a reasonable opportunity to represent the employees in negotiations with other employees. It is the employer with whom the negotiations are to occur. I see no impediment to a two-step process, that is, the employer negotiating with employees and the employer negotiating with an employee organisation on behalf of its members. There is no reason why those involved could not have met separately. Section 146 requiring negotiations to be in good faith gives an example of "negotiating with all of the parties". QIEU was not proposed as a "party" to the employee agreement. I see no necessity for all of the players in the situation which confronted the College to be present around the same table at the same time. However, as I interpret what has happened, this is precisely what QIEU insisted upon.

Yet even so, there was an opportunity given by the College to QIEU to meet with employee representatives, albeit only two, when it complied with the Commission's suggestion after the 10 October conference and arranged for the meeting on 12 October. "Negotiating with all of the parties" did not require, in this instance, a meeting with any more than the two employees offered up.

Mr Spriggs, in endeavouring to suggest an answer to what is a reasonable opportunity, cited a decision of Swan C in *Miandetta Farms Pty Ltd Asparagus Section Employees – Certified Agreement 1998 – 2001* 160 QGIG 281. That case dealt with the provisions of s. 20(6) of the *Workplace Relations Act 1997* and the Commissioner held that there was an onus placed upon the employer to give the organisation "a reasonable opportunity" to meet and confer and that the employer was in breach because it had made no contact at all with the Union. That fact I think sets that case aside from these circumstances. While the College did not go out of its way to inform QIEU of various meeting dates, there was some opportunity extended "before the agreement was made".

Mr Spriggs also pointed to a distinction between the wording of the Act and the former *Workplace Relations Act 1997* and the Federal *Workplace Relations Act 1996*. Section 144(3) requires that there be an opportunity to negotiate whereas the former Acts required an opportunity to "meet and confer". He argued that had the Act required the opportunity to meet and confer, the actions of the employer in wanting to meet with QIEU in the absence of employee representatives as a separate component from the negotiating process just may have complied with the requirement to meet and confer. He submits that is not the case in relation to a requirement to negotiate. He referred to *Asahi Diamond Industrial Australia Pty Limited v Automotive, Food Metals and Engineering Union* (1995) 59 IR 385 where a Full Bench of the Australian Industrial Relations Commission pointed out that to meet or confer does not include the essential element implicit in an order to negotiate, namely, that concessions be made. Mr Spriggs submits that the Act does require negotiation and that means more than just a meeting with the employer or perhaps one or two employee representatives. He submitted that the absence of employee representatives was not a *bona fide* part of the negotiating process.

What the Act does require is that there be a reasonable opportunity to represent the employee in negotiating with the employer about the agreement before it is made. The opportunity to meet with the employer on 10, 11 and 12 October, if not the 25 September, complied with that provision. The requirement is for an opportunity to negotiate with the employer, not other employees. If the opportunity is not utilised, the employer need go no further. What is more, the employer had a base document which had provisional agreement by other employees. The opportunity was being extended to negotiate about that document. The agreement was not **made** until, at least, it had been approved by a majority of those voting. It had not yet been distributed for that purpose. There was still sufficient time to negotiate but instead, QIEU elected not to do that but to endeavour to replace that base document with its own and seek to have it substituted. QIEU's failure to attend the meetings as arranged or offered by the College has been driven by its refusal to attend a meeting in the absence of the employee representatives. QIEU passed up the opportunity given to it to represent its members in negotiating. As between QIEU and the College, they never got to the negotiating stage.

In its letter to QIEU on 12 October, the College concluded by requesting QIEU that if its members had any concerns with the terms of the proposed agreement, that these concerns be raised with the College within 14 days so that discussions could take place. Even then there was ample time for negotiations to occur on any areas of concern to QIEU. QIEU responded by referring the matter back to the Commission with the dispute notification of 15 October.

QIEU also complains that in that letter of 12 October, the College rejected any negotiations on the terms of the Union certified agreement. However, that rejection was in regard to the Union agreement, not the employee agreement.

In neither of the conferences was matters of real substance about the terms of the agreement raised by QIEU and it is not alleged that any matters of real concern were ever raised with the College.

This employee agreement, to all intents and purposes, met with the approval of QIEU. The only issue QIEU finally had was that it was not a Union agreement. The Act provides for employee agreements, does not give a precedence to one agreement as against another and allows, via s. 166, an organisation to be bound by an employee agreement. What is a reasonable opportunity to negotiate must bear some relation to what really is in issue. It is the opportunity to negotiate which is initially required by s. 144(3), not the negotiation itself.

Furthermore, if the employer did not want to make an agreement with an organisation but would prefer to deal with the employees who agree with that course of action, I see no reason in principle why it should not be so, provided of course that the provisions of the Act have been complied with.

I am of the view that the College has complied with s. 144(3) in that it gave the employee organisation a reasonable opportunity to represent the employees in negotiating with the employer about the agreement before it was made.

I order that the Agreement be certified as from the date of the hearing on 20 November 2001. I also decide, in accordance with s. 166(2) that the agreement also binds the Queensland Independent Education Union of Employees.

I order accordingly.

B.J. BLADES, Commissioner.

Appearances:-

Mr A. Aspromourgos, Livingstones Australia, with him Mr D. Hosking, for Ormiston College Limited.

Released: 23 November 2001

Mr J. Spriggs, Queensland Independent Education Union of Employees.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 335 – application for costs

David John Martin AND Positive Futures Pty Ltd t/a Daintree Eco Lodge (No. B358 of 2001)

COMMISSIONER BLOOMFIELD

23 November 2001

Reinstatement – Application to Withdraw – Application by Respondent for costs – Arbitrated matter – Application was not pursued frivolously or vexatiously or without reasonable cause – No unreasonable act or omission by Applicant – Application by respondent for costs dismissed – Applicant granted leave to withdraw application.

DECISION

Background

The Commission has before it an application for leave to withdraw a reinstatement application lodged by Mr David John Martin. Save as to costs the application is not opposed by the respondent. Costs are sought on an indemnity basis.

Mr J. Jacobs, on behalf of the respondent, said the applicant had been invited, by way of a letter to his solicitors dated 14 August 2001, to withdraw his application because the respondent viewed the application as vexatious and without reasonable cause.

The said letter put the applicant on notice that the respondent would be leading evidence to establish that Mr Martin was guilty of gross dereliction of duty and breaches of the most fundamental requirements of any contract of employment. The applicant was also put on notice that twenty-four allegations (identified in the letter) would be proved.

Mr Jacobs said the letter also warned the applicant that the respondent would apply for indemnity costs pursuant to s. 335 of the Act if the matter was pursued.

The invitation to withdraw was repeated on 28 September 2001 and the applicant again put on notice that the respondent intended to seek indemnity costs if the matter went ahead.

Finally, Mr Jacobs said the applicant was again invited to settle the matter on 29 October 2001 on the basis he met 60% of the respondent's costs incurred to that date in the amount of \$14,000. Mr Jacobs also said the applicant was told that, in the respondent's view, he had failed to respond in a reasonable fashion to a reasonable offer of settlement made on two occasions and that such refusal would be sufficient to attract an award of costs.

The application for an award of costs was opposed by Mr D. Morzone, of counsel, on behalf of the applicant.

Mr Morzone said, *inter alia*, indemnity costs were not available in the Commission and the only circumstances under which costs could be awarded were those mentioned in s. 335 of the *Industrial Relations Act 1999*. Mr Morzone said that none of the circumstances mentioned in that section were applicable in this case.

He said the application had not been pursued frivolously or vexatiously and nor had the applicant been guilty of an unreasonable act or omission connected with the conduct of the application. The applicant had simply reassessed his position in light of the mounting costs and the possible length of the trial, as well as the need to deal with "scandalous and oppressive" matters raised by the respondent in a public forum. Mr Morzone said that the applicant had weighed up the possible "reward" if he was successful in his action and had determined that he would be left with a very significant deficit – in both a financial and emotional sense – if he continued with the application. Accordingly, he sought leave to withdraw it.

The Commission's Costs Jurisdiction

The Commission's ability to award costs is governed by s. 335 of the Act. That section provides as follows:-

"Costs

335.(1) The court or commission may order a party to an application to pay costs incurred by another party only if satisfied –

- (a) the party made the application vexatiously or without reasonable cause; or
- (b) for an application for reinstatement – the party caused costs to be incurred by the other party because of an unreasonable act or omission connected with the conduct of the application.

(2) In this section –

‘costs’ include legal and professional costs and disbursements and witness expenses.’.

In *Townsville City Council v Brennan* (1998) 157 QGIG 92 Chief Industrial Commissioner (now President) Hall referred to the virtually identical section at s. 225 of the *Workplace Relations Act 1997* and said:–

“The general rule is that if a general power is conferred without limitations or qualifications and a special power over the same topic is expressed to be subject to some limitation or qualification, the general power cannot be exercised to do that which is the subject of a special power, see *Grofam Pty Ltd v ANZ Bank Group Ltd* 117 ALR 669 at 674-5. Section 350 vests an unfettered statutory discretion. For the reasons outlined by the Full Court of the Supreme Court of Queensland in *Wyatt v The Albert Shire Council* [1987] 1 Qd.R 486 at 489, an unfettered discretion to award costs is unconstrained and must be exercised having regard to the circumstances of the particular case. The discretion at s. 225 is not of that type. It arises only where the applicant for costs satisfies the Commission that a case of the type described at paragraph (a) or (b) of subsection (1) exists. It is the effect of s. 32CA of the *Acts Interpretation Act 1954* that s. 225 cannot be read as casting an obligation upon the Commission to award costs where paragraph (a) or (b) of subsection (1) is satisfied. (I quite accept that a finding that an application is frivolous, vexatious or without reasonable cause or, alternatively, that costs have been incurred in consequence of an unreasonable act or omission may, and usually will, be relevant to the exercise of the discretion.)”.

That quote is, in my opinion, a concise and correct statement of the law on the matter. In that statement the (now) President makes it plain that, firstly, a decision to award costs is discretionary and, secondly, the discretion can only be exercised if the tests at (a) or (b) have been made out.

Accordingly, the questions which the Commission must determine are, firstly, whether Mr Martin’s application was pursued frivolously, vexatiously or without reasonable cause or, secondly, whether he caused costs to be incurred by the respondent because of an unreasonable act or omission connected with the conduct of the application.

Was the matter pursued frivolously or vexatiously or without reasonable cause?

I am not able to conclude that the application was pursued frivolously or vexatiously or without reasonable cause.

Mr Martin’s services were summarily terminated on 4 February for a number of reasons set out in his letter of termination. Mr Martin disputed the validity of those reasons and alleged in his 26 paragraph/4 page application for reinstatement that the employer’s decision was harsh, unjust or unreasonable within the meaning of the legislation.

Subsequently, a conciliation conference was held before a Member of the Commission where Mr Martin’s representative continued to challenge the appropriateness of the respondent’s decision to terminate [apparently the applicant could not be patched into the telephone conference because he was in an inaccessible region]. Importantly, having regard to the costs argument, the Commission Member who chaired the conference did not issue any warning to the applicant or the applicant’s representative about the question of costs and nor did he recommend to the applicant that the application be discontinued. Clearly, he was faced with competing views about the facts and the merits of the respondent’s decision.

The matter subsequently came on for call-over on 8 August 2001 and directions were issued for the applicant to file material in support of his application by 12 September 2001. As stated above, the respondent wrote to the applicant’s representative on 14 August putting the applicant on notice that costs would be pursued if he pressed ahead with his application.

On or around 12 September 2001 the applicant filed a 65 paragraph/33 page statement canvassing the reasons why he thought that his termination was harsh, unjust or unreasonable.

Subsequently, on or around 26 September the respondent filed eleven statements from witnesses to be called in defence of the application. Those statements contain a number of specific and general complaints about Mr Martin and his performance during the period of his employment with the respondent. The statements canvassed in more detail many issues referred to in the letter of 14 August 2001. Importantly, however, many of the specific allegations had not previously been made known to Mr Martin either during the period of his employment, in his termination letter or in the letter of 14 August.

