



# The Queensland Government Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$297 + GST

ISSN 0155-9362

Vol. 168

FRIDAY, 14 DECEMBER, 2001

No. 15

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
CA568/01	John Holland Pty Ltd Civil Construction - Certified Agreement 2001	30/11/01	CA605/98
CA571/01	Bob Young t/a B & F Waterproofing Systems - Certified Agreement	30/11/01	
CA569/01	Queensland Shopfronts and Doors Pty Ltd - Certified Agreement	30/11/01	
CA561/01	I.M.S. Innsol Pty Ltd - Certified Agreement 2001/2002	30/11/01	
CA562/01	Stowe Australia Pty Ltd - Certified Agreement 2001/2002	30/11/01	CA79/00
CA563/01	Heyday Group (Qld) Pty Ltd - Certified Agreement 2001/2002	30/11/01	CA223/99

E. EWALD  
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

*WorkCover Queensland Act 1999*

**WorkCover Queensland AND Patricia Mary Downey (No C70 of 2001)**

PRESIDENT HALL

4 December 2001

DECISION

The respondent applied for workers compensation on 10 November 2000. The application was in respect of an injury described in the application as carpal tunnel syndrome to both wrists. The description given of causation was: "heavy lifting over the years". The application was supported by a medical certificate issued on 9 November 2000 by Dr John M. Osgood which showed the appellant has been totally incapacitated for work from 11 November 2000 to 9 December 2000. Dr J.M. Osgood diagnosed her condition as carpal tunnel syndrome.

In a statement to the self insurer dated 15 November 2000, the respondent said, *inter alia* –

“Although I have been having problems with my hands since 1996-1997, initially the symptoms were not too aggressive and I was able for the most part, to not worry about them too much. I have checked with Dr Osgood, and the first time I saw him regarding my hands was the 15 May 1997. . . . I think from the first time that I saw Dr Osgood about my hands, he has always said it was carpal tunnel syndrome. I remember that he said that my condition would have been caused by the constant and heavy lifting that I have been doing all the time.”.

The self-insurer rejected the claim on the ground that by s. 158(1) of the *WorkCover Queensland Act 1996* the application was statute barred. A statutory review confirmed that decision. The respondent successfully appealed to the Industrial Magistrate’s Court at Brisbane. It is against that decision that this appeal is brought.

It is necessary to set forth the terms of ss. 158 and 168 of the *WorkCover Queensland Act 1996*. The sections are limited by subject matter and by s. 168(4) which makes s. 168(2) “subject to s. 158(2)”.

**“158 Time for applying**

- (1) An application for compensation is valid and enforceable only if the application is lodged within 6 months after the entitlement to compensation arises.
- (2) If an application is lodged more than 28 days after the entitlement to compensation arises, the extent of WorkCover’s liability to pay compensation is limited to a period starting no earlier than 28 days before the day on which the valid application is lodged.
- (3) Subsection (2) does not apply if death is, or results from, the injury.
- (4) WorkCover must waive subsection (1) for a particular application if it is satisfied that special circumstances of a medical nature, decided by a medical assessment tribunal, exist.
- (5) WorkCover may waive subsection (1) or (2) for a particular application if WorkCover is satisfied that a claimant’s failure to lodge the application was due to–
  - (a) mistake; or
  - (b) the claimant’s absence from the State; or
  - (c) a reasonable cause.

**168 Time from which compensation payable**

- (1) The entitlement to compensation for an injury arises on the day the worker is assessed by –
  - (a) a doctor; or
  - (b) if the injury is an oral injury and the worker attends a dentist – the dentist.
- (2) However, any entitlement to weekly payment of compensation starts on –
  - (a) if a doctor or dentist assesses the injury as resulting in total or partial incapacity for work on the day the worker stops work because of the injury – the day after the worker stops work because of the injury; or
  - (b) if a doctor or dentist assesses the injury as resulting in total or partial incapacity for work on a day later than the day the worker stops work because of the injury – the day the doctor or dentist assesses the injury.
- (3) Subsections (1) and (2) are not intended to limit any availability for compensation for the day of injury provided for under part 7A.
- (4) Subsection (2) is subject to section 158(2).”

With respect to the careful argument of counsel for WorkCover, it is correct but unhelpful to start with the proposition that only WorkCover Queensland (or an appellate tribunal) can determine entitlement to compensation. A period of limitation which commences upon success of a claim would be a futility. Given that the expression “after the entitlement to compensation arises” is not to be given its natural meaning, one would (*prima facie*) expect that a statutory meaning would be provided. It seems to me that at least one meaning is provided by s. 168(1)(2).

Because subs. (2) operates as an exception to or a limitation upon the operation of subs. (1), it seems to me that the expression “assessed by a doctor” (or for that matter “assessed by a dentist”) must be taken to mean “assessed by a doctor as resulting in total or partial incapacity for work”. I.E., where the commencement of the limitation period is said to be triggered by the activity of a doctor, it is necessary to show that a doctor has assessed the alleged injury as involving partial or total incapacity. The exception or limitation at s. 168(2) both protects the worker against a doctor retrospectively unleashing the limitation period by an assessment that the total or partial incapacity was present many months ago, and protects insurers against an assessment that total or partial incapacity has been present for a few months. The legislature must have intended that s. 168 will be used in the interpretation of s. 158. The legislature had both sections present to the mind at the same time. Section 168(4) expressly refers back to s. 158(2).

