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No. 3

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
CA383/01	Autism Association of Queensland (Inc) Adult Accommodation Workers - Certified Agreement	4/9/01	
CA402/01	Pozzolanic Bulk Carriers Maintenance (SEQ) – Certified Agreement 2001	6/9/01	CA448/98
CA369/01	Peak Downs Shire Council Enterprise Bargaining – Certified Agreement	7/9/01	CA227/99
CA368/01	Mrs Crocket's Kitchen Pty Ltd - Transport Staff - Certified Agreement 2001	10/9/01	CA400/00
CA385/01	The Warwick Newspapers Pty Ltd - Comprint Division – Certified Agreement 2001	10/9/01	CA537/98

E. EWALD
Industrial Registrar

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INDUSTRIAL COURT OF QUEENSLAND

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

Clive John Newman AND Foamaction Pty Ltd (No. C37 of 2001)

PRESIDENT HALL

7 September 2001

DECISION

On 6 February 2001 the appellant laid a complaint and summons against the respondent in the Industrial Magistrate's Court at Caboolture alleging a breach of s. 24 of the *Workplace Health and Safety Act 1995*. A circumstance of aggravation was averred, viz that in consequence of a failure to discharge a workplace health and safety obligation Brent William Hitchin sustained bodily harm. The complaint and summons was returnable on 6 April 2001 at 11.00 am. Subsequently, at the request of the respondent, with the consent of the appellant and upon advice to the Industrial Magistrate the matter was adjourned until 4 May 2001. On 4 May 2001 the matter was further adjourned for mention on 1 June 2001 at 11.00 am. The adjournment was at the request of the respondent and with the consent of the appellant whom, I should add, attended at the mention. Regrettably, the appellant did not attend at the mention on 1 June 2001. At the request of the respondent, the Industrial Magistrate dismissed the complaint. His Worship plainly had power to do so. Section 147 of the *Justices Act 1886* provides:—

“If at the time or place to which a hearing or further hearing is adjourned, either or both of the parties does not or do not appear personally or by counsel or solicitor, the justices then present may proceed to such hearing or further hearing as if such party or parties were present, or if the complainant does not appear the justices may dismiss the complaint with or without costs.”.

The discretion vested by the section is patently broad and large. At one time Queensland courts were loath to interfere with decisions of inferior courts exercising such discretions in dealing with matters of practice and procedure, see e.g. *McKeering v McIlroy; ex parte McIlroy* (1915) StRQd 85. However, it has long since been settled that even such a broad discretion as that conferred by s. 147 may be tested against the principles of *House v The King* (1936) 55 CLR 499 at 504-505. In *Lawrence v Oil Drilling* (1967) QWN 4, Gibbs J said for the Full Court:—

“The proper attitude of an appellate Court on an appeal from a judgment given in the exercise of a discretion was discussed by Kitto J in *Australian Coal and Shale Employees’ Federation v The Commonwealth* (1953) 94 CLR 621, at p 627, as follows: ‘. . . the true principle limiting the manner in which appellate jurisdiction is exercised in respect of decisions involving discretionary judgment is that there is a strong presumption in favour of the correctness of the decision appealed from, and that that decision should therefore be affirmed unless the court of appeal is satisfied that it is clearly wrong. A degree of satisfaction sufficient to overcome the strength of the presumption may exist where there has been an error which consists in acting upon a wrong principle, or giving weight to extraneous or irrelevant matters, or failing to give weight or sufficient weight to relevant considerations, or making a mistake as to the facts. Again, the nature of the error may not be discoverable, but even so it is sufficient that the result is so unreasonable or plainly unjust that the appellate court may infer that there has been a failure properly to exercise the discretion which the law reposes in the court of first instance’.”.

In a case such as this, where there is no transcript and no reasons for decision, it is the principle encapsulated in the last sentence of the quotation which is apposite.

All that the Industrial Magistrate had before him was the fact of the appellant’s absence and a file showing that the matter had twice been adjourned. The fact of absence could not support a finding that the absence was intentional or contumelious. The fact that the matter had been twice adjourned did not support an inference that the complainant was continuing litigation with no intention of bringing it to a conclusion. (Such conduct is an abuse of process, *Grovit v Doctor* [1997] 1 WLR 640). The fresh evidence led on the appeal and previously referred to now discloses that the adjournments were at the initiative and for the convenience of the respondent. It must be remembered that the *Workplace Health and Safety Act 1995* is an act which neuters the mens rea provisions of the criminal code and reverses the onus of proof. It is understandable that legal representatives of a defendant would seek adequate time in which to mount a case and that the complainant would co-operate in making that time available.