Mr Martin responded to each of the eleven statements, paragraph by paragraph, in a 25 page response filed on or around 15 October 2001. In doing so, Mr Martin took issue with many of the allegations made against him – either specifically or generally – by the respondent’s witnesses. Importantly, Mr Martin rejected the specific serious allegations raised in the statements.

Although the respondent might believe that its decision to terminate the applicant was well-founded, and that it would have succeeded in defending the unfair dismissal application if the matter went to trial, that is not the test. The test is whether or not the matter was pursued frivolously or vexatiously or without reasonable cause.

The fact that the applicant now seeks to withdraw the matter does not indicate that he accepts the validity of the respondent’s evidence or that he pursued the matter frivolously, vexatiously or without reasonable cause.

Mr Martin challenged the employer’s original reasons for termination and has denied, on affidavit, the validity of the allegations made against him in the respondent’s witness statements. The claim that his dismissal was unfair remains untested.

In *MIM Holdings Limited v AMEPKIU* (2000) 164 QGIG 370 his Honour the President suggested that s. 335(1)(a) was aimed “at the case which was objectively recognisable as one which could not succeed at the time when the application was made.”. Having regard to the material contained within the initial application and in Mr Martin’s response to the witness statements filed by the respondent on or around 15 October 2001 it is not open to the Commission to conclude, simply on the filed material, that the application could not succeed.

In *MIM* the President also observed that a vexatious application was one where the party which initiated the proceedings was not acting *bona fide* and wished to annoy, embarrass or harass his opponent. The detailed nature of the application and response, together with the costs incurred by the applicant to date, do not suggest that the applicant pursued the matter solely to annoy, embarrass or harass the respondent.

Nothing in Mr Martin’s actions – including his application to withdraw – suggests that the matter was pursued frivolously or vexatiously or without reasonable cause and I so conclude.

Did Mr Martin cause costs to be incurred by the respondent because of an unreasonable act or omission connected with the conduct of the application?

Mr Morzone submitted that the applicant had decided to withdraw his application after considering the cost and the emotional strain (above). Mr Morzone also submitted that the application was likely to run for more than the three days allotted because of the need to deal with the many allegations raised by the respondent's witnesses – most of which had not been raised with him during his employment.

He said that both the applicant and the respondent had already incurred significant costs and that the applicant's decision to withdraw would save all of the parties the additional substantial cost which would be incurred if the trial proceeded. Rather than being condemned the applicant's decision should be applauded.

I have considered Mr Jacobs' submissions and have concluded that there is no basis to his claim that the applicant caused costs to be incurred by the respondent because of an unreasonable act or omission connected with the conduct of the application and I so determine.

As stated above, the respondent has approached the application on the basis that its assertions in the eleven witness statements are fact (see a similar observation of Blades C in *Annette Ross v Silvalake Financial Services Pty Ltd* (2001) 168 QGIG 104). The matter cannot be approached on that basis. The applicant disputed many of the allegations made by the respondent's witnesses and the Commission has not reached any conclusions in relation to the matter.

The applicant has merely decided – primarily for financial reasons – that he does not desire to press the application. Any "reward" from the case would still leave the applicant with a very significant deficit. In my experience it is not uncommon for a well-intentioned applicant to determine at some point in the proceedings that the end result simply does not justify continued pursuit of a matter. In this case that decision has been made by Mr Martin relatively late in the proceedings. However, having regard to what are said to be his (and his partner's) costs to date (something of the order of \$15,000-\$20,000) one can well understand the logic behind his decision not to continue to pursue the application.

Except for the respondent's submissions about its chances of success – which I cannot decide on the material before me – there is no material before the Commission to suggest that Mr Martin's continued pursuit of the application after the warning letters of 14 August and 28 September was an unreasonable act or omission.

For the foregoing reasons I dismiss the application for costs.

The applicant is granted leave to withdraw application number B358 of 2001.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

Appearances:-

Mr D. Morzone, of Counsel, instructed by Mr M. McGuigan of Farrellys Lawyers, for Mr D. Martin.

Mr J. Jacobs, of Morrow Petersen, for Positive Futures Pty Ltd t/a Daintree Eco Lodge.
Released: 23 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Bettina O'Connor AND Electroboard Administration Pty Ltd (No. B1836 of 2000)

COMMISSIONER FISHER

26 November 2001

Application for Reinstatement – Case stated – Jurisdiction – s. 72(1)(e)(iii) – Definition of annual wages – Case Law – Commission not included – Annual wages below threshold – Commission finds jurisdiction – Directions Order to be issued – Parties encouraged to continue discussions – Commission available to assist on request.

DECISION

On 23 August 2001 the Commission as constituted released a decision determining two jurisdictional issues and stating a case to the Industrial Court in relation to a third jurisdictional issue (168 QGIG 4). This third issue required consideration of the term "annual wages immediately before the dismissal" found in s. 72(i)(e)(iii) of the *Industrial Relations Act 1999* (the Act). The point in issue was whether various components of the applicant's remuneration that were paid pursuant to an employment agreement were to be included in the calculation of annual wages for the purpose of s. 72(1)(e)(iii) of the Act. In his decision, Hall, P decided that commissions paid on sales, car allowance and superannuation were not to be included in the calculation of annual wages.

The respondent to the substantive application (the applicant in these proceedings but for ease referred to as the respondent) submits that it believed the basis upon which the Commission stated the case to the Industrial Court was that the Commission made a finding of fact that the applicant's income was \$80, 000 per annum, an amount that exceeded the statutory threshold which applied at the relevant time of \$68, 000. It was therefore necessary to seek the Court's determination of whether that portion of the income that took it above the statutory threshold was commission.

Alternatively, if such findings of fact were not made then the Commission needs to determine the applicant's annual wages taking into account that commission was paid for other than sales made and included services and effort. In the respondent's submission the President's decision contemplated commission paid for these purposes would be capable of being considered as wages.

The applicant rejects and refutes both propositions now advanced by the respondent.

I should respond first to the argument that the Commission made findings of fact as asserted by the respondent. Prior to posing the questions to Court, the Commission recited a series of facts including the applicant's annual salary, her period of employment and extracts from her employment agreement and the commission plan. The Commission also stated the commissions actually paid to the applicant and provided the total amount of salary and commission paid for the period of employment. Reference was also made to the preparation of a sales budget by the Company which had little input from the applicant. The Commission acknowledged that commission payments were projected by the Company for the 2000/2001 financial year based on the sales budget. Also included in the facts was a calculation of the amount of the applicant's income had she received her salary and the projected commission.

The purpose of the case stated was to gain the Court's opinion on the meaning of the term "annual wages" given that no decisions about this matter had been issued by the Court or Commission since the change in legislation from remuneration to wages. This approach was made known to the parties in the Commission's statement included in the decision of 23 August 2001.

The "findings of fact" were to give the Court sufficient material about the matters in issue so that a decision could be made. It would have been inappropriate to express any view at that time about the merit of using actual commissions paid or projected commissions in the calculations. The basis for the case stated was to determine whether commissions fell within the meaning of annual wages. The series of questions posed to the Court made it evident that an opinion was being sought on whether various components of the applicant's remuneration should be included in the calculation of annual wages. It was not simply a case about whether the amount above the statutory threshold was commission. It follows then that the Commission did not make a finding about the quantum of the applicants annual wages.

The Commission must therefore determine the second matter raised by the respondent. The argument is that commission was not limited to sales made, as put by the Commission in the case stated, but was also paid for other reasons. To support this argument the respondent referred to evidence by Ms Bolton, a Director of the Company, which was that commissions were paid on services and installations as well as sales. As she said in evidence "it's the installation that really deserves the payment more than the actual sale." (p. 28). Commissions were said to be paid in recognition of the effort expended by staff and the resulting customer satisfaction. In the respondent's submission, commission paid for these purposes came within the analysis by the President of the relevant principles to be applied in determining whether a particular payment to an employee falls within the general common law or English definition of wages. These definitions require that the payment be assessed as being "to a person for services rendered" or that which is "paid for work or services, hire, pay".

The applicant took the Commission to the decision of Hall, P in the case stated. There, after referring to definitions of "wages" cited by Wilcox, J in *Ardino v Count Financial Group Pty Ltd* (1997) 57 IR 89, Hall, P concluded that "sums earned by way of commission do not fit comfortably within either definition.". In addition he stated that reference to payment for services rendered was not intended to embrace commission payments. Rather, "wages or salary were paid to a worker to recognise that it is the service that earns the remuneration".

Extrapolating from the President's decision, the applicant said that the key issue concerns the relationship between the service and the remuneration. Whereas with salary or wages it is the service which earns the remuneration, with commission the employee must perform a service but it is the result which earns the remuneration not the service itself. The amount of commission which a person receives may have little bearing on the actual effort expended or the "services rendered" by the employee. The applicant did not earn her commission unless the sale was made. That was the defining characteristic of the relationship between the service and the remuneration.

From the decision of Hall, P which makes reference to decisions of other jurisdictions, I think it can be concluded that wages are paid for services rendered and commission is paid for the result of a service.

In this case the terms and conditions of the applicant's employment were agreed in writing prior to the commencement of the employment. These terms and conditions were reflected in an Employment Agreement and the Electroboard Commission Plan. As the applicant stated, "it is axiomatic that when there is a written agreement the relevant tribunal construes the terms of that agreement and oral evidence of what is purported to be meant by the terms of the agreement is inadmissible: the parole evidence rule".

This Commission is not bound strictly by the rules of evidence (s. 320(2)). It is the case however that the approach advanced by the applicant is one adopted by this Commission (see *Cooper v Queensland Theatre Company* (1996) 152 QGIG 1241).

Clause 8 of the Employment Agreement, deals with Remuneration. Paragraph (e) of that clause states—

"Commission on sales, and the rates and conditions under which it is paid are contained in the ELECTROBOARD Commission Plan appropriate to account managers and branch managers." (emphasis added).

The Commission Plan expands on this. The introductory paragraph provides that it is "for all Account and Branch Managers **selling** the complete range of Electroboard products and services in Australia. The plan is based on earning commission for the **sale** of each of the products." (emphasis added). The Commission Schedule provides for commission on the "**sale** of Electroboard products, services (excluding Hire) and room fit outs." (emphasis added).

The Commission Plan also provides for part payment of commission after an order has been placed and the balance on payment for the goods.

It is clear from both the Employment Agreement and the Electroboard Commission Plan that commission is paid on sales. While it might be Ms Bolton's preference that commission be paid on installation or for customer satisfaction, this is not provided by the written agreements specifying the terms and conditions of commission. It is these documents that must be construed, not the preference, belief or wish of one of the parties to the agreement.

The commission paid by Electroboard is a payment for a result, i.e., a sale of a product or service. As such it does not fall within the definition of wages as decided by Hall, P in the case stated. It is therefore unnecessary to consider whether the commissions earned or projected to be earned by the applicant should be included in determining her annual wages.

The Employment Agreement of the applicant specified an annual salary of \$35,000 per annum gross inclusive of leave loading. Hall, P also decided that car allowance and superannuation are not to be included in the calculation of annual wages for the purposes of s. 72(1)(e)(iii) of the Act. Given that the commission is also excluded from the calculation, I find that the applicant's annual wages, for the purposes of s. 72(1)(c)(iii) of the Act, are \$35,000, well under the threshold of \$68,000 that applied at the time of the applicant's employment. Accordingly, the Commission finds that it has the jurisdiction to hear this application.

A Directions Order for the hearing of the substantive application will be issued to the parties shortly. The Commission has previously expressed concern about the time and cost expended by both parties in this matter to date. The parties are encouraged to try to settle their differences. A member of the Commission would be available to assist the parties if requested.

Order accordingly.

G.K. FISHER, Commissioner.

Appearances:-

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

Mr A. Herbert (Barrister) instructed by Mr L. Moloney (Livingstone's Australia) and with him Ms M.

Released: 26 November 2001

Bolton and Mr C. Huggins on behalf of the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Narelle Marie Wilson AND Rulebrook Pty Ltd t/a Addable (No. B415 of 2001)

COMMISSIONER BLOOMFIELD

26 November 2001

Reinstatement – Dismissal – Termination of Employment – Casual employee – Hearing *ex parte* – Arbitrated Matter – Termination was harsh, unjust or unreasonable – Compensation awarded.