There is force in the submission for WorkCover Queensland that, so construed, s. 158(1) is a limitation period wholly unsuited to the operation of what might be described as the “repair of the body” elements of the legislative scheme (at chapter 4,) and fails to insure that potential claimants give insurers the opportunity to manage injury from the earliest stage. However, I can understand why an Industrial Magistrate in dealing with a remedial statute (which should, of course, be interpreted beneficially,) was unwilling to depart from the literal meaning to develop a legislative scheme which is properly the province of the legislature.

In my view the claim was not statute barred. The decision of the Industrial Magistrate was correct. I dismiss the appeal.

Counsel for the respondent has asked for costs. The obstacle is s. 510A of the *WorkCover Queensland Act 1996*. One can feel for the respondent, a woman of slender means, who has been forced to bear the costs of a test case. However, one cannot conclude that in appealing to settle an unresolved and controversial point of WorkCover Queensland acted "vexatiously or without reasonable cause". I reject the application for costs.

Dated this fourth day of December, 2001.

D.R.HALL, President,

Released: 4 December 2001

*Appearances:-*

Mr J. Farrell directly instructed by WorkCover Queensland for the appellant.

Ms J. Ryrie instructed by Sciacca's Lawyers and Consultants for the respondent.

#####

#### INDUSTRIAL COURT OF QUEENSLAND

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

#### **WorkCover Queensland AND James Manuel (No. C66 of 2001)**

PRESIDENT HALL

30 November 2001

#### DECISION

The respondent applied for workers compensation flowing from an injury suffered in his employment on 9 March 2000. The application was accepted by WorkCover. On 29 March a certificate was issued by a Dr Kuhnemann, an orthopaedic surgeon, certifying that the respondent would be totally incapacitated from 9 March 2000 to 14 April 2000. Compensation was paid up to and including 14 April 2000. No payments were made after 14 April 2000. WorkCover Queensland ceased payments on the basis that any consequences flowing from the injury suffered by the respondent had ceased at that date. Disappointed with the outcome of the statutory review process, the respondent appealed to the Industrial Magistrate at Southport. He was successful.

On the basis of the evidence of Dr Kuhnemann who had prepared a report which was tendered and who gave evidence (on the telephone) the Industrial Magistrate found:

" . . . the CT scan performed on Mr Manuel showed a sclerosis of the pars intra-articulosis with some degeneration disease of the facet joint. It further showed no increased activity in the region of the pars intra-articulosis of L5, indicating no fresh injury at that point. This is confirmed by Dr Kuhnemann who says in his report of 19 April 2000 that the bone scan demonstrated no activity in the pars defected L5, and his CT scan demonstrated no evidence of any significant disc protusion. Dr Kuhnemann says that he thinks the symptoms experienced by Mr Manuel are due to muscle spasms most likely from an aggravation of his present defect."

After noting the evidence of another orthopaedic surgeon, Dr Parkington, who examined the respondent on 14 April 2000 and who concluded that the respondent's symptoms were attributable to an underlying degenerative condition neither caused nor aggravated by the respondent's work, the Industrial Magistrate concluded, because Dr Kuhnemann had seen the respondent earlier and more often, that notwithstanding the inconsistencies in Dr Kuhnemann's evidence, he should prefer the evidence of Dr Kuhnemann. On the basis of Dr Kuhnemann's evidence the Industrial Magistrate concluded that the respondent was incapacitated for work by reason of an injury within s. 34 over the whole of the period 9 March to 26 July 2000. Regrettably, the Industrial Magistrate was entirely incorrect.

The thesis developed by Dr Kuhnemann was that as a result of an underlying degenerative condition and an incident in September of 1998, the respondent was afflicted by a very bad back indeed. Although there would be periods when the back was asymptomatic, incidents, both at work and elsewhere, which others would regard as within the normal vicissitudes of life, would cause the back to become disablingly painful. On occasion, the respondent's back would become painful in the absence of an identifiable cause, and possibly because the underlying condition produced muscle spasms.

There was no inconsistency in Dr Kuhnemann's evidence. Dr Kuhnemann was at all times insistent that, as and from 14 April 2000, the symptoms (basically pain) displayed by the respondent were in no way attributable to the aggravation of his existing condition caused by the incident of 9 March 2000. Indeed, after that date Dr Kuhnemann had issued the respondent with the Centrelink Certificates for incapacity to work unrelated to the respondent's earlier employment. Dr Kuhnemann's evidence that he would normally expect the symptoms arising from the incident of 9 March 2000 to continue for 6 to 12 weeks is not inconsistent with his evidence that the aggravation had ceased by 14 April 2000. Dr Kuhnemann expressly said that he put the respondent's case outside the normal category of case because on the CT scan there was no indication of any recent activity or of any new injury. The Industrial Magistrate was right to notice that it was the evidence of Dr Kuhnemann that on 26 July 2000 the symptoms displayed by the respondent were symptoms which he displayed by him on 29 March 2000. But (importantly) Dr Kuhnemann went on to make plain that, although the pain was the same, the pain had a different cause, viz the underlying degenerative condition.

The Industrial Magistrate had the advantage of hearing the witnesses. With respect, His Worship misused that advantage. The evidence of Dr Kuhnemann has been misunderstood. Even on an appeal against the exercise of discretion the Court would interfere where the tribunal of first instance was mistaken as to the facts, compare *House v The King* (1936) 55 CLR 499.