The complaint had not been brought by the appellant for his private benefit. He was a public official bringing the complaint and the discharge of his public duties. The charge is a serious one and there was a public interest in the charge being properly heard.

The absence of any identifiable factor supporting the decision must weigh heavily. The decision is not compatible with the general principle asserted by Hanger J (with whose reasons Mack CJ agreed) in *James v Williams; ex parte James* [1967] QD. R. 496 at 501-502:—

“If a defendant who has been served with a summons to appear on a certain day attends at court on that day ready to answer the complaint, and the complainant is not then ready to proceed, then, if nothing else appears, the *prima facie* order to be made would be to adjourn the hearing and to require the complainant to pay the expenses of the defendant – the costs thrown away. If justice can be done by adjourning the case and ordering the payment of costs, there is no justification for dismissing the complaint where the *bona fides* of the complainant is not challenged.”.

The principle is equally applicable to a mention. There has been no challenge to the *bona fides* of the appellant.

The mention was at a callover of industrial matters. No court time was lost. The public interest in the proper management of judicial time and the interests of other litigants are not here in issue, compare *Cooper v Hopgood and Ganim* (1999) 2 Qd R 113.

The only weakness which I can see in the appellant’s case is that the appellant has not filed affidavit material disclosing the reasons for his absence on 1 June 2001. However, it follows from the decision of Thomas J (with whom Andrews SPJ and McPherson J agreed) in *Wilson v Bynon* [1984] 2 QdR 83 at 86 that the omission to disclose the reason for the absence, whilst always relevant, should not be treated as decisive on an appeal such as this.

In all the circumstances I allow the appeal. I set aside the order of the Industrial Magistrate dismissing the complaint. I consider that the appellant should pay the respondent any costs thrown away at the hearing of 1 June 2001. There is no evidence before me on the question whether costs were thrown away. I remit the matter of costs to the Industrial Magistrate.

Dated this seventh day of September, 2001.

D.R. HALL, President.

Released: 7 September 2001

Appearances:—

Mr S. Habermann for the appellant.

Mr M. VanderWelt instructed by Watling Solicitors for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Property Sales Association of Queensland, Union of Employees AND Mustheri Abdul
AND Yong Huang of Yong Real Estate (Nos. W150 and W160 of 2001)**

COMMISSIONER BLOOMFIELD

11 September 2001

Unpaid commission from sale of real estate – 2 employees of real estate agent claiming payment of commission from sale of same property – Witness evidence – Commission determined that payment of commission be on 70:30 split.

DECISION

This decision relates to two applications received from employees of Mr Yong Huang of Yong Real Estate, Sunnybank Hills, which seek payment of commission alleged to have been earned through the sale of a property situated in Beenleigh Road, Kuraby. Each of Ms Olive Weir and Ms Mustheri Abdul claim the total commission involved in the sale on the basis of having “introduced” the purchaser to the property.

The principal of Yong Real Estate, Mr Yong Huang, accepts that his firm owes an obligation to pay the (quite significant) commission on the sale of the property, which realised in excess of \$2.2 million. However, because of the dispute between the employees, Mr Huang is reluctant to make a payment to either of them in the event that it leaves him liable to pay the other person. He has unsuccessfully attempted to mediate a settlement between the employees.

Each of the employees is a member of PSAQ. They have decided to bring the matter before the Queensland Industrial Relations Commission to have it determined. By some agreement between them and the employer it was agreed that the most appropriate mechanism was to lodge s. 278 applications seeking payment of the outstanding commission on the basis that commission is "wages" payable to an employee for work performed.

Having regard to the unusual nature of the applications, and how they came before the Commission, the Commission discussed with the parties the most appropriate way to progress what is, in reality, a dispute between them. Each of the applicants agreed that the Industrial Commission would determine the matter and that they would accept the Commission's decision. Mr Yong Huang also signified his consent to that process. Such method of determining the matter is in accord with s. 320 of the Act which states that the Commission is not bound by technicalities, legal forms or the rules of evidence and that it is to be governed in its decisions by equity, good conscience and the substantial merits of the case having regard to the interests of the persons immediately concerned and the community as a whole.