DECISION

Ms Narelle Wilson was a casual employee employed by Rulebrook Pty Ltd, trading as Addable. She commenced employment in May 1999 and worked until 20 April 2000 when she began a period of maternity leave. She returned to work on 9 October 2000 and was terminated by courier-delivered letter, received on 29 January 2001, which stated that her termination was effective 25 January 2001.

The available evidence [see below] suggests she was terminated because she became involved in a dispute with her employer about whether her wages were going to be banked into her bank account prior to the public holiday on Friday 26 January 2001. The evidence also suggests that Ms Wilson made the enquiry because her wages had been banked late on a number of other occasions following her return to work in October 2000.

During the telephone discussion between Ms Wilson and the proprietor of Addable, Ms Pham, Ms Pham apparently expressed her displeasure at the telephone call and chastised Ms Wilson about “demanding” money. Ms Wilson apparently told Ms Pham that she needed to know what was happening because if she wasn’t going to be paid she would need to go to the bank to get money before the long weekend. During their discussion Ms Wilson told Ms Pham if she was paid regularly she would not have had to make the enquiry. She also told Ms Pham she was fed up with her treatment. Ms Wilson also said that she “stupidly” told Ms Pham she was “pathetic” before terminating the phone call.

The respondent did not appear in the Commission to defend the application. Nor did it submit any material in defence of the application. The respondent simply informed my Associate that the business had been “wound up” as of Thursday 15 November 2001 and, as a consequence of that development, she would not be attending the Commission. That advice was confirmed by correspondence received in the Registry at 1706 hours on Sunday 25 November 2001.

The respondent was clearly aware that the matter was scheduled for hearing at 10.00 a.m. on Monday 26 November 2001 but consciously chose not to appear. Further, the respondent also declined to file any material in defence of the application.

Accordingly, the Commission can only determine the matter based upon the material contained in the original Application and in the applicant’s witness statement.

The available material discloses that Ms Wilson worked an average of 71.45 hours per fortnight prior to her maternity leave. Between her return in October 2000 and her termination she worked an average of 39.93 hours per fortnight.

Assessing the evidence as best I can, there is a strong implication that Ms Wilson was terminated because Ms Pham was not happy with her for ringing to make enquiries about whether her pay was going to be banked before the long weekend *and/or* because she questioned the frequent lateness of her payments *and/or* because she called Ms Pham “pathetic” during their telephone altercation.

If Ms Pham had some concern about Ms Wilson’s performance *and/or* her behaviour then s. 77 of the *Industrial Relations Act 1999* requires that she put such concerns to Ms Wilson and that she gives Ms Wilson an opportunity to respond. None of those requirements was met.

Indeed, Ms Wilson’s statements record that she had never been spoken to about any concerns that Ms Pham, or any other members of management, may have had about her performance.

Accordingly, I am left to conclude that the termination, in all of the circumstances, was harsh, unjust or unreasonable. I turn now to the question of remedy.

Mr L. Gillespie, who represented Ms Wilson, informed me that he had made enquiries about the status of the three Addable stores in Brisbane. His enquiries disclosed that the stores ceased trading on or around 15 November 2001 – the date that Ms Pham says that the company was “wound up”. Accordingly, reinstatement does not seem to be a viable option.

That leaves the only other available remedy, viz. compensation.

Ms Wilson was a casual employee with a total length of service of approximately fourteen months. After the resumption of her employment in October 2000 her hours were irregular and averaged just over one-half of the hours that she worked during her first period of employment (39.93 versus 71.45 per fortnight).

In the circumstances, I propose to award Ms Wilson eight weeks' pay calculated at the rate of 39.93 hours per fortnight, being a total of 159.72 hours. In assessing such amount I have considered:-

- Ms Wilson's total length of employment,
- the casual nature of her engagement and the decreasing hours that she was working,
- the fact that her termination seems to have been related to her simple enquiry about when she could expect her fortnightly pay, and
- the fact that she may have contributed to her own termination by describing the employer as "pathetic" during their telephone altercation.

The amount of compensation of 159.72 hours, at Ms Wilson's pay rate at the time of her termination, is to be paid to the applicant within twenty-two days of the date of release of this decision.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

Appearances:-

Mr L. Gillespie, of the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees, with Ms P. Town for Ms N. Wilson.

No appearance for Respondent.

Released: 22 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Beth Kennedy AND Aged Care Standards & Accreditation Agency Ltd (No. B455 of 2001)

COMMISSIONER THOMPSON

27 November 2001

Application for reinstatement – Suppression Order – *Aged Care Act 1997* – Alleged breach of confidentiality – "Independent" investigation – Suspension – Emails – Application dismissed – Two (2) weeks notice outstanding to be paid.

DECISION

Background

The applicant in this matter, Ms Beth Kennedy, commenced employment with the Aged Care Standards & Accreditation Agency Ltd (Agency) on 28 June 1999 in the position of Associate Quality Assessor and, upon becoming registered as a Quality Assessor Level 1 in October 1999, was promoted to that position within the Agency.

On 22 February 2001, Ms Kennedy received correspondence from the Agency advising that after consideration of material provided by her solicitors, that her employment was to be terminated for the reasons that the Agency regarded as breaches of the confidentiality agreement that existed between the parties.

The reasons for the dismissal that were contained in the letter of termination were:-

- “(a) The breach of confidentiality in relation to the affairs of the Agency described in my letter of 5 February 2001 is very significant in that the information passed on to your husband:
- (i) concerned the assessment processes of the Agency;
 - (ii) was capable of being characterised as a deficiency in those processes; and
 - (iii) was passed to an employee of an organisation which owns a Residential Care Service that could potentially have used such information to its advantage and to the detriment of the Agency; and
- (b) The breach of confidentiality in relation to a Residential Care Service described in my letter of 5 February 2001 is very significant because the information passed on to your husband concerned the confidential assessment of a Residential Care Service by the Agency and thus could undermine the reputation of the quality of care provided by the Residential Care Service and/or a critical aspect of the reputation of the Agency being its ability to keep information concerning a Residential Care Service absolutely confidential; and
- (c) These two breaches of confidentiality are serious enough to justify the termination of your employment with the Agency.”.

At the commencement of the proceedings, submissions were made by Mr Richard Perry, of Counsel, on behalf of the respondent, seeking a Suppression Order in relation to the names of certain facilities, organisations, and identified persons being withheld from publication, release or search absolutely until further orders of the Commission.

After due consideration of his submissions, which included references to the pertinent Federal legislation, that being the *Aged Care Act 1997*, an Order was issued on 4 September 2001, pursuant to s. 679 of the *Industrial Relations Act 1999* (Act) which provided the relief sought and, in particular, suppressed the publication of the names of two (2) witnesses who, for the record, will be known as Assessor 1 and Assessor 2.

Applicant

In the presentation of the applicant's case, evidence was relied upon from Ms Kennedy, Mr David Kennedy, Ms Leisa Turner and "Assessor 2". An affidavit was tendered from Ms Vanessa Wilkes, however she was not required to attend at the Commission.

Evidence was also brought before the Commission which came about as a result of an Attendance Notice being served on the Manager of an organisation (covered by the Suppression Order) to attend the Commission.

In giving evidence, Ms Kennedy provided a background to her employment circumstances, which included details of the Contract of Employment, positions held including a recommendation in August 2000 for her progression to Quality Assessor Level Two.

Up until the events leading to her termination in February 2001, her work history with the Agency had been without incident in that she had not received any warnings or been counselled for matters relating to performance, capacity or conduct.

In respect of her dismissal, in the first instance, she was summoned to a meeting on 12 December 2000 at which she was informed by Senior Management of the Agency that a written complaint had been received by the Agency from an approved provider regarding an alleged breach of confidentiality attributed to the applicant.

Ms Kennedy's evidence was that she was advised that the Agency, acting on legal advice, was immediately suspending her (on full pay) and that there would be an investigation of the complaint carried out in a "speedy" manner.

She was questioned at the meeting as to whether she had provided her husband with information relating to a supporting visit by officers of the Agency, or if discussions that had occurred between herself and "Assessor 2" around a visit to the approved provider identified as the complainant.

At the conclusion of the meeting, the applicant was handed a letter of suspension, required to surrender all property belonging to the Agency, and requested to immediately leave the premises.

There was evidence given as to a course of action taken by the applicant in contacting her husband and discussions that ensued with a senior person of the organisation responsible for the control of the approved provider from where the complaint was alleged to have emanated.

Ms Kennedy attended the Agency's offices on 15 December 2000, along with her solicitor, where she was informed of the complaint against her but was given no information or detail relating to the complaint.

On or about 22 December 2000, a letter was forwarded from the Agency to Ms Kennedy containing statements from a number of persons concerning certain allegations that had been levelled against her. The letter alleged that the applicant had informed her husband of confidential information, but did not provide any detail as to the content of that information.

The applicant instructed her solicitor on 5 January 2001 to respond to the allegations contained in the letter of 22 December 2000 being hopeful that the response would resolve the matter that had led to her suspension.

At 17 January 2001, Ms Kennedy received a letter from the Agency's solicitors which contained a further statement and additional "expanded" particulars to which a response was sought from the applicant.

In her affidavit of evidence, Ms Kennedy, at paragraph 33, provided details of her response:-

"33. In that response, in part, I stated:

- that the work related part of our conversation on 6 December 2000 had been very brief and consisted of me asking 'Assessor 2' if she had a good day. She said it had been, although the team had identified a few issues;
- 'Assessor 2' did not tell me what those issues were, nor did she say which Service she had visited;
- I was not aware of which Service she had visited;
- I was not aware, and 'Assessor 2' did not tell me, that she had been in a meeting with Ms Radburn and 'Assessor 1';
- I did not recall 'Assessor 2' complaining about Ms Radburn drawing conclusions on insufficient evidence;
- that I denied that 'Assessor 2' spoke about 'serious risk' during our conversation and that 'Assessor 2's' statement says she is not sure that she did;
- that 'Assessor 2' had told me that she had a report to write before she went home;
- that the only thing I said to my husband about work that night or at any time after that was that I wanted to give 'Assessor 2' a lift home because she appeared tired but she could not leave as she had to complete a report;
- that the explanation for my husband's knowledge of the issues which arose during the visit was through his employment and 'The Manager'.
['Assessor 2' and 'The Manager' replaces actual names].

A letter was received from the Agency on 5 February 2001 which stated that Ms Kennedy had been found to have breached her confidentiality agreement by passing information on to her husband and seeking from the applicant an input as to what would be an appropriate penalty to be imposed for such actions.

Correspondence was forwarded to the Agency from the applicant's solicitors on 9 February 2001 denying the conclusions of the Agency's investigation and that, in any event, dismissal was not an appropriate penalty that ought to be considered.

The Agency, on 22 February 2001, by letter, terminated the applicant's employment based on the outcome of their investigations which determined that she had breached the confidentiality agreement that she had signed in June 1999.

The second affidavit that was sworn by Ms Kennedy which rebutted certain points raised in the affidavits of evidence from Mr Barry Ashcroft and Ms Kylie Radburn.

Cross-examination

Ms Kennedy disputed a number of points contained in the affidavits of evidence by Mr Ashcroft and Ms Radburn.

Under cross-examination, Ms Kennedy was questioned on a number of matters including:

- E-mails which contained alleged confidential information that had been forwarded to former employees of the Agency;
- Breach of confidentiality obligations;
- Confidentiality agreement;
- Offer to provide a reference to a former employee;
- S. 86 of the *Aged Care Act 1997*;
- Protected information;
- Recommendations on the preparation of a final report;
- Complaint in respect of a former Agency employee by an organisation; and
- Content of discussions with "Assessor 2".

Mr Kennedy, the husband of the applicant, is a Property Maintenance Officer employed by an organisation whose name has been suppressed.

His evidence was that he had always understood that both he and his wife had a potential conflict of interest because of their employment positions and because of that, they had refrained from discussing work-related matters.

At a time around 6 December 2000, through his employment, he became aware of a support visit conducted by "Assessor 1" and "Assessor 2" to an establishment operated by his employer. Through discussions with his "Manager" he was advised of the three main issues of concern identified during the course of that visit.

The matter of the visit was discussed at length with the "Manager" with further discussions occurring between himself and the person responsible for the "on-site" management of the establishment.