I allow the appeal. I set aside the decision of the Industrial Magistrate. I order that the respondent's appeal to the Industrial Magistrate Court be dismissed.

By its notice of appeal WorkCover Queensland sought costs. It is the affect of s. 510A of the *WorkCover Queensland Act 1996* that costs are not recoverable by an appellant. WorkCover Queensland does not seek costs in respect to the proceedings in the Industrial Magistrate Court.

Dated this thirtieth day of November, 2001.

D.R. HALL, President.

Released: 30 November 2001.

*Appearances:-*

Mr G.C. Rhead for the appellant.

Mr S. McLeod, instructed by Murphy Podmore and Associates for the respondent.

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 459 – application for order to observe rules of an organisation

Gregory McMahon AND Timothy Griffin (No. C85 of 2001)

PRESIDENT HALL

30 November 2001

REPORT ON DECISION (as edited)

In giving a decision from the Bench on 29 November 2001, President Hall stated:–

“The matter currently before the Court arises in the following way. On 18 September 2001, the annual general meeting (AGM) of The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees was due to be held.

Notice of the AGM had been given as required by rules 15(b) and 15(c) of the Association. The meeting lapsed for want of a quorum. With the consent of the Industrial Registrar, a further meeting is scheduled for tonight, 29 November 2001.

By an application under s. 459 of the Industrial Relations Act 1999, orders are sought which, in short form, would require that the meeting not be held, would set a date for an alternate meeting, and would require the president to distribute to all members of the Association written notice of the time, date and place of such an alternate meeting and at least 14 days prior to that date, certain indications of intention to move motions by the applicant.

I have some doubt that it is the effect of the rules that a matter can be raised at the AGM only where notice of motion has been given and have some doubt that it is the effect of rule 15 that only the secretary can distribute any notices of motion or indications of intention to move motions.

It is not necessary to decide those points. I am satisfied that on a fair perusal of the rules, while the president may be entitled – and I do not finally determine that he is – to distribute notices of motion and/or intentions to move motions, the president is not under any obligation to distribute notices of motion or indication of intention to move motions when requested by a member, financial or otherwise. In those circumstances, it seems to me that there is no basis for the grant of the relief sought.

I should indicate that I entertain some doubt that, if such an obligation was imposed upon the president, non-compliance with it would have the consequence that the meeting set for this evening would be a nullity.

I also have some doubt about whether s. 459 does vest this Court, which is a statutory tribunal which has no inherent jurisdiction, with the power to make an order preventing the meeting from being heard.

If I had taken different views about matters to which I have referred, I would adjourn the matter to hear further evidence about whether, indeed, s. 463(2) has been satisfied. I dismiss the application.”.

Dated this thirtieth day of November, 2001.

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

Released: 30 November 2001

Appearances:–  
Mr J. Merrell instructed by Roberts and Kane Solicitors for the applicant.  
Mr M. Plunkett directly instructed by The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees for the respondent.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – Industrial Relations (Tribunals) Rules 2000

AgForce Queensland Industrial Union of Employers AND The Australian Workers' Union of Employees, Queensland (No. 2)(No.B391 of 2001)

SHEARING INDUSTRY AWARD – STATE

PRESIDENT HALL  
COMMISSIONER K.L. EDWARDS  
COMMISSIONER J.M. THOMPSON

29 November 2001

REPORT ON DECISION  
(as edited)

In delivering a decision of the full bench 8 November 2001 President Hall stated:–

“The matter before the Commission is an application by the organisation known as AgForce Queensland Industrial Union of Employers to discontinue proceedings in matter number B391 of 2001.

The application is made in circumstances in which there has been both a response and a counter-proposal to the application bearing the number B391 of 2001.

We do not accept that if AgForce Queensland Industrial Union of Employers were granted leave to withdraw the application that would terminate what is in truth an application bearing the name ‘counter proposal’.

Additionally, elements of the counter-proposal are intelligible only when read against the language which appears in the initiating document, the application which bears the number B391 of 2001. In those circumstances, we have decided to reject the application to discontinue the proceedings.

We note that there is an issue as to whether having regard to the basis on which other matters between the parties were resolved, a decision should be made under s. 331 to refrain from hearing the counter-proposal until the year 2003 hearing claims contained in the application of AgForce Queensland Industrial Union of Employers until 2003 in the same way that we have already decided to refrain from. However no application under s. 331 has yet been made.”.

Dated this twenty-ninth day of November, 2001.

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

*Appearances:-*

Mr W.J. Turner for AgForce Queensland Industrial Union of Employers.  
Mr B. Swan for The Australian Workers' Union of Employees, Queensland.

Released: 30 November 2001

#####

#### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Greg Massart AND Kentlands Pty Ltd t/a Bluebird Taxi Trucks (No. B464 of 2000)**

COMMISSIONER FISHER

4 December 2001

Application to amend or void contract – Contract not unfair because it did not provide industry standards – No evidence that contract designed to avoid Award – Contract void save remuneration provisions – Compensation ordered.

#### DECISION

This is an application (as amended) by Greg Massart and G.C. Massart and K.E. McCoy (a partnership) under s. 276 of the *Industrial Relations Act 1999* (the Act), for orders amending or voiding the contract for services between Kentlands Pty Ltd trading as Bluebird Taxi Trucks and Greg Massart. The applicant contends the contract was unfair within the meaning of s. 276 of the Act in that:

- (i) it is harsh, unconscionable or unfair; and/or
- (ii) it provides, or has provided, a total remuneration less than that which a person performing work as an employee would receive under an industrial instrument or this Act; and/or
- (iii) it is designed to, or does, avoid the provisions of an industrial instrument.