As it turned out, the Commission was greatly assisted by the presence of the purchaser of the disputed property, Mr Hatia. He gave evidence about how he had become aware of the property and his involvement with both Ms Weir and Ms Abdul.

Mr Hatia said that he had known about the property for some time because he passed it on a daily basis. One day he noticed that it had a "For Sale" sign on it with Ms Weir's contact details. He phoned her and spoke to her at some length about the property. He said he made a verbal offer over the telephone just to "test the water". Ms Weir told him that his offer did not meet the vendor's expectations.

Mr Hatia said that a day or so later (he could not remember precisely) he either made contact with, or was contacted by, Ms Abdul in relation to another property that he was interested in. He arranged to inspect that property. During the inspection Ms Abdul mentioned several other available properties, including the one in Beenleigh Road. Mr Hatia said he told Ms Abdul that he had already spoken to Ms Weir about the property and what he thought it was worth. Mr Hatia said Ms Abdul told him she could take him on to the land now and she made a telephone call to talk to someone about it. After the telephone call he was taken on an inspection.

Ms Abdul said she had phoned Mr Hatia, as a prospective buyer, about the Beenleigh Road property several days after it was listed and arranged for him to meet her there to inspect it. She said Mr Hatia had not mentioned to her that he had spoken to Ms Weir about the property.

Ms Abdul argued that taking Mr Hatia on this inspection constituted his "introduction" to the property.

Ms Abdul said that in accordance with Yong Real Estate's commission structure she was entitled to the total commission because she had introduced the purchaser to that particular property and had followed the buyer up throughout the process. She said the only reason that she had not been able to take the sale through to its conclusion was because the vendor's details were withheld from her by Ms Weir and because the initial purchase contract had been taken out of her possession by Mr James Weir (Ms Olive Weir's son) immediately after Mr Hatia had signed it.

Ms Abdul said that her direct involvement in the sale was evidenced by:-

- The fact that she was the first person to take Mr Hatia to the site, on 30 August 2000.
- The fact that she had witnessed the initial sales contract which Mr Hatia had signed.
- The fact that she had received an award as the number 2 sales associate in October 2000 for evolving sales in a volume of one contract totalling \$2 million (claimed to be the disputed property).
- The fact that the company had authorised the preparation of a brochure to neighbouring property owners in February 2001 (when the sale went unconditional) which mentioned that she, Olive Weir, James Weir and Yong Huang had just sold the Beenleigh Road property.
- The fact that Mr Yong Huang had repeatedly told her not to become involved in the negotiation for the sale – because Ms Weir was doing it – but that he would protect her full commission for the sale.
- The fact that Mr Hatia had allegedly said to Ms Weir on 2 September 2000 that Ms Abdul was entitled to the full commission and that the only reason he was meeting with Ms Weir was because she had not provided enough information about the property to Ms Abdul.
- The fact that Ms Weir had acknowledged Ms Abdul's entitlement to the Commission by proposing a 50/50 settlement in February 2001.

Ms Weir said she was entitled to the Commission because she had received the initial phone call from the ultimate buyer following the placement of the "For Sale" sign on the property. She said Mr Hatia had phoned her and discussed the property in detail and that during the discussion he had made an initial offer. She had also offered to take him to the site but he had indicated he was not able to visit it on that day. Her electronic diary records that this discussion had taken place on 30 August 2000.

Ms Weir said Mr Hatia was a person who was known to her and that she had identified him as a strong possible buyer from the time of his original approach. She said she had every intention of following him up as a possible buyer but Ms Abdul had somehow or other become involved and continued to assert her entitlement to complete the transaction because she had happened upon Mr Hatia. Ms Weir said she had told Ms Abdul to "back off" on about twenty occasions because Mr Hatia was her prospect.

Ms Weir said that Ms Abdul did not back off and that she had to "pussy foot" around because she was concerned about the ethnic connection between Ms Abdul and Mr Hatia. Ms Weir said she was concerned about losing the contract totally because Ms Abdul said she knew Mr Hatia through personal and church connections. For this reason she had allowed Ms Abdul to have some involvement in the matter and some continuing contact with Mr Hatia.

Ms Weir also said that Ms Abdul had almost no involvement in the negotiation of the sale, and its ultimate completion. The negotiations had been very complex and delicate. Her long-term relationship with the vendor had been instrumental in its completion.