In the course of the discussions with the "on-site" manager, he was sure that the words "critical rating" were used and not the words "serious risk".

In evidence, Mr Kennedy stated that that evening he had picked up his wife from the Agency and that his wife had wanted to give "Assessor 2" a lift home. However, "Assessor 2" could not accept the offer of a lift because there was a need to remain at work to finish a report which Mr Kennedy assumed related to the visit by the Agency to the establishment operated by his employer.

During a telephone discussion with the "on-site" manager on 11 December 2000, he raised the visit from the Agency, and at paragraph 11 of his affidavit of evidence, in referring to that discussion:-

"During our discussion, I said words to the following effect:

"The issue regarding drugs and clinical documentation could have been considered critical. You are lucky that "Assessor 1" and "Assessor 2" were the Assessors because they are two of the most reasonable and fair Assessors. "Assessor 2", in particular, appears tough, but is really a softie at heart".

When advised by his wife, on 12 December 2000, of her suspension, he arranged for a meeting to be held with the "Manager" and themselves to discuss the complaint and he made further contact, during that meeting, with the "on-site" manager of the establishment subject to the visit.

Mr Kennedy stated that he had contacted Mr Ashcroft and was assured that a full and fair investigation would be held into the allegations against his wife. However, at no time during the course of that investigation was he requested to provide any input into the investigation.

His evidence concluded with a statement in respect of his involvement in the matter where, at paragraph 18 of his affidavit of evidence, he states:-

"At no stage did my wife tell me anything about any meeting that occurred at the Agency between Kylie Radburn and the Assessors. The sole source of the information that was relayed during my discussion of 11 December 2000 with 'the on-site manager' was the discussion with 'the Manager' on the evening of 6 December 2000, my own knowledge of 'Assessor 1' and 'Assessor 2' and the general knowledge of any person working in the Aged Care industry of the Agency's procedures."

Under cross-examination, Mr Kennedy answered questions in relation to his working arrangements, job description and in the detail of his conversations with the "Manager" and the "on-site" Manager.

Ms Turner had been employed as the Office Administrator from June 1999 until her resignation in July 2000.

In the period immediately following her departure from the Agency, she provided, to the Agency, services on a consultancy basis for a period of some two weeks.

Her evidence related to an email forwarded to her by the applicant some months after her resignation, which was alleged to have contained information that, in effect, was in breach of Ms Kennedy's confidentiality agreement.

It was Ms Turner's view that the information contained in the email was not sufficient to enable the identity of the service referred to to be identified.

"Assessor 2" in giving evidence, stated that she had been employed by the Agency from June 1999 until April 2001 and, that during the course of her employment, had become friends with the applicant to the extent that they had socialised, with their partners, on a "couple of occasions".

In the main, the evidence of "Assessor 2" related to the visit to the "Approved Provider" at the centre of the allegations against the applicant, and of the subsequent events leading up to, and following, the suspension of the applicant.

On 6 December 2000, after spending most of her day on the support visit, "Assessor 2's" evidence was that she arrived back at the Agency at approximately 3.30 p.m. where a meeting was held with Ms Radburn to provide feedback on the visit.

"Assessor 2", in evidence, said that following a meeting with Ms Radburn, she had been angered by the reaction of Ms Radburn, and had taken the opportunity to have a conversation with Ms Kennedy to "vent" her frustration.

She did not believe that the identity of the "Approved Provider" was made known to the applicant at the meeting, nor was any other confidential information passed on during the conversation.

In her affidavit of evidence, at paragraph 26, details were provided of a social function attended by the applicant, herself, and their partners:-

"On Friday, 8 December 2000 following the visit, I attended a social function with my partner. This function was with the Kennedys and another couple known to us, but not connected with the Agency. We had dinner at a public venue. Throughout the evening we stayed together as a group, except for short periods. I am not aware of anyone discussing the Agency or its business at any time during the evening."

However, in a statement (Exhibit 17) signed by "Assessor 2" on 22 December 2000, in reference to the 8 December social function, at paragraph 16, there was a contradictory recall of the events of that evening:-

"I cannot recall the exact time it occurred but I do recall that David Kennedy said to me that he knew I was going to 'the Approved Provider' and that another Agency employee, 'another Assessor' was going to another Service which is operated by the same organization as 'the Approved Provider'. My best recollection was that my response was 'Yes, sometime next week' and that I mentioned that it was just a Support Contact." ['Approved Provider' and 'another Assessor' replace actual names given]

Her evidence also provided a recount of her involvement in the investigation of the allegations against Ms Kennedy, including the circumstances in which she gave statements to an "independent body" undertaking the investigation.

In terms of the independent investigation, "Assessor 2's" evidence reflected concerns at the pressure applied by the lawyer conducting the process.

There were also references made to meetings with Ms Radburn and of her displeasure with the behaviour of Ms Radburn for the manner in which those meetings were held.

"Assessor 2", in paragraph 47 of her affidavit of evidence, put forward her views on the Agency's investigation of the allegations concerning Ms Kennedy:-

"It is my belief that a decision as to Beth's guilt was made by the Agency at the beginning of the whole process and that I was being used to provide them with evidence to justify their actions. Throughout the process, I consistently felt that my job was under threat. However, I do not believe that I passed on any information to Beth Kennedy about the visit to 'the Approved Provider', or about the meeting between myself, Ms Radburn and 'Assessor 1' that was confidential."

The final witness for the applicant, the "Manager" of the organisation with whom Mr Kennedy is employed, gave evidence that the "on-site" Manager had informed him, by phone (or he had phoned the "on-site" Manager), of the accreditation audit and of the issues of concern that had been raised with him and then mentioning to Mr Kennedy, on the same day, the content of that call.

He gave evidence that it was his practice to keep his staff briefed on such matters and that was done on a "need to know" basis.

Admitted in evidence, at Exhibit 19, was a page from the "Manager's" diary what purported to be notes of a phone conversation with the "on-site" Manager and which contained a reference to "Critical Care".

Respondent

The witnesses giving evidence on behalf of the respondent were Ms Radburn, "Assessor 1", "on-site" Manager and Mr Ashcroft.

Affidavits were tendered by Ms Norma de Clara and Mr David Swain, however they were not required to attend the Commission.

Ms Radburn, who is employed as an Accreditation Co-ordinator and the person second in charge at the Brisbane office of the Agency, in giving evidence, defined her role as that of having to ensure that the Agency's Quality Assessors conduct thorough and objective reviews and that they assess the services they visit in accordance with the highest appropriate standards.

In performing those duties, it is her opinion that she is required to probe and question assessors when it becomes known that, following a visit to an approved provider, a possible serious risk may exist.

She recalled a meeting with the assessors following the visit of 6 December 2000 to the "approved provider" and of asking if they thought any of the issues that they had talked about constituted "serious risk".

Ms Radburn rostered two assessors to carry out a review audit of the "approved provider" on 12 December 2000, and at around 10.00 a.m. on that day received a phone call from "Assessor 1" advising that the "on-site" Manager had recounted to him, almost verbatim, the contents of the feedback session held on 6 December 2000 between herself and "Assessors 1 and 2".

"Assessor 1" further advised in that phone call that the "on-site" Manager had told them that the information had been passed on from a staff member of her own organisation who in turn had received the information from an Agency Quality Assessor.

Ms Radburn, in evidence, gave detail of phone contacts she had with the "on-site" Manager regarding the content of the discussion between the Assessors and herself and was informed by the "on-site" Manager that Mr Kennedy had been the person who had provided the information.

Further evidence from Ms Radburn covered the investigation into the allegations that had been levelled against Ms Kennedy, including the role of Clayton Utz as the investigator.

In a supplementary affidavit of evidence, Ms Radburn, in reference to emails forwarded by Ms Kennedy to persons outside the Agency, believed that a serious breach of confidentiality had occurred and, in referring to the email, at paragraph 6 of her affidavit (Exhibit 21) stated:-

"It is hard to imagine a more serious breach of confidentiality that to disclose to an outside party that a service has been rated as a serious risk. The Agency's program of visits to services is disclosed on its website and any party seeing the email could easily ascertain the identity of the service. The fact that it had been critically rated was a matter of absolute confidence between the service and the Agency and most certainly constitutes a breach of the Quality Assessor's Code of Conduct as there was no requirement under law to provide this information nor any authority in writing to do so."

An extensive cross-examination of Ms Radburn occurred covering such areas as serious risk, file notes, legislation governing the Agency, review audits, phone conversations with "Assessor 1" and the "on-site" Manager, emails, Ms Turner's employment, visits to other approved providers, training and protected information.

"Assessor 1" has been employed by the Agency for approximately two (2) years, and on 6 December 2000, along with "Assessor 2", carried out a support contact visit to an "approved provider".

At the conclusion of the day, he discussed with the "on-site" Manager the issues that the Assessors had identified during the course of the visit.

On returning to the Agency that afternoon, a meeting was held between Ms Radburn and both Assessors, at which Ms Radburn, after hearing their report, suggested that there may have been a serious risk to clinical care.

A file note was prepared and signed by both "Assessor 2" and himself and handed to Ms Radburn prior to him leaving the Agency's building.

On 12 December 2000, he conducted a review audit of the "approved provider" at which the "on-site" Manager, at the entry meeting, had made reference to comments made by the Agency about the "approved provider" after the previous visit of 6 December 2000.

In "Assessor 1's" affidavit of evidence, at paragraphs 22, 23 and 24, he recorded his recollection of the discussions with the "on-site" Manager on 12 December 2000:-

"22. At the commencement of the entry meeting the "on-site Manager" informed us she was most upset as she had heard comments made by the Agency about the home after the support visit on 6 December 2000. I asked her what she meant by this and she then told myself and "another Assessor" that the following information had been disclosed to her:

- (a) the Service should have got a critical rating for clinical care;
- (b) that 'Assessor 1' and 'Assessor 2' got into trouble for what was said in feedback at the support Visit;
- (c) that when a report was requested by Kylie Radburn I told her that I was tired and was going home, and that Kylie would get the report in the morning.

1. I did not confirm or deny the comments.

24. I asked the 'on-site Manager' how she had got this information. She replied to the effect that she was told by someone whose relative works in the Agency about what was said. Later she said that it was someone's wife who worked in the Agency."

The "on-site" Manager gave evidence of the visit by the Assessors on 6 December 2000 and her practice in contacting the "Manager" following such visits.

Her evidence also included her recollection of phone conversations with Mr Kennedy on 11 and 12 December 2000.

The 11 December call was covered at paragraph 5 of her affidavit of evidence:-

"My best recollection of this conversation is as follows:

- (a) David Kennedy asked how I was;
- (b) David Kennedy then stated that he had heard that the Service did not get a very good report;
- (c) I replied, 'oh, really?';
- (d) David Kennedy said that the Service was going to get rated a critical;
- (e) I asked David Kennedy how he knew this and whether he should be telling me this information?
- (f) David Kennedy did not respond to my question and continued the conversation and stated that he believed that the Agency watered down the report in the end;
- (g) David Kennedy then said that 'Assessor 2' had got into trouble for being too soft during the Support Visit;
- (h) David Kennedy then said that when 'Assessor 2' and 'Assessor 1' got back to the office, they had been told to write a report but they said they were too tired as they had worked all day."

While further on in her affidavit, at paragraph 11, the 12 December conversation was recalled:—

“On evening of 12 December 2000 at approximately 6.00pm David Kennedy rang me at work. My recollection of the conversation we then had is as follows:

- (a) David Kennedy asked me whether during the Review Audit I had mentioned the information he had provided about the site visit when he rang me on 11 December, 2000;
- (b) I confirmed to David Kennedy that I had;
- (c) David Kennedy then said that he had got that information from ‘the Manager’;
- (d) I asked David Kennedy how could ‘the Manager’ possibly know about the assessors getting into trouble?
- (e) David Kennedy replied ‘*Did I tell you that?*’;
- (f) I replied, ‘*yes, you did*’. I then told David Kennedy the other things he had said to me as set out in paragraph 5 of this Affidavit;
- (g) David Kennedy responded, ‘*yes, well obviously that came from my wife and myself*’.”.