These three grounds of unfairness essentially repeat paragraphs (a), (c) and (d) of the meaning of unfair contract defined in s. 276 of the Act.

#### **The contract**

Greg Massart is a partner in the partnership of G.C. Massart and K.E. McCoy. That partnership had operated a business and had owned and operated a truck before purchasing another vehicle and entering into a contract with the respondent.

In or about February 1997, Mr Massart was searching for a business when he saw an advertisement in “The Courier Mail” for an owner driver to purchase a 3 tonne truck. The advertisement said there was a permanent account, work was available five days per week and the earnings were \$40-\$45, 000 per annum, paid weekly. Mr Massart contacted the owner, Kevin Mobbs, and after discussions with Mr Mobbs and a consultant to Kentlands, Mervyn Collins, Mr Massart agreed to purchase the vehicle. In these discussions with Messrs Mobbs and Collins, Mr Massart was satisfied that permanent work was available, through Kentlands providing transport services for a company called Cospak Pty Ltd (Cospak). Mr Massart agreed to work between 40 and 48 hours per week and agreed to accept payment of \$18 per hour worked. This rate was increased twice over the life of the contract, which was terminated in June 2000. The first increase was to \$18.50 per hour after 18 months and then to \$19.50 per hour approximately six months prior to the conclusion of the contract.

At the commencement of the contract the applicant primarily provided transport services for Cospak but was available and provided transport services for other businesses at the direction of the respondent. By the end of the contract the applicant was exclusively providing services for Cospak, although on the evidence of Mr Massart, he advised that from time to time, when the work for Cospak had finished early, he sought other work from the respondent.

The respondent resisted the proposition that a contract for services existed between it and the applicant contending instead that the applicant had a contractual or employment relationship with Cospak. The respondent argued that it only provided an administrative service for the applicant and Cospak, providing invoices and taking care of the taxation arrangements. At the point of the final submissions the respondent conceded that a contract for services had existed. Because of the lateness of the concession a deal of evidence was called about the nature of the relationship between the applicant and the respondent. It became apparent from the evidence, sufficient for the Commission to form its own conclusion, that a contract for services existed. In light of the respondent’s concession, it is not the intention of the Commission to provide reasons for its conclusion.

The contract between the applicant and the respondent was terminated due to the change in the taxation system that occurred in July 2000. Given its belief that only an administrative service was being provided, that the applicant was the sole provider of transport services to Cospak and the requirements of a new tax system, the respondent decided that it was not cost effective to continue the arrangement.

This decision coincided with one taken by Cospak that it did not wish to continue to have a business relationship with Kentlands Pty Ltd. The applicant continued to provide Cospak with transport services for several weeks after the contract was terminated.

### Was the contract an “unfair contract”?

The applicant contends that the contract was an unfair contract on the three grounds listed above. The respondent, after making the concession that a contract for services existed, argued that it was not unfair and relied on case law and evidence from a Chartered Accountant to support its position.

#### Harsh, Unconscionable or Unfair.

The applicant submitted that the contract provided for rates below the industry standard, which, in the applicant’s submission, is determined by the application of the formula contained in the Owner Driver’s Costing Manual. This is a publication produced annually. The costings are developed by representatives of the Transport Workers’ Union of Australia (Queensland Branch) (TWU) and the Queensland Trucking Association (QTA).

Evidence about the Manual was called from Peter Biagini, an Organiser of the TWU, and Peter Garske, Executive Director of the QTA. It was Mr Garske’s evidence that, from the QTA’s perspective, the Costing Manual was only to be used as a resource or a guide. The Manual was accepted in the heavy motor sector of the industry for the purpose of assisting in calculating rates paid to subcontractor owner drivers. It had not gained wide acceptance in other sectors of the industry. In addition, certain pages in the Manual were inserted without the QTA’s knowledge or consent. These pages set out the “TWU/Recommended Owner Driver Costing Formula: Rates for Permanent and Casual Owner Drivers.”

In this case the Commission is not prepared to accept the argument that the contract was unfair because it did not provide the industry standard rates according to the Owner Driver’s Costing Manual. The applicant kept meticulous records of all income and expenditure associated with the vehicle. These records show the true costs of running the vehicle. They are substantially less than the costs given in the Owner Driver’s Costing Manual. Because they are accurate, they are to be preferred to notional or estimated costs.

The second reason this argument is rejected is the evidence of Mr Biagini who conceded that the Costing Manual had not been generally accepted in the taxi truck industry. This is the industry in which Kentlands and the applicant were engaged. It seems to be unreasonable then to rely on the Costing Manual as providing a basis for unfairness in this case when it has not gained any real level acceptance in this sector of the industry.

When this reason is added to the reason that the applicant kept meticulous records, the Commission is not satisfied that the contract was harsh, unconscionable or unfair because it did not provide industry standards according to the Owner Driver’s Costing Manual. Whether it was generally harsh, unconscionable or unfair or could be found to be so for other reasons is discussed later.

#### Remuneration Less than an Industrial Instrument.

##### Avoidance of the Provisions of an Industrial Instrument.

These two grounds were considered together by the applicant. It was submitted that had the applicant been an employee, the Transport, Distribution and Courier Industry Award – Southern Division would have applied. This Award would have provided a greater total remuneration than that received by the applicant when considering the hours worked and the net income of the applicant.