Finally, Ms Weir said she had proposed a settlement of the dispute between herself and Ms Abdul in February/March 2001 because there was significant conflict in the office and because she was under financial pressure at the time. She said that whilst she was willing to negotiate on the payment of the Commission Ms Abdul had rejected all approaches. This was confirmed by Mr Huang during his evidence.

Conclusion

Commission payments under Mr Huang’s system are payable to the person who “introduces” the purchaser to the particular property.

The Shorter Oxford English Dictionary defines the word “introduce”, *inter alia*, as follows:–

“... 6. To bring (a person) into the knowledge of something; to teach, instruct 7. To bring into personal acquaintance; to make known to a person or to a circle b. To present formally, as at court etc. c. . . . 8. To bring to the notice or cognizance of a person, etc.; . . .”.

The Concise Macquarie Dictionary defines the same word as follows:–

“1. to bring into notice, knowledge, use, vogue, etc. 2. to bring forward for consideration, as a proposed bill in parliament, etc. 3. to bring forward with preliminary or preparatory matter. 4. to bring (a person) to the knowledge or experience of something. 5. to lead, bring, or put into a place, position, surroundings, relations, etc. 6. to bring (a person) into the acquaintance of another. 7. to present formally, as to a person, an audience, or society.”.

In the context of this matter there is some difficulty in stating that either Ms Weir or Ms Abdul “introduced” Mr Hatia to the Beenleigh Road property.

Mr Hatia said that he had known about the Beenleigh Road property for some time and first became aware that it was for sale when he saw Ms Weir’s sign on it. Because he had some interest in the property he phoned her. In one sense it could be argued that Ms Weir directly brought to Mr Hatia’s notice that the property was for sale. However, if the matter was that simple every listing agent would become entitled to commission for a sale if a passer-by saw a for sale sign outside a property and phoned the real estate agent’s office to make an inquiry about it. It would not matter who they spoke to because the lister could be argued to be the person who “introduced” the (ultimate) buyer to the fact that the property was for sale. Here, however, Ms Weir’s claim is enhanced because Mr Hatia spoke to her directly upon seeing the sign.

On the other hand, the evidence also disclosed that Mr Hatia was first taken to the site by Ms Abdul and that all of his initial inquiries in relation to the property were directed to her. She was also the one who sent him the survey plans and other information.

In addition, Ms Abdul was the one who prepared and obtained the first formal written offer from Mr Hatia. However, there is a significant difference between obtaining an initial offer – which is rejected – and the completion of a sale of this size.

The evidence suggests that Ms Abdul’s involvement essentially ceased once the initial offer had been made. Whilst she had periodic contact with Mr Hatia she had no contact whatsoever with the vendor nor anyone associated with the vendor. That role was performed by Ms Weir. Ms Weir was the person who, ultimately, steered the contract to its completion.

The evidence of Mr Hatia and Ms Weir was that the contract was off the rails on a number of occasions and that it was Ms Weir’s relationship with the vendor which ultimately led to the contract being completed.

There is little doubt that the Commission structure at Yong Real Estate is not designed to accommodate the complexities of a major sale such as the one which is in dispute. Whilst it might provide for the whole of the commission structure to be paid to the salesperson who introduces the buyer to the property it does not deal with the situation where there may be some dispute about who actually introduced the buyer. Nor does it deal with the situation where the sale might be significant and/or complex and where more than one salesperson is involved.

In this particular case, having regard to the facts of the matter and the commission structure in place, I have concluded that Mr Hatia was introduced to the property by both Ms Weir and Ms Abdul on the same day. I am satisfied that while Mr Hatia may have phoned Ms Weir to talk about the property, he also received a phone call from Ms Abdul about this particular property, as well as others, on that same day and that he then inspected it in her company.

In the circumstances I think that the commission should be split between Ms Weir and Ms Abdul having regard to their respective involvement in, and contribution to, the whole of the sale. My assessment of the evidence on this point – especially that given by Mr Hatia – leads me to conclude that the commission entitlement for the sale of the property should be split 70:30 between Ms Weir and Ms Abdul.