The “on-site” Manager said that she was astounded when Mr Kennedy had referred to his wife during the phone conversation of 12 December 2000 given that his wife worked for the Agency.

In cross-examination, the witness was questioned and challenged, in the main, on her recall of the phone conversations between herself and Mr Kennedy.

The final witness called by the respondent was Mr Ashcroft, the State Manager of the Agency, who, in evidence, gave a background in the Agency’s functions and activities and, in particular, referred to the applicant’s employment history with the Agency and of the signing of a confidentiality agreement on the commencement of her employment.

His initial involvement in this matter came about after a conversation with Ms Radburn on 12 December 2000, of which he was informed of the phone conversation between Ms Radburn and the “on-site” Manager in which it was alleged that confidential information, in respect of the “approved provider”, had been given to another party.

After taking advice from a Human Resource Consultant how best to conduct an investigation, Mr Ashcroft, along with Ms Radburn, met with the applicant where they advised that grounds existed for suspecting a serious breach of confidentiality had occurred, and of the Agency’s requirement to investigate the issue.

The applicant was informed that her employment, at that point, would be suspended, and she would remain on full pay until further notice.

A complete outline of the investigation carried out by the Agency was given, in evidence, by Mr Ashcroft, including the opportunity afforded to the applicant to present her responses to all of the allegations that had been levelled against her.

At the conclusion of the investigating process, he considered all of the material obtained by the Agency in its investigation of the alleged breach of confidentiality by the applicant, and formed a view that the applicant had, in fact, breached the confidentiality agreement that she had signed on the commencement of her employment.

On 5 February 2001, he forwarded correspondence to the applicant advising of his decision and he invited the applicant to make submissions as to an appropriate penalty that ought to be applied.

Prior to reaching a decision to terminate Ms Kennedy’s employment, he took legal advice based on the evidence gathered during the course of the investigation and on responses made on behalf of the applicant by her legal representative.

The legal advice received indicated that the Agency was entitled to summarily dismiss the applicant, however Mr Ashcroft had determined that a statutory period of notice would be paid *ex gratia*.

The applicant was advised by letter, on 22 February 2001, that her employment had been terminated.

Further evidence from Mr Ashcroft was that, subsequent to the termination of the applicant’s employment, it was necessary, in line with standard practices of the Agency, to clear emails from the computer disk drive and, during the course of this process, two (2) emails were unearthed that had been forwarded by the applicant to firstly a former staff member, and secondly an external contractor of the Agency which, in the view of Mr Ashcroft, contained information that was a serious breach of the confidentiality agreement.

Cross-examination of Mr Ashcroft encompassed such matters as the suspension of the applicant, Industrial Relations Consultant advice, statements of “Assessor 2”, phone conversations with Mr Kennedy, procedures for workplace disputes and disciplinary action, email and the confidentiality agreement.

Final Submissions

On completion of the evidence of the witnesses for both the applicant and the respondent, an agreement was reached between the parties that written submissions would be provided to the Commission.

Applicant

The applicant’s submission, in the first instance, questioned the basis upon which the termination was predicated, that being the existence of facts that could not objectively be established to any reasonable standard of proof.

The applicant had given adequate responses to the respondent which consistently denied the passing of any confidential information to her husband.

The respondent had incorrectly assumed, on purely circumstantial evidence, that confidential information had been passed between the applicant and her husband and their failure to interview Mr Kennedy in the investigative process, had disadvantaged the applicant.

The submission document also questioned the evidence that had been given by the "on-site" Manager and put forward a view that the evidence of the "on-site" Manager had been disputed in evidence by Mr Kennedy to the extent it would be difficult for the Commission to rely upon the "on-site" Manager's recall of events.

In terms of the procedures leading to the dismissal, it was argued that the process itself constituted a serious breach of the principles of natural justice and procedural fairness.

A number of the respondent's actions in the investigation process were touched on including the:-

- Suspension meeting – 12 December 2000;
- Formal response meeting – 15 December 2000; and
- Original particulars v expanded particulars.

Other matters of importance raised in the submission were the failure to pay the correct notice and the issues (emails) relied upon by the respondent after the dismissal had been effected.

In a particular reference to the emails, it was submitted that they alone were not sufficient to justify termination of Ms Kennedy's employment and had they come to the fore whilst the applicant was still employed, either counselling and/or a warning would have been suffice to discipline the applicant.

In summary, the applicant submitted that the substantive reason for the dismissal had not been established, and that the emails, in their own right, did not necessarily constitute breaches of confidentiality.

Alternatively, it was asserted that if there had been a breach of confidentiality, as it related to the emails, then it was an honest mistake as opposed to being intentional, dishonest or of malicious intent.

The applicant placed relevance upon a decision of Wilcox CJ in *Gooley v Westpac Banking Corporation* (1995) 49 IR 212 in that Wilcox CJ found that the employee had not sent information to a third party knowing or believing it was confidential, and that at most he was guilty of an error of judgement that could not properly be described as serious misconduct.

The Commission's attention was further drawn to the matter of *Byrne v Australian Airlines* (1995) CLR 410 at 465 which, in effect, found that any "punishment" for an error of judgement should be proportional to the gravity of the conduct.

It was submitted by the applicant that in all circumstances the termination of the employment was harsh, unjust and unreasonable.

On the issue of reinstatement, the applicant's position was that as the respondent had not led any evidence to indicate that reinstatement was impracticable, in that the relevant legislation is clear that reinstatement is the primary remedy and "if and only if" reinstatement is not practicable then there is a consideration for compensation.

The remedy sought by the applicant was reinstatement to her previous position, together with an order for the respondent to pay the applicant all remuneration lost between the date of dismissal and the date of reinstatement.

Respondent

The submission, filed on behalf of the respondent, addressed a wide range of issues as set out under the following headings:-

- Introduction
- What was it that Kennedy Relayed to "on-site" Manager
- What was discussed at the meeting between Radburn, "Assessor 1" and "Assessor 2"
- Relevance of email sent by the applicant
- Section 83 *Industrial Relations Act 1999*
- Obligation of confidentiality
- Contractual obligation of confidentiality
- Information passed by the applicant to her husband was confidential information
- Confidentiality agreement was an expressed condition of the contract
- Serious misconduct justifying summary dismissal
- Procedural issues – Was termination reasonable or harsh and unjust?
- Procedural fairness
- Summary
- Response to applicant's submissions.

In the submission, it was put quite forcibly that the evidence could lead to but one conclusion, that Mr Kennedy could only have obtained either the whole or the bulk of the information that he passed to the "on-site" Manager from his wife.

The contention of the applicant that it was the "Manager" who had passed on the information to Mr Kennedy was not substantiated in evidence before the Commission.

In referring to the source of the information that Mr Kennedy passed on to the "on-site" Manager, at page 7 of the final submission document, in paragraph 19:-

"Mr Kennedy no doubt had found himself in a difficult position. A conversation between himself and his wife, which the Applicant no doubt thought he would keep to himself, was relayed to the "on-site" Manager. Perhaps he chose to do that because he wished to highlight his importance, as he saw it, in the organization or perhaps he was simply not mindful of the extremely sensitive and confidential nature of the information. Whatever his motive was is immaterial. The fact remains that he told the "on-site" Manager things which he became aware of from his wife. The reliance on the "Manager" failed as soon as the "Manager" was called to give evidence. Were it otherwise, the "Manager" would have been asked all of the questions necessary to substantiate Kennedy's account. The Commission is entitled to conclude that those questions were not asked because the "Manager's" answers would not have been of assistance."

On the obligation of confidentiality, the respondent cited the *Aged Care Act 1997* at s. 86:—

“Section 86-1 defines *protected information* as:

In this Part, protected information is information that:

- (a) was acquired under or for the purposes of this Act; and
- (b) either,
 - (i) is personal information; or
 - (ii) relates to the affairs of an approved provider; or
 - (iii) relates to the affairs of an applicant for approval and a Part 2.1; or
 - (iv) relates to the affairs of an applicant for a grant under Chapter 5.

Section 86-2 provides for the ‘*use of protected information*’:

- (1) A person is guilty of an offence if:
 - (a) the person makes a record of, discloses or otherwise uses information; and
 - (b) the information is protected information; and
 - (a) the information was acquired by the person in the course of performing duties or exercising powers or functions under this Act.”.

It was put that, in the Confidentiality Agreement that was signed by the applicant at the commencement of her employment, it specifically referred to the *Aged Care Act 1997* stating:—

“The *Aged Care Act 1997* provides for the protection of information about Residential Aged Care Services . . . All information is to be treated as confidential when it relates to Residential Aged Care Facilities, residents (and the carers) and the staff of such facilities. In addition, information relating to the business of the Agency and to Agency staff is regarded as confidential.”.

The submission contained references to numerous authorities in respect of the range of issues subject to consideration by the Commission.

In summary, the respondent submitted that it was entitled after a lengthy investigation to draw the inferences it did and to decide that information had been passed on by Mrs Kennedy to her husband in breach of the Confidentiality Agreement.

It was also put that there was an entitlement, as a matter of law, for the respondent to rely upon the issue of the emails, which had subsequently come to their attention after Ms Kennedy had left the Agency.

In terms of a remedy, should the Commission decide in favour of the applicant, the respondent argued that it was clear, from the evidence that came from Mr Ashcroft and Ms Radburn, that they had viewed Ms Kennedy’s conduct as being a serious breach of her obligations and, as a number of other Agency employees had given evidence in this matter on behalf of the respondent, it was clear that reinstatement would be impracticable.

Conclusion

From the outset of this matter, it became apparent that due to the role and function of the Agency, that a level of sensitivity existed that may not normally be found in other work places.

The applicant was not a person that could be described as a long-term employee, but was however an employee whose performance and conduct, up until the time of her termination, had been without incident.

On 12 December 2000, whilst on a review (follow up) visit to an approved provider, “Assessor 1” found himself in a situation where the “on-site” Manager of the facility, at an entry meeting, relayed to him, in some detail, the content of discussions that had occurred between Ms Radburn and the two assessors (including himself) who had visited the provider on 6 December 2000.

Such was the understanding of “Assessor 1” as to the strict confidentiality requirements of the Agency that he immediately informed, by phone, Ms Radburn of the comments made by the “on-site” Manager.

Following a phone conversation with the “on-site” Manager, Ms Radburn informed Mr Ashcroft of the situation who, in turn, set in motion a series of actions that was eventually to lead to an investigation of the allegations by “independent” persons, and the subsequent termination of the applicant’s employment with the Agency.

In terms of the “independent” investigation, which was carried out by Clayton Utz (the respondent’s lawyers in this matter), there was no evidence, led or otherwise, that raised question with the conduct of the investigation in terms of it being “independent”.

The Agency reacted to the matter in what some may regard as somewhat hasty in that, by the close of business on 12 December 2000, the applicant had been informed of a complaint that had been made, and of the decision, following legal advice, of the Agency, to suspend her on full pay whilst an investigation ensued.

On 15 December 2000, the applicant, along with her solicitor, met with officers of the Agency to discuss the matter. However, it was not until 22 December 2000 that written correspondence from the Agency made known the allegations that the applicant had passed on confidential information to her husband who, in turn, was alleged to have disclosed the information to another party, being the “on-site” Manager.

In the consideration of this matter, from the perspective of the Commission, the event of 12 December 2000, immediately following the suspension of the applicant, when Mr Kennedy contacted the “on-site” Manager is most critical in the determination of this matter.

It is not disputed that Mr Kennedy phoned the "on-site" Manager, however there exists some significant differences in the content of the discussion between both parties.

The Commission was placed in the position of having to assess the credibility and demeanour of both Mr Kennedy and the "on-site" Manager to reach a conclusion as to whose evidence was to be accepted.

On close examination of the transcript, in particular the cross-examination of both witnesses, the Commission is satisfied that, on the balance of probabilities, it is more than reasonable to accept the version put forward by the "on-site" Manager as opposed to that of Mr Kennedy.

With the acceptance of the "on-site" Manager's evidence of the 12 December 2000 phone call, it was also necessary to look closely at the evidence relating to the other phone conversation between Mr Kennedy and the "on-site" Manager on 11 December 2000 and, in doing so, I have formed the view that in again accepting evidence of the "on-site" Manager over that of Mr Kennedy, that the only explanation as to how Mr Kennedy had obtained the exact type of information that he had passed on in the conversations with the "on-site" Manager, then it would have had to have come from someone within the Agency.