Mr Biagini provided evidence about the remuneration that would have been received had the Award applied. Mr Biagini relied on Mr Massart’s records of his hours worked, kept for the period from 24 August 1998 until the termination of the contract. He also relied on information from Mr Massart that he had worked an average of 42 to 43 hours per week from the commencement of the contract. In making the calculation, Mr Biagini used an award weekly wage rate of \$303.60 per week. This rate is provided in clause 2(a) of Schedule 2 Owner Driver Rates of the Award for an employee providing their own vehicle. This rate is less than the owner driver rate for a motor lorryman providing their own vehicle found elsewhere in the Award. The lesser rate was used to err on the side of caution.

According to Mr Biagini’s calculations, the total amount payable under the Award for the period of the contract was \$160, 885.20. The applicant actually received \$139, 182.00. The difference between these two amounts is \$21, 703.20. It is this amount that the applicant claims as compensation for unfairness based on these two grounds.

The respondent commissioned James Scott, a partner in the firm of Chartered Accountants, Douglas Heck and Burrell, to prepare a report in relation to the applicant’s claim. Mr Scott was given a number of assumptions and asked to make calculations about earnings and the after tax situation. The assumptions included:

- to accept the amount claimed (\$21, 703.20) but to assume Mr Massart was engaged as a full-time employee under the Award and to calculate the resulting tax effect on the claim.
- that Mr Massart was engaged as a full-time employee under the Award;
- that Mr Massart was engaged as a casual employee under the Award;
- that overtime was worked as either a full-time or casual employee; and
- that overtime was not worked.

Two assumptions were later provided to Mr Scott to make further calculations. The difficulty with the calculations is that Mr Scott did not have access to the hours or numbers of weeks actually worked by Mr Massart. Despite this, the respondent claims Mr Scott’s analysis is relevant because the Commission needs to consider how the Company could have worked Mr Massart had he been an employee. In addition the calculations assist in establishing the extent of any unfairness. The Commission accepts the accuracy of the calculations, but except for the calculations using the applicant’s claim and that which assumed Mr Massart was employed personally as an owner driver and earned the same amount as he earned for the contract period, finds they provide little assistance in resolving the matter.

Mr Scott calculated that had Mr Massart been employed under the Award for the period, the tax payable on the earnings calculated by Mr Biagini was \$13,076. This would have given him a net income of \$147, 809 over the period February 1997 to June 2000. Under the contract, Mr Massart paid tax of \$4, 621 on income of \$139, 182. The difference between the net earnings under the Award and the net income from Mr Massart’s portion of the partnership is \$13, 248.

From the calculations provided, the Commission is satisfied that the contract was an unfair contract in that it provides, or has provided, a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument. While the respondent cautioned me against using mathematical calculations to make this finding, it seems to me that this is what is contemplated by this section. A question for separate determination is whether, having arrived at this conclusion, the unfairness should be remedied.

Mr Biagini’s calculations showed that by receiving less remuneration under the contract than had Mr Massart been an award employee, the contract avoided the provisions of the Transport, Distribution and Courier Industry Award – Southern Division. The Commission does not have any evidence to suggest the contract was designed to avoid the provisions of the Award.

**Should the contract be amended or declared void?**

Having decided the contract was unfair, the Commission must now consider whether the contract should be amended or declared void. Section 276(2) sets out the types of considerations the Commission may take into account:

- (a) the relative bargaining powers of the parties to contract and if applicable, anyone acting for the parties, or
- (b) whether any undue influence or pressure was exerted on, or unfair tactics were used against, a party to the contract, or
- (c) an industrial instrument or this Act, or
- (d) anything else the Commission considers relevant.

The respondent urged the Commission not to take any action in relation to the contract and relied on several decisions in other jurisdictions to support its position. The Commission was taken to the decision of Dowsett J, in *Buchmueller v Allied Express Transport Pty Ltd* (1999) FCA 319 at para 42.

“I accept that a mere discrepancy between the actual return pursuant to a contract and the notional return pursuant to an award does not compel a finding that the contract was unfair or harsh. There may be reasons for a person choosing to be a contractor rather than an employee. He or she may hope for long-term financial benefits despite short-term disadvantages, or the flexibility of working hours may offer some special attraction. In the present case, however, there were not factors sufficient to offset the substantial financial disadvantage incurred by the applicant.”

This was relied on to argue that a remedy need not be accorded even if it is established that there is a financial deficiency. The remainder of the paragraph from which the above quotation is taken is also relevant to the present matter:

“To some extent, this disadvantage was contributed to by the applicant’s inexperience, but the bulk of it was attributable to the unfairness of the contracts. In the absence of other significant attractions for the applicant, it could not be fair to expect him to accept substantially less than the value of the award for somebody in a similar position.”

The respondent also referred the Commission to decisions, which address circumstances where a person or persons have made what in time has turned out to be a poor or an imprudent commercial decision. In this regard, the respondent cited the decisions of *Stevenson v Barham* (1977) 136 CLR 190 and *Autobake Pty Ltd v Budd* (1986) 19 IR 18. The principles emanating from these decisions relate to situations where there was no inequity in the bargaining positions of the parties to the contract.