Accordingly, having regard to the agreement reached between the parties as to how this matter should be progressed and determined, it is the Commission’s order that Mr Yong Huang of Yong Real Estate pay the commission earned on the sale of the property at 1537 Beenleigh Road and part of 199 Compton Road, Kuraby to Ms Weir and Ms Abdul in the proportion of 70:30.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

Appearances:–

Mr B. Gannon, of Property Sales Association of Queensland, Union of Employees, with Ms O. Weir.
Released: 12 September 2001

Mr. M. Mustapha and Ms F. Mustapha for Ms M. Abdul.
Mr Y. Huang for Yong Real Estate.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

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

Application for Reinstatement – Termination – Dismissal – Evidence – Expert Witness – Alleged Incident – Allegations Denied – No Official Record of Incident – Client Had No Signs of Distress – No Investigation – Employer/Employee Relationship – Dismissal Harsh, Unjust and Unreasonable – Reinstatement Impractical – Compensation Awarded.

DECISION

By application filed on 20 February 2001 William Patrick Ludwig, Secretary of The Australian Workers' Union of Employees, Queensland acting as agent for Leteica Kajewski (the applicant) applied for reinstatement of Leteica Kajewski to her former position with Spiral Inc. (Spiral).

Ms Kajewski commenced employment with Spiral Inc. in approximately October 1997. When she first commenced employment she started as a probationary support worker. She was employed for a probationary period of approximately five months.

Ms Kajewski's dismissal came about when Ms Amber Thornburrow informed Mr Eric Jones, Manager of Spiral that she had seen Ms Kajewski strike Sharon with her shoe a number of times on one day during the previous week. The allegations that Ms Kajewski struck Sharon were strenuously denied but Ms Kajewski agreed that it was necessary to physically prompt her.

During her period with Spiral she had never been criticised, counselled or warned regarding her conduct, performance or capacity to assist and manage consumers.

The applicant received her letter of termination from Mr Eric Jones dated 6 February 2001 (Exhibit 9) which stated:–

“This letter is to confirm your dismissal on the 5th of February at 5 pm. After your interview with Virginia and myself you left us with no alternative but to take this action. Your behaviour of using your shoe to strike Sharon Boast breaches your Code of Conduct at Spiral Inc. By conducting yourself in this way you put at risk the reputation of Spiral Inc. as well as infringing on the basic rights of Sharon to service free from the risk of abuse. Your separation certificate is included and you will be paid any outstanding monies into your bank account.

I am sorry that I needed to take this action however your behaviour has left me with no other choice.”

Ms B. Callaghan of Counsel represented the applicant at the hearing and called the following witnesses:–

Ms L. Kajewski;
Ms J. McNamara
Mrs J. Boast; and
Dr P. White.

Mr S. Alexander on behalf of the respondent called the following witnesses:–

Ms A. Thornburrow;
Mr E. Jones;
Ms V. Watson;
Ms A. Muir; and
Mr B. Gallagher.

From the applicant's perspective she had considerable experience in the field and had worked for the following agencies since 1997:–

- Skills Nambour – for approximately 5 months in 1997 on a volunteer basis;
- The Cerebral Palsy League – 1998 to 1999;
- Link Family Scheme of Nambour in 1999 and 2000; and
- Endeavour Foundation of Nambour for approximately the last two years.

To assist the Commission gain an appreciation of Sharon's condition a video of Sharon was screened.

Ms Kajewski was responsible for the care of Sharon, who suffers from Angelman's Syndrome also known as Happy Puppet Syndrome. As a consequence of the condition a program was prepared to enhance her life. The current program was prepared by Sharon's mother, Mrs J. Boast, Amanda Maggs and Ms Kajewski. The program included walking twice per week, swimming twice per week, RSL once a fortnight and massage. As a result of the syndrome Sharon walks on her tiptoes with her balance forward so that she is always at a risk of falling over if her momentum stops. On a regular basis she needs to be prompted by physical touch or tapping. To assist her a walking belt is worn. The belt could be described as being of soft material, which goes around her waist and clips shut with a number of handles for the support worker to hold at the back. On occasions Sharon would fall. Another symptom is that she will look behind and on occasion grab people who may be unknown to her.

The Commission records that Sharon resides with her parents and from time to time they arrange for respite at Orchard House. At the time of the alleged incident she was at arranged respite.

By Exhibit 12, Mr Peter Thrussell, Acting Regional Director, North Coast Region, Disability Services Queensland advised that Disability Services Queensland does not hold any records of incidents or injuries relating to Sharon Boast on or about Tuesday 30 January 2001. He made reference to the incident/injury proforma reports required to be used if a client injury had been detected.

Ms Kajewski advised that on the day in question, 30 January 2001 her program was as follows:–

“I say that I would normally attend at Spiral