In reaching this conclusion, I have placed limited regard on the evidence of the "Manager" that was given to the Commission, and have not been convinced that, as Mr Kennedy alleges, the "Manager" was the sole provider of the information given to him which he passed on to the "on-site" Manager.

I find that, on the evidence and materials placed before the Commission, the applicant has breached the confidentiality agreement that she signed on commencement of employment with the Agency in relaying information relating to the activities of the Agency to her husband who then "unwisely" chose not to keep that information to himself.

In reaching this position, I have also paid close attention to the evidence of "Assessor 2", and it would be my view that a reasonable person would have little difficulty finding that Ms Kennedy gained the information that was eventually passed on to her husband directly from "Assessor 2".

There was, of course, some conflict in the evidence of "Assessor 2" (mentioned earlier in the decision) which would lead one to reach a conclusion that at the social outing on 8 December 2000, which was attended by "Assessor 2" and the Kennedy's, that matters relating to the activities of the Agency were subject to discussions, in some form or other, between "Assessor 2" and Mr Kennedy.

For the record, I would not suggest that the actions of the applicant in having what many would accept as a "normal" type of discussion that one has with a partner over matters that occur in the work place, were mischievous or of malicious intent.

It would appear that the Kennedy's were more than aware of the potential area of conflict that would exist due to the nature of each others employment and that Mr Kennedy should not have taken the opportunity to disclose to a person within his own company information that had been provided in the manner it had been.

I accept the argument put forward by the respondent in respect of the serious nature of the breach of confidentiality, and when one considers the importance of the role of the Agency in maintaining standards in Aged Care facilities, it is not acceptable that "approved providers" or organizations that have control over or manage facilities subject to inspections by the Agency should have access to information that has the potential to thwart the legitimate operations of the Agency.

On the issue of the lack of procedural fairness and natural justice applied to the applicant during the course of the "independent" investigation, the failure of the investigator to seek to obtain a statement from Mr Kennedy as to his involvement was, in my view, of some disadvantage, as was the limited time and information that was made available to the applicant during the course of her involvement in the investigation.

However, after having considered the evidence before the Commission in these proceedings, I have not been convinced that each of those issues, in respect to procedural fairness and natural justice, were significant to the point where they would have changed the outcome of the "independent" investigation or of these proceedings.

In respect of the two emails that came to the attention of the respondent after the termination of the applicant, Asbury C in the matter of *Chris MacKenzie and Michelle MacKenzie v Wangetti Education Centre* (B1090 and B1091 of 2000) 166 QGIG 202 stated:-

"It is well established at law that information obtained subsequently, but which existed at the time of a dismissal (i.e. After acquired knowledge), can be used to justify that dismissal. (*Shepherd v Felt and Textiles of Australian* (1931) 45 CLR 359; *Lane v Arrowcrest Group Pty Ltd* (1990) 99 ALR 45 at 74 -75; *Forward v Queensland Nickel Pty Limited* (1993) 144 QGIG 909 at 913; *Byrne and Frew v Australian Airlines Limited* 131 ALR 422 at 433 per Brennan CJ, Dawson and Toohey JJ and 462 463 per McHugh and Gummow JJ)."

In saying that, on the evidence before the Commission, I am not of the opinion that either of the emails could clearly be found to have contained breaches of the applicant's confidentiality agreement as argued by the respondent. However, they may have breached a policy (that appeared not to be widely known or observed within the Agency) in respect of forwarding private emails.

Therefore, the issue of the emails has, in my view, little to play in the final outcome of this matter.

I find that, on the evidence before the Commission, the allegations levelled against the applicant that she breached her confidentiality agreement by providing confidential information to her husband in relation to activities of the Agency has been substantiated and that the nature of her actions were sufficient to warrant the decision made by the respondent to terminate her employment which, in my view, is not considered to be harsh, unjust or unreasonable.

I dismiss the application for reinstatement.

The only matter that still requires some consideration relates to the payment of two (2) weeks' notice given to the applicant at the time of her termination which, according to Mr Ashcroft, was made on the basis of being an *ex gratia* payment.

Whilst rejecting the application for reinstatement, I have not formed a view that the actions of the applicant were sufficient to warrant the forfeiture of her entitlements for notice under her contract of employment and, therefore, the respondent is required to pay the applicant a further two (2) weeks' pay which is in line with the contractual arrangement that existed between the parties.

I order accordingly.

J.M. THOMPSON, Commissioner.

Released: 27 November 2001

Appearances:-

Ms J. Shaw of Deacons Lawyers for the Applicant.

Mr R. Perry, instructed by Mr G. Harley of Clayton Utz) for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Queensland Nurses' Union of Employees AND Anglican Church Grammar School
(Nos. W133 and W134 of 2001)**

COMMISSIONER BROWN

27 November 2001

DECISION

These matters involved applications by the Queensland Nurses' Union of Employees (QNU) on behalf of Helen Petsky (Petsky) and Shayle Woods (Woods) for orders against the Anglican Church Grammar School (the respondent) for the payment of unpaid wages pursuant to s. 278.

Attempts to resolve the differences through conciliation failed.

The claim on behalf of Petsky was structured as follows:-

1. \$320.40 Payment at double time for the duration of the meal break worked;
2. \$476.15 Overtime in excess of 10 hours per day;
3. \$176.22 Broken shift allowance;
4. \$1,056.88 Overtime worked in excess of ordinary span of hours between 7 a.m. and 6 p.m.;
5. \$211.36 Overtime hours worked outside employee's starting and ceasing time (Call-ins)

\$2,241.02 Total for 17 July 1999 to 31 December 1999

\$4,482.04 Total for 1 January 1999 to 31 December 1999.

The structure of the claim for Woods was as follows:-

1. \$1,019.05 Overtime worked in excess of ordinary span of hours between 7 a.m. and 6 p.m.
2. \$1,050.20 Payment at double time for the duration of the meal breaks worked and Overtime in excess of 10 hours per day;
3. \$620.78 Call-ins – Overtime worked in excess of ordinary span of hours;
4. \$453.90 Meal breaks worked in 1998.

\$3,143.93 Total for 17 July 1999 to 31 December 1999

\$6,287.85 Total for 1 January 1999 to 31 December 1999.

As a preliminary matter the claim for Woods was amended downwards by the sum of \$720.90 and similarly for Petsky by \$453.90.

Woods commenced employment with the respondent in January 1998 and Petsky commenced in January 1999. Both ceased employment with the respondent in February 2000.

From evidence and submissions Wood's claim was based on the provisions of the Nurses' Award – State (the Award) for 1998 in relation to meal breaks. From 1 January 1999 to 31 December 1999, her claim was based on the provisions of the Anglican Schools Enterprise Bargaining Agreement – Certified Agreement 1999 (the Agreement) for the remaining items.

Petsky's claim was for the period 1 January 1999 to 31 December 1999 and based entirely on the Agreement.

The parties agreed that the instrument governing the working arrangements for 1998 was the Award.

The Meal Breaks provision in the Award is as follows:-

“4.3 Meal Breaks

- (1) Where an employee is rostered to work at least 6 hours, a meal break of no less than 30 minutes shall be available before the sixth hour after commencement of duty, and thereafter at intervals of no more than six hours.
- (2) Except as hereinafter provided time and one-half shall be paid for all work required to be performed during meal breaks and thereafter until a meal break is taken.
- (3) Employees performing ordinary work in excess of eight hours and up to ten hours per day shall be entitled to a meal break of not less than one-half hour and not more than one hour at or about the fifth hour from the ordinary starting time each day.
- (4) In the event of an emergency circumstance occurring during the meal break such meal break may be delayed without penalty:

Provided that such meal break should be taken as soon as the emergency circumstance ends:

Provided that overtime in accordance with subclause (2) above shall be paid if the meal break is unable to be taken after the emergency circumstance ends.”.

The respondent prepared a summary of the days upon which Woods did not receive a 45 minute meal break during 1998 and this was referred to in the submissions of both Mr Ross for the QNU and Mr Aspromourgos for the respondent.

Mr Aspromourgos in transcript at page 149 lines 15 to 23 stated:-

“A similar process was put in place for the period of 1998 where, as Mr Ross indicated, I perused the red books – I didn’t personally, someone from my office perused the red books and came up with certain days that did not appear to have been sufficient time for a meal break to be taken and that was recorded. And, again, on the basis of the available evidence that period was accepted. The times were worked and that if the Awards applied as suggested in the application that would result in the payment of certain moneys.”.

That summary (Ex. 8) listed the days that Woods had less than 45 minutes for a meal break.

The Award, however, provides for a minimum of 30 minutes for a meal break not 45.

The Award further provides that (except in dealing with emergencies) the time spent working during the meal break and until a meal break can be taken should be paid for at time and one-half.

It would appear from Ex. 8 that there were 12 occasions where less than one-half hour was able to be taken and of those twelve, ten, it appears, were days where no meal break was taken at all.

Mr Ross indicated in transcript at page 137 that uncertainty existed as to the timing and extent of those interruptions. He asserted at line 35 that “. . . we’re saying that whenever that interruption took place that it is most likely that it was at least half an hour before she would be able to resume a meal break and as a consequence she would, at the very least, be entitled to time and a-half for half an hour”.

Further, at page 179, line 9 Mr Ross submitted:-

“. . . then final comment I’ll make is that Mr Aspromourgos tried to belittle the possible interruptions during meal breaks by saying they might be a phone call or something like that. The fact of the matter is that those meal breaks that were interrupted recorded for ’98 were of such significance that they were recorded in the red books that were referred to as the books relating to the in-patient records. So they weren’t a wrong number of somebody ringing up wanting a cup of coffee. They were significant interruptions relating directly to the work of the nursing staff and Ms Woods in that she was required.”.

This, in my view, further complicates the issue in that Mr Ross rates these interruptions as “significant” and related “directly to the work of nursing staff”.

The question which arises from this submission is whether or not any of the interruptions were emergencies which might not attract a penalty.

Woods in transcript at page 72, line 1 stated:-

“They were health insurance details being run through. They were maintenance people ringing. There were parents ringing. Maybe a doctor’s surgery would ring to get a Medicare number. You know, there was just – they were minor things. The only time we really got calls about boys were for emergencies and that was, ‘there’s a boy down on the field with a broken leg or a dislocated knee or a severe asthma attack or there is a boy unconscious’. That was when they would ring. Otherwise they would just come down to the health centre.”.

However, there was no claim from the respondent that the interruptions in 1998 were emergencies.

No evidence was presented regarding the length of the interruptions or whether or not the meal period was completed after the interruption.

Finding Woods 1998

On the evidence and submissions I find payment for 10 lunch interruptions of 30 minutes duration, 1 of 10 minutes duration and 1 of 5 minutes duration are owing and remain unpaid.

Claims for 1999

Both Petsky’s and Woods’ claims from 1 January 1999 to 31 December 1999 depend on the operative date of the Agreement and also to the interpretation of the status of employment of Petsky and Woods under the Agreement, i.e. as to whether they were full-time or term-time and classified as “All Others” or “Boarding House staff”.

Mr Ross contended that the agreement had effect from 1 January 1999 despite being certified on 28 September 1999. Further, that the employees were full-time employees and that Schedule 7 of the agreement (Hours of Work – Non Teaching Staff) was applicable with the exception of clause 7 of that Schedule which related to term-time employees.

Mr Aspromourgos accepted that the agreement applied to Nurses. He contended that under the agreement Petsky and Woods were term-time employees and not full-time employees and also that the agreement did not apply until 28 September 1999 (the date of certification) in any event.

The Award exempts nurses in Boarding Schools from certain provisions, specifically Hours of Work (cl 4.1(4)), Overtime (cl 4.2(1)) and the keeping of the time portion of Time and Wage Records.

Because of these exemptions at all times when the Award applied any claims connected with Hours of Work or Overtime will fail. Meal break provisions, on the other hand, whilst treated differently in the Award and the Agreement do not exclude nurses.