The respondent contended this was not a case where unequal bargaining power existed between the parties. It said that Mr Massart was not looking to become an employee but to participate in a business venture. There were taxation benefits in having a partnership and operating as an independent contractor. He believed that by entering into the contract for services with the respondent that he would receive a reasonable income. He was aware of the income received by the previous owner driver from whom he had purchased the truck.

Against this the applicant argued his bargaining power was less than the respondent’s. It was asserted the applicant had not had a long standing background in the industry and was unaware of the existence of the Owner Driver’s Costing Manual. These factors together with the presence of other potential purchasers of the truck contributed to the applicant being in a weaker bargaining position.

On this matter, the Commission prefers the submission of the respondent. In such circumstances the Commission would not ordinarily interfere to remedy a situation, which had not turned out to be as profitable as anticipated.

This is not a case of “mere discrepancy”. The difference in my view is that to quote the words of Dowsett, J., “. . . it could not be fair to expect him to accept substantially less than the value of the award for somebody in a similar position.”. The evidence before the Commission is that the applicant accepted substantially less than the provisions of the Award, even when the lowest relevant minimum award rate was taken into account. It is for this reason that the Commission would be persuaded to amend or declare void the contract.

Before reaching that point, the Commission must consider a further submission by the respondent. The contract was entered into prior to the commencement of the *Industrial Relations Act 1999*. Although unfair contract provisions were contained in the *Workplace Relations Act 1997*, they were not in the same terms as the present legislation. Section 290 of that Act only allowed the Commission to amend or declare void a contract if it considered that it is a contract for services that is designed or does avoid the provisions of an industrial instrument and the contract is harsh, unconscionable or unfair. The test under s. 290 of the Workplace Relations Act was a conjunctive one. In the circumstances, the respondent submitted that the Commission cannot, or in the alternative, should not, make any order for payment in respect of work performed prior to the commencement of the *Industrial Relations Act 1999*.

In response to this argument, the applicant contended the application could have been made under the previous Act as the contract is argued to be unfair because it is harsh, unconscionable or unfair and is designed to, or does, avoid the provisions of an industrial instrument. Both of these arguments were contained within the amended application.

The Commission accepts this application could have been made under the Workplace Relations Act as the claimed grounds of unfairness reflect the provisions of that Act. The Commission has found that the contract in question meets two of the three requirements under the previous legislation. The Commission did not find the contract was unfair for the claimed reason of the Owner Driver’s Costing Manual. The test for unfairness under the Workplace Relations Act and under s. 276 (7) (a) of the Industrial Relations Act would be that enunciated in *Baker v National Distribution Services Ltd* (1993) 50 IR 254 where the approach of Sheldon J in *Davies v General Transport Development Ltd* (1967) AR (NSW) 371 was cited with approval. That test was said to be “the common sense approach characteristic of an ordinary jurymen. . . It is a plain matter of morals not law.” Although restraint was cautioned in exercising the power to amend or void a contract, the disparity that has been evidenced in this matter between the contract and the Award would have been such that had the application been made under the previous legislation, the Commission may well have been sympathetic to the claim. In such a case the unfairness might be said to have arisen in the special circumstances of and surrounding the particular contract – *Barry v Incitec Ltd* (1999) 45 IR 143. Both the provisions of the Workplace Relations Act and the Industrial Relations Act relating to unfair contracts are focused on the advantage that has been taken of a worker to obtain cheap labour.

In this matter the Commission has decided that a contract for services existed and that it was an unfair contract. In deciding whether to amend or declare void the contract or part of it, the Commission has taken into account the provisions of the relevant Award. Using the lowest relevant wage rate under the Award, the applicant was found to have received substantially less than had Mr Massart been engaged as an employee. The significance of the difference in remuneration received as a contractor compared to a person who had performed work as an employee has led the Commission to determine that a remedy should be ordered. In the words of Dowsett, J, the significant difference “could not be fair”.

Section 276 (5) of the Act enables the Commission to make an order it considers appropriate about payment for an amount for a contract that is amended or declared void. The respondent argued that the applicant had received a taxation benefit from being in a partnership rather than being an employee and

sought that this be taken into account should compensation be awarded. Further, the respondent submitted that any order of compensation should take into account that the tax would be split between the partners and as a result a greater net amount would be received than had Mr Massart be engaged as an employee.

The Commission has considered this submission but decided not to proceed along those lines. The amount of compensation ordered is based on the lowest award rate which is relevant. Arguably, a higher rate and perhaps a more appropriate rate could have been used. This was not done by the applicant and without more information about the history and applicability of the two rates in question, the Commission decided to also err on the side of caution and rely on the rate submitted. As a consequence, the order for compensation made may be less than it might have otherwise been.

The applicant has been found to have been financially disadvantaged over the period of the contract. Had he been receiving amounts equivalent to or better than the Award during the life of the contract, he would have received the benefit of that at the time. Such benefits may have included interest. The applicant is now the beneficiary of an order for compensation nearly eighteen months after the contract was terminated. Any small taxation benefit the applicant might now receive could be seen as offsetting his inability to access that income, or interest, at the time the contract was on foot.

In addition, the benefits available to an employee under an Award or legislation such as paid annual leave, sick leave or superannuation are not available to Mr Massart and have not been taken into account in calculating compensation. It seems that the appropriate amount in this case is a sum that represents the difference between the amount earned by the applicant pursuant to the contract and the amount Mr Massart would have received had he been an award employee and paid in accordance with clause (2) (a) of Schedule 2 of the Award. The amount ordered is a gross amount and is to be taxed according to law. It will be a matter for the Australian Taxation Office to determine whether this payment or indeed any other income received by the partnership through its relationship with Kentlands has received the appropriate tax treatment.

Accordingly, the Commission makes the following orders:

1. The contract between the parties be declared void save and except for provisions of the contract that have entitled the applicant to remuneration throughout the course of the contract.
2. That compensation in the amount of \$21 703 be paid by the respondent to the applicant. Such amount to be taxed according to law.

No submissions were put on the period for the payment of any compensation that might be awarded. Ordinarily, the Commission would order payment within 22 days of the date of release of the decision. The compensation awarded is not an insignificant amount. In these circumstances the Commission considers that it would not be unreasonable for the amount to be paid in two equal instalments. The following further order is then made:

3. That the respondent pay the compensation ordered above to the applicant in two equal instalments. The first instalment is to be paid within 22 days of the date of release of this decision. The second instalment is to be paid 30 days from the date of the payment of the first instalment.

The Commission orders accordingly.

G.K. FISHER, Commissioner.

*Appearances:-*

Mr M. Brady (Barrister) instructed by J. Dwyer of Reidy and Tonkin solicitors.

Mr A. Horneman-Wren (Barrister) instructed by Mr R. King of Deacons Lawyers and with them Mr J. Dodds for the respondent.

Released: 4 December 2001

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Leteica Kajewski AND Spiral Inc. (No. B337 of 2001)**

COMMISSIONER EDWARDS

5 December 2001

Application for Reinstatement – Termination – Costs – Submissions – *State Home and Community Care Service Providers Agreement* – Approved Services – Use of Grant – Respondent Determined as Employer – Costs Awarded.

DECISION

On 11 September 2001 (168 QGIG 40–44) the Commission decided that submissions would be received on the question of costs.

The Commission received submissions from both parties.

On 11 October 2001 Mr S. Alexander of Carroll, Alexander & Associates on behalf of Spiral Inc. provided material from MSAN Woodward, Chartered Accountants and Queensland Health suggesting that Spiral Inc. did not have authority to pay amounts awarded by the Commission as such funding would not be within funding guidelines.

By decision of the Commission the matter was listed for hearing on 13 November 2001 to enable Mr Alexander to specify the clauses of the guidelines upon which the Chartered Accountants and Queensland Health relied to arrive at such a view. At this hearing, material of a general nature, which did not specify the clauses, was provided.

On 20 November 2001 Mr Alexander provided further correspondence from MSAN Woodward, Chartered Accountants.

In considering the submissions and material presented, the Commission acknowledges that the *State Home and Community Care Service Providers Agreement* provides for “approved services” and “use of grant”.

Clause 1(1)(a) states:-

“1.(1) In this Agreement unless the contrary intention appears the following words and phrases shall have the following meanings:

- (a) ‘approved services’ means home and community care services jointly approved by the Commonwealth Minister and the State Minister which provide basic maintenance and support to the target group as described in the National Guidelines and specified in paragraph 5 of Schedule 1. Such services include one or more of the following –
- . home help or personal care (or both);
  - . home maintenance or modification (or both);
  - . food;
  - . community respite care;
  - . transport;
  - . community paramedical services;
  - . community nursing;
  - . assessment or referral (or both);
  - . education or training for service providers and users (or both);
  - . information;
  - . co-ordination; or
  - . such other service as is agreed upon by the Commonwealth Minister and the State Minister”.

Clause 2.(3) states:-

“2.(3) The grantee shall use the grant for the approved project and shall not use the grant for any other purpose”.

In managing the approved projects and providing the approved services it is necessary for Spiral Inc. to employ labour. The authority for Spiral Inc. to employ labour is provided for by clause 10(1) of the State Home and Community Care Service Providers Agreement which states:-

“10.(1) The Grantee is responsible for all persons employed by it.”.

Under s. 6.(1) of the *Industrial Relations Act 1999* an employer is defined as:-

“6.(1) An ‘employer’ is –

- (a) a person employing, or who usually employs, 1 or more employees, for the person or someone else; or

...”.

Spiral Inc. was in receipt of a grant to care for clients including Ms Boast and to manage the client it was necessary to employ Ms Kajewski. As an employer Spiral Inc. must assume all responsibilities whether they be at the time of engagement, during the employment or at the time of separation.

The Commission does not accept the opinion of MSAN Woodward, Chartered Accountants or Queensland Health that the orders made by the Commission are not within the funding guidelines.

An application for an award of costs may be made under s. 335 (1)(b) of the *Industrial Relations Act 1999* which states:-

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

... .

- (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.”.

McColm Matsinger Lawyers have made detailed submissions in relation to the question of unreasonable acts by Spiral Inc. in the conduct of the dismissal and the application.

The Commission accepts that a significant aspect of the matter was the fact that Spiral Inc. failed to conduct a satisfactory investigation into the allegations and there was no record of any incident being recorded in official log books. This led to willingness by Ms Kajewski to settle the application but there was no satisfactory response by Spiral Inc.

On consideration of all the factors but in particular those mentioned above, the Commission is prepared to award costs as provided for in Rule 66(1)(a) of the *Industrial Relations (Tribunals) Rules 2000* which provides for costs in accordance with the scale of costs for Magistrates Courts.

The Commission orders accordingly.

K.L. EDWARDS, Commissioner.