In relation to the date of operation of the Agreement, the *Industrial Relations Act 1999* at ss. 164 and 165 states:-

“When a certified agreement is in operation

164.(1) A certified agreement starts operating when it is certified.

(2) The agreement continues to operate until-

- (a) after its nominal expiry date, it is replaced by another certified agreement, or
- (b) it is terminated under section 158, 171, 172 or 173.

Certified agreement's effect on awards, agreements or orders

165.(1) While a certified agreement operates, it prevails, to the extent of any inconsistency, over an award or industrial agreement or an order made under section 137.

(2) While a project agreement operates, it operates to the exclusion of any other certified agreement or QWA.”.

The Agreement at clauses 1.3 and 2.1 states (*inter alia*)–

“1.3 Date and Period of Operation

This agreement shall operate from 1 January 1999 and shall remain in force until 31 December 2000. This agreement may only be terminated by any of the Parties to the agreement in the manner prescribed in Part 1 of Chapter 6 of the Industrial Relations Act 1999 (Queensland).

2.1 Relationship with Parent Awards

This agreement shall be read and interpreted in conjunction with Awards having application to or adopted for the purposes of Section 160 and 163 of the Industrial Relations Act 1999 as set out hereunder except as varied by this agreement:–

Nursing Staff

Nurses' Award – State

This agreement shall be read and interpreted in conjunction with existing Awards and Industrial Agreements applying to employees of the schools listed in Schedule 1. In the event of any inconsistency with existing Awards and Industrial Agreements, the terms of this agreement shall take precedence. The parties agree that except as provided in the Agreement, existing Award and/or Industrial Agreement provisions applicable as at 1 January 1997 will be maintained.”.

The Agreement was certified on 28 September 1999.

During that certification hearing Mr Spriggs for the Queensland Independent Education Union of Employees outlined the reasons for the delay and Commissioner Baldwin in handing down her decision certified the agreement “operative from today” (28/9/99) .

Mr Ross's argument in his outline of submissions was “it would be passing strange indeed if an employee was unable to claim their entitlement under an agreement once that agreement was certified”.

The Agreement was certified and became operative on 28 September 1999. That is to say that it became enforceable in all aspects.

The parties agreed that the Agreement would operate from 1 January 1999. Whilst specific dates for the payment of wage increases are listed there was no indication that other matters would have an operative date other than 1 January 1999. I find that the Agreement operated and had effect from 1 January 1999 and prevailed over the Award to the extent of inconsistency from that date.

The coming into existence of the Agreement on 28 September 1999 retrospective to 1 January 1999 posed problems for the respondent – some of them insurmountable.

For example the times for starting and ceasing meals were not recorded and the starting and ceasing times generally were not recorded. Until 28 September 1999, they were not required to be and then, in what I believe to be an unintended consequence of the agreement, the respondent was required to attempt a reconstruction.

The inability of the respondent to retrospectively construct those time records was understandable and I make no finding adverse to the respondent on that issue.

Having determined that the Agreement operated and prevailed over the Award in relevant areas from 1 January 1999, the question of the status of employment is to be considered next in order to consider ordinary hours of work and in turn overtime.

On consideration of the evidence and letters of appointment, I have formed the view that both Woods and Petsky were full-time employees. They were paid for 52 weeks of the year at the full weekly rate (4 of which included annual leave loading). They did not have their wages earned during term time (38 weeks) averaged over 52 weeks which along with certain *pro rata* benefits as is a feature of term-time employment. Despite the fact that they were normally only required to work during the times that students were present. Both accepted that the arrangement of not having to work during school vacations was intended as compensation for the working of unregulated hours at other times.

I find that Schedule 7 applied to both Petsky and Woods as full-time non-teaching employees.

This may not have been the intention or understanding of the respondent at the time of making the Agreement (or perhaps the QNU for that matter). Unintended though it may have been, it is none the less the case in my view.

The further issue to be decided on employment status is whether (as contended by Mr Ross) they were in the “All other” category or as submitted by Mr Aspromourgos, “Boarding House staff”.

Mr Aspromourgos contended and witness Scott stated in cross-examination that the 24 hour, 7 day nature of employment was for the purpose of providing coverage for the residents in the Boarding House and therefore they should be considered “Boarding House staff”. Evidence was that this view was not constant over time but had varied with different advice at different times.

Mr Ross contended that there was no reference in Schedule 7 or elsewhere in the Agreement which would bring the employees in question under the definition of “Boarding House staff”, therefore they must be considered as “All other”.

Schedule 7, where it refers to “Boarding House” employees in clause 1.4.1 states:–

“Boarding House staff (including Boarding Supervisors), Cleaners, Caretakers and Groundstaff shall commence no earlier than 6.00 am Monday to Sunday inclusive, provided that Groundstaff shall work ordinary hours between 5.30 am to 6 pm, Monday to Sunday.”.

The use of the word “including” would, to me, indicate that the calling of “Boarding Supervisors” mentioned is not exhaustive but one of a number of classifications which could be “Boarding House staff”.

This does not automatically rule Nurses in or out as Boarding House staff.

I believe that the best method of determining this issue is by an assessment of responsibilities and the time spent working in connection with the Boarding House.

Mr Ross and Mr Aspromourgos both accepted that in terms of the Award that Woods and Petsky were Nursing employees in a Boarding School.

That in itself does not mean that they are Boarding House staff as mentioned in Schedule 7. There would be many employees, cleaners for example, that work in a "Boarding School" cleaning classrooms who have no responsibility for duties in connection with the "Boarding House". There might also be a "cook" in the tuckshop with no connection to the Boarding House. This "cook" would be "All other" for the purpose of hours under Schedule 7. Whilst a "cook" working in connection with the Boarding House would be governed by the hours for "Boarding House staff".

All hours worked by Woods and Petsky were directly linked to the Boarding House. While they had the additional responsibility for non boarding students during the school days however, the 24 hour, 7 day nature of the work was brought about because and only because of their service to boarders residing in the Boarding House.

Schedule 7 sets out *inter alia* the hours of work appropriate for employees in the various areas of the Schools' responsibilities. It does not list the callings for pay or other purposes.

For the purposes of Schedule 7, I find that Woods and Petsky were full-time Nurses employed in connection with the Boarding House and subject to the hours provisions in Schedule 7 for "Boarding House staff".

Having already determined that the agreement applies from 1 January 1999 it now remains to determine what, if any, wages are unpaid and owing.

Broken Shifts

In Schedule 7, clause 6 states:-

"6. Broken Shift Allowance

Where a full-time employee works a broken shift as defined, such employee shall be paid 5% in addition to the ordinary rate for every shift so worked, except in the case of Caretakers and Boarding Supervisors who are provided with accommodation by the employer."

I order that any broken shifts worked by Woods and Petsky are to be paid in accordance with clause 6 of Schedule 7.

With respect to meal breaks for Woods and Petsky during 1999, as mentioned earlier, the agreement altered the entitlements contained in the Award.

Clause 2.1 of clause 2 of the Agreement reads as follows:-

"2.1 Where an employee is employed for at least (6) hours per day, such employee shall be entitled to a continuous unpaid meal break of not less than 30 minutes and not more than one (1) hour duration; provided that no such employee shall work for more than five (5) hours without a break for a meal except where the employer and the employee mutually agree to work through the meal break as paid crib.

2.2 Where an employee is required to work through a meal break as prescribed in subclause 2.1 above, such employee shall be paid at the rate of double time for the duration of the meal break worked, except employees who agree to a paid crib break as detailed above."

There was no agreement as to a paid crib break.

Significantly the Award provided for a penalty of time and a-half for work required to be performed during meal breaks. The Agreement on the other hand enables the employer and employees to mutually agree to work through the meal break as a paid crib or alternatively where the employee is required to work through a meal break, double time is paid where no agreement exists regarding a crib.

The circumstances, in my view, are quite different. Whilst the Award provided compensation for work performed during a meal break, i.e. an interruption to a meal break of 15 minutes would be paid at time and one-half for 15 minutes, the Agreement only provides compensation where employees are required to work through their meal break.

President Hall in *Queensland Nurses' Union of Employees v Bethlehem Nursing Home* 165 QGIG 216/7 after examining the term "required" in the context of "required to remain on the premises during crib breaks" concluded "The only employee who is entitled to the allowance . . . is the employee who was directed by the employer to remain on the premises during the meal break" (the underlining is mine).

Evidence was presented with respect to correspondence and discussions between employees and the respondent regarding the provision of meal breaks in a manner which would ensure minimum interruption e.g. the stipulation of times at which students should and should not attend the Medical Centre.

There was no direction from the respondent to work through the meal break. On the contrary genuine efforts were made by both parties to establish as far as possible an uninterrupted meal break. On the evidence these efforts did not ensure an uninterrupted meal break. However, also on the evidence, the employees were not as a general rule required to work through meal times by direction of the respondent.

Despite those efforts the requirements and responsibilities of the position meant that the employees at times did work through their meal break (as opposed to being disturbed during it). Such decision to work was made by the nurse on duty who, in my opinion, was the respondent's agent or in charge at the time and able to make a decision that circumstances required the working through a meal break that equated to a requirement of the respondent.

The Agreement is clear in this regard. I find that the employees should be paid double time for each meal time where the circumstances of the job required the meal break to be worked through i.e. where no break was taken at all. The agreement is silent regarding interruptions to meal times once commenced and no evidence is available regarding the length of interruptions in any event. I note that the Agreement narrowed the circumstances in which meal break penalties were paid whilst increasing the penalty from time and one-half to double time.

Regarding the claim for overtime.

I have some sympathy for the offset sought by the respondent in respect of payment made for vacation periods.

The wages that were paid for the weeks not worked (excluding annual leave) were paid to compensate for the unregulated hours required during term time under the Award.

The claim for overtime is exactly that, compensation for the hours required during term-time (See *Wallace and The Haggarty Group Pres Hall* in C69 and C70 of 2001). The remaining offsets are rejected (see also *Wallace v The Haggarty Group*).

Both Woods and Petsky acknowledged that it was their understanding that the arrangement whereby they were paid for 52 weeks per year whilst normally not required for vacation periods was to compensate for hours worked during school terms. Originally they had agreed to this arrangement and had not withdrawn from that arrangement.

This, to me, indicates that an agreement existed in practical terms that paid time off was taken in lieu of overtime and that it existed from the commencement of employment of Woods and Petsky and remained unchanged after the coming into operation of the Agreement. There was no evidence that either Woods or Petsky sought to end this arrangement.

Clause 4.1 of Schedule 7 (Time Off in Lieu of Overtime) states:-

“4.1 Time Off in Lieu of Overtime

Subject to prior approval of the employer, an employee who so requests may be allowed time off duty in lieu of the payment of overtime, subject to the following.

- 4.1.1** The time allowed off duty shall be equal to the number of hours so worked provided that where an employee is required to work overtime on a Saturday or Sunday by agreement between the employee and the employer, time off in lieu of overtime may be given to the employee. Such time off in lieu of overtime shall be equivalent to the number of ordinary hours pay that the employee would have received for such overtime. (eg. One (1) hour worked at overtime at time and a-half equates to one and a-half hours ordinary pay, therefore the employee would receive one and a-half hours of time off in lieu of overtime.)
- 4.1.2** Employees shall be allowed to accumulate up to five (5) working days credit at any one time: provided that term-time employees may accumulate up to 10 days at any one time. Accumulated time shall be taken at a time mutually agreed between the employee and the employer, within 12 months of such accumulation.
- 4.1.3** Any accrued time that is outstanding after 12 months, or at the time of termination, shall be paid out at the rate of time and a-half for all time outstanding, unless there is agreement between the employer and the employee to continue to accumulate in excess of 12 months.”.

There may not have been a specific request from Woods and Petsky after 28 September 1999 in line with this clause, however, the clause best reflects the arrangements that were in place by agreement prior to 28 September 1999 and no attempt was made to change those arrangements.

The *Industrial Relations Act 1999* at s. 331 states:-

“Decisions generally

331.The court or commission may, in an industrial cause-

- (a) make a decision it considers just, and include in a decision a provision it considers appropriate for preventing or settling the industrial dispute, or dealing with the industrial matter, the cause relates to, without being restricted to any specific relief claimed by the parties to the cause; or
- (b) dismiss the cause, or refrain from hearing, further hearing, or deciding the cause, if the court or commission considers -
- () the cause is trivial; or
- () further proceedings by the court or commission are not necessary or desirable in the public interest; or
- (c) order a party to the cause to pay another party the expenses, including witness expenses, it considers appropriate.”.