Released: 05 December 2001

*Appearances:-*

Mr M. Devine, of McColm Matsinger Lawyers on behalf of the applicant.

Mr S. Alexander of Carroll Alexander & Associates on behalf of the respondent.

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 125 – application for amendment**The Australian Workers' Union of Employees, Queensland AND Grainco Australia Ltd (No. B854 of 2001)****GRAINCO AWARD – QUEENSLAND**

COMMISSIONER FISHER

5 September 2001

## AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 30 May, 18 June and 5 September 2001, the Commission orders that the said Award be amended as follows as from the thirtieth day of May, 2001:–

By deleting clause 11 (Shift Work) and inserting the following in lieu thereof:–

## “11.(1) Shift Work:

- (a) may be worked under this Award where, in the opinion of the employer it is necessary to meet customer requirements or it is not reasonably practicable to carry on the operations of the employer without such shift work;
- (b) will be worked in accordance with the conditions contained in this clause and on the basis of a roster agreed upon between the employer and the majority of employees concerned.

## (2) Shift Allowances:

- (a) in addition to the rates of pay prescribed by clause 6 (Rates of Wages) of this Award, employees whilst engaged on a shift roster shall be paid:
  - (i) an additional allowance of 12.5% or \$9.70 whichever is the greater, for the afternoon shift; and
  - (ii) an additional allowance of 15% or \$9.70 whichever is the greater, for the night shift.
- (b) in both cases, the shift allowance shall be calculated upon the employees' classification or grade normal hourly rate as prescribed by clause 6 of this Award for the ordinary hours of work for the shift.

## (3) Shift Hours of Work:

The following hours shall be the hours of work for shift workers:

- (a) Day shift – a shift commencing at or after 6.00 a.m. and finishing at or before 7.00 p.m.;
- (b) Afternoon shift – a shift finishing after 7.00 p.m. and / at or before midnight;
- (c) Night shift – a shift finishing after midnight or where the majority of hours in the shift fall between midnight and 8.00 a.m.

## (4) Two Shift Arrangements:

- (a) Subject to the approval of the employer, where employees are engaged on shift where a day shift (or day work) and afternoon shift roster is to be used to cover extended hours at a particular workplace, a majority of the employees concerned may voluntarily elect to alter the finishing time of the day shift (or day work) and the starting time of the afternoon or second shift, to suit local needs.
- (b) Where a majority of affected employees make a voluntary election to alter their start and finish times and this is approved by the employer, the afternoon shift allowance will be paid for the second shift irrespective of the finishing time.
- (c) However, where:
  - (i) the employer does not approve of a voluntary election or a majority of the employees concerned do not wish to make a voluntary election; or
  - (ii) the shift start and finish times are determined by the employer,the usual shift allowance will apply as prescribed by this Award.

## (5) Shift Week:

Shifts may be worked on five days in the week Saturday to Friday.

## (6) Weekend Shift:

Ordinary hours worked on any shift commenced after 7.00 p.m. Friday and before 6.00 a.m. Monday will be paid at the rate of time and one-half:

Provided that the provisions of clause 9(3) and 13(2) of this Award shall apply.

## (7) Crib Breaks:

Employees working shift work shall be allowed a crib break of 30 minutes without deduction of pay, to be taken at a time so as not to interfere with the continuity of work where continuity is necessary.

## (8) Overtime:

All overtime worked by employees working shifts will be paid at the rate of double time.

## (9) Other Conditions:

Notwithstanding any provisions to the contrary contained within this Award, the following terms shall apply:

- (a) An employee on shift work may only be rostered for a maximum of five shifts each of eight ordinary hours duration over the period of one week, Saturday to Friday inclusive. Where the working of shifts as ordinary hours on a Saturday or Sunday in any week requires the rostering off of alternative days in any week at least two consecutive days off shall be given unless otherwise agreed between the employer and the employee.
- (b) The employer shall notify employees of the intention to work shiftwork together with the details of the shift roster as soon as possible prior to the introduction of working shiftwork. A minimum of 48 hours' notice of the commencement of the shift work will be given to employees unless otherwise agreed between the employer and the employees affected. Where the employer fails to provide 48 hours' notice, the first shift following shall be paid at the rate of double time.
- (c) Where in the opinion of the employer it becomes necessary to vary shift rosters in place they may be so varied with 24 hours' notice.
- (d) The employer will consult with employees and the appropriate union prior to the introduction of three shift arrangements at Port.

(10) No employees shall suffer any reduction to their current entitlement to shift allowance as a result of this clause.

Dated this fifth day of September, 2001.

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

Operative Date: 30 May 2001  
Amendment – Shift Allowance  
Released: 5 December 2001

Filename: no.15 14.12.01  
Directory: S:\QIRCDEV-BASE\qgig\2001\168  
Template: H:\NORMAL.DOT  
Title: QGIG - Vol. 168 No. 15 14.12.01  
Subject:  
Author: Queensland Industrial Relations Commission  
Keywords:  
Comments:  
Creation Date: 21/01/2002 2:43:00 PM  
Change Number: 3  
Last Saved On: 17/01/2008 9:55:00 AM  
Last Saved By: TorrenVM  
Total Editing Time: 1 Minute  
Last Printed On: 17/01/2008 9:56:00 AM  
As of Last Complete Printing  
Number of Pages: 11  
Number of Words: 8,743 (approx.)  
Number of Characters: 44,595 (approx.)