Section 320 says the Commission is not bound by technicalities, legal forms or rules of evidence and may inform itself on a matter it considers appropriate in the exercise of its jurisdiction and is governed in its decisions by equity, good conscience and the substantial merits of the case having regard to the persons immediately involved and the community as a whole.

I find that the hours paid during vacation periods are to be considered in line with Schedule 7, clause 4.1 of the Agreement. The number of hours owed to Woods and Petsky are to be calculated in accordance with clause 4.1 of Schedule 7 of the Agreement i.e. the number of hours worked in addition to ordinary hours during term-time minus the number of hours paid during vacation (non working) periods (excluding annual leave), reveals the number of hours owing at overtime rates to each.

Calculation in the absence of records

Mr Ross submitted, in the absence of records for the first six months of 1999, that the calculations for the second six months should be accepted as representative and such amount be doubled to find the total for 1999. The consistency of witness McCaul’s assessment for 1998 meal times worked by Woods when compared with the respondents’ assessment was suggested as supportive of the methods adopted. As well, Woods and Petsky believed their work load in the first half of 1999 to be similar or heavier than the second half.

This was contested by the respondent’s submissions and in the evidence of Mr Scott. However, whilst they contested the number of interruptions to meal breaks and call outs, there was no suggestion that they did not do any.

Computer data known as TASS was only useful as a guide as there were times at which the system was not working.

Ultimately the truth is that neither party was in a position to present time and wage book evidence relating to working time or meal breaks for 1999. As mentioned neither party was required to maintain such records prior to 29 September 1999. I note that records from this date should have been kept.

The records that were relied on and submitted as exhibits, including the records prepared by Woods and Petsky on their own initiative, are the only records provided for the Commission’s guidance for the purpose of calculations of any matter in these proceedings.

The standard of proof is on the balance of probabilities, with the onus of proof on the applicant.

Sheldon J in *Ray v Radano* (1967) (67) NSWAR 471 said that an employer who neglects to keep statutory records, which, in their probative effect, are as much a protection to himself as to the employee, deserves little sympathy if he loses in a battle reduced to oath against oath.

In this case the parties do deserve some sympathy for the failure to keep adequate records but to a large extent in this case the battle is reduced to "oath against oath".

Considering the available material and evidence I accept that on the balance of probabilities the first half of 1999 was similar to the second. I find that the second half calculations once made should be doubled to establish the full amount for 1999.

In summary, my findings are as hereunder.

Meal breaks for Woods during 1998 are to be paid as detailed earlier.

The Agreement applied throughout 1999, including Schedule 7.

Both Woods and Petsky were full-time employees – Non Teaching under the Agreement.

Both Woods and Petsky were Boarding House staff for determining hours of work.

Meal breaks worked through in 1999 be paid in line with Schedule 7.

Clause 4.1 (Time Off in Lieu of Overtime) governed the arrangements of both Woods and Petsky as to hours of work in 1999.

Broken shifts worked by Woods and Petsky to be paid for in accordance with Schedule 7 of the Agreement.

The calculations for the second half of 1999 are to be doubled to establish the total for the year.

I require the parties to jointly prepare a draft order as to the amounts owing for each of Woods and Petsky based on the above findings. The orders should include the amount which is owing for the meal breaks in 1998 for Woods. However, this amount is not to be doubled as suggested in Schedule 1 of Wood's application.

The draft order is to be provided to the Commission within 21 days of the date of release of this decision.

In the absence of agreement the Commission will set a time to hear further from the parties on the question of quantum.

I note that the respondent accepted that their cross claim could not result in an award for an order that monies be refunded to them. Whilst consideration was given to the vacation period pay issue, I do not believe that the offsets sought by the respondent should impact on this decision.

Order accordingly.

D. K. BROWN, Commissioner.

Appearances:-

Mr S. Ross, with him Ms G. McCall for the Queensland Nurses' Union of Employees.

Mr A. Aspromourgos of Livingstones Australia for the Anglican Church Grammar School.

Released: 27 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 230 – arbitration of industrial dispute

**Queensland Rail AND Australian Rail, Tram and Bus Industry Union
of Employees, Queensland Branch and Another (No. D97 of 2001)**

COMMISSIONER BECHLY

28 November 2001

DECISION

A dispute exists within Queensland Rail (QR) operations at Jilanan Depot concerning the provisioning of locomotives, specifically being the decanting of locomotives.

Historically Rolling Stock labourers performed this function at Jilanan. Some considerable time ago the work was moved from Rolling Stock Maintenance to Operations and some labourers moved to Operations and continued to perform the duties as porters. Porters then continued performing the duties as a part of the Operations activity.

The porter classification later translated to a Rail Operator 2 classification level.

QR now seek to include the function of decanting locomotives at Jilanan with the higher RO 4 classification, the intent being, as I understand it, that the role of the RO 2 classification will disappear with the lowest grade of employment being set at the RO 4 level and thus enable a wider range of duties and skill levels to be performed.

While the Unions recognise that Rail Operations at Jilanan carrying out the function is as a result of historical circumstances specific to Jilanan, it was argued that, on a State wide basis employees rejected decanting as a Rail Operator task in a 1997 State wide ballot dealing with job redesign and productivity issues and that QR could not, at this later time, require the decanting function to be performed by RO 4 employees at Jilanan.

There are a multitude of different practices adopted within QR at its various Divisions and Depots.

The issue is to be considered in the context of the practices at Jilanan alone.

What is proposed by QR effectively means that the existing RO 2s at Jilanan would no longer be required but that the number of RO 4 classifications would be increased but would also perform the decanting function. The existing RO 2s have the opportunity to be appointed to the RO 4 classification through the normal selection interview, training and competency assessment at Jilanan.

Should existing RO 2s be successful in receiving appointment to the RO 4 level they would be performing duties at a RO 4 level and also the duty of decanting which they performed at the RO 2 level.

This apparently is not the nub of the problem. What is the nub of the problem is existing RO 4 classified employees who argue that decanting is not within the role of an RO 4 classification and, because of a 1997 State wide ballot which rejected the performance of decanting as an activity for Rail Operators then they should not be required to perform that function.

There are approximately ten additional vacancies for RO 4 positions. All of these positions are capable of being filled through the open selection process by those presently employed at the RO 2 level at Jilanan who have applied for the positions. These employees have been given appropriate training to complete the tasks that would be required in the RO 4 role.

At Jilanan the work has been performed by Rail Operators for a considerable period of time with the knowledge of all parties. To now deny the decanting role as one for Rail Operator classifications because of a scale upgrade is inappropriate. The practice in Jilanan has been in place for several years prior to the State wide vote referred to earlier. Further, to deny the role as one capable of being performed by Rail Operators 4 would be to deny to trained and capable personnel a significant salary upgrade which may not otherwise become available to them.

The parties have placed the matter in the Commission’s jurisdiction for a finding.

I find that, at Jilanan, partially because of past accepted practice, the work of decanting locomotives can be required of any employee occupying a Rail Operator 4 position or lower by QR.

This finding may not be used in support or detracting of any similar matter at any other location.

R.E. BECHLY, Commissioner.

Appearances:-
Mr P. Lucas for Queensland Rail.
Mr O. Doogan for the Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch,
Mr P. Sparrow for the Queensland Services, Industrial Union of Employees.

Released: 28 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 166 – order re persons bound

Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Employees of Sporting Wheelies and Disabled Association and Another (No. CA429 of 2001)

SPORTING WHEELIES AND DISABLED SPORT AND RECREATION ASSOCIATION OF QUEENSLAND INC – CERTIFIED AGREEMENT 2001

COMMISSIONER FISHER

23 November 2001

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 18 and 30 October 2001, this Commission orders as follows from the 30 October 2001:-

“This Agreement is also binding on the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees pursuant to an order made under s. 166 of the *Industrial Relations Act 1999* on 30 October 2001.”.

Dated this twenty-third day of November, 2001.

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

Operative Date: 30 October 2001
Order – persons bound
Released: 23 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

The Australian Workers’ Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited Industrial Organisation of Employers (No. B568 of 2001)

PRIVATE HOSPITALS AND NURSING HOMES INDUSTRY AWARD – STATE

COMMISSIONER SWAN

10 April 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 10 April 2001, this Commission orders that the said Award be amended as follows as from the first day of May, 2001:-

By deleting clause 2.5 Part B – PRIVATE HOSPITALS, Section 2 (Extra Payments for Afternoon and Night Shifts) and inserting the following in lieu thereof:-

“2.5 Allowance for Afternoon and Night Work

- (a) In addition to the rates of pay prescribed by clause 1.2 (Rates of Pay) Part D, Section 1 of this Award, employees whilst engaged on afternoon shift and night shift, as defined, shall be paid an additional penalty rate for each such shift as follows:-
- | | |
|---------------------------------------|--|
| (i) Afternoon Shift (from 1/5/2001) | 12% (or \$9.70 whichever is the greater) |
| Night shift (from 1/5/2001) | 14% (or \$9.70 whichever is the greater) |
| (ii) Afternoon Shift (from 1/11/2001) | 12.5% (or \$9.70 whichever is the greater) |
| Night Shift (from 1/11/2001) | 15% (or \$9.70 whichever is the greater) |
- (b) For the purposes of this clause:-
- (i) ‘Afternoon shift’ shall mean a shift, other than a night shift as defined herein, commencing at or after 12 midday;
- (ii) ‘Night shift’ shall mean any shift commencing at or after 6.00pm or before 7.30am the following day, the major portion of which is worked between 6.00pm and 7.30am;
- (iii) The percentage which is quoted shall be the amount which is payable for each shift in addition to the employee’s ordinary time wage rate.
- (c) This allowance shall not apply to work performed on Saturday and Sunday and statutory holidays where extra payments apply for such work.”.

Dated this tenth day of April, 2001.

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

Operative Date: 1 May 2001
Amendment – Allowance for Afternoon and Night Work
Released: 28 November 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**The Australian Workers’ Union of Employees, Queensland AND Queensland Chamber of Commerce
and Industry Limited Industrial Organisation of Employers (No. B568 of 2001)**

PRIVATE HOSPITALS AND NURSING HOMES INDUSTRY AWARD – STATE

COMMISSIONER SWAN

18 September 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 18 September 2001, this Commission orders that the said Award be amended as follows as from the eighteenth day of September, 2001:-

By deleting clause 2.5 Part C – NURSING HOMES, Section 2 (Extra Payments for Afternoon and Night Shifts) and inserting the following in lieu thereof:-

“2.5 Allowance for Afternoon and Night Work

- (a) In addition to the rates of pay prescribed by clause 1.2 (Rates of Pay) Part D, Section 1 of this Award, employees whilst engaged on afternoon shift and night shift, as defined, shall be paid an additional penalty rate for each such shift as follows:-
- | | |
|---------------------------------------|--|
| (i) Afternoon Shift (from 18/9/2001) | 12% (or \$9.70 whichever is the greater) |
| Night shift (from 18/9/2001) | 14% (or \$9.70 whichever is the greater) |
| (ii) Afternoon Shift (from 1/11/2001) | 12.5% (or \$9.70 whichever is the greater) |
| Night Shift (from 1/11/2001) | 15% (or \$9.70 whichever is the greater) |
- (b) For the purposes of this clause:-
- (i) ‘Afternoon shift’ shall mean a shift, other than a night shift as defined herein, commencing at or after 12 midday;
- (ii) ‘Night shift’ shall mean any shift commencing at or after 6.00pm or before 7.30am the following day, the major portion of which is worked between 6.00pm and 7.30am;
- (iii) The percentage which is quoted shall be the amount which is payable for each shift in addition to the employee’s ordinary time wage rate.
- (c) This allowance shall not apply to work performed on Saturday and Sunday and statutory holidays where extra payments apply for such work.”.

Dated this eighteenth day of September, 2001.

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

Operative Date: 18 September 2001
Amendment – Allowance for Afternoon and Night Work
Released: 28 November 2001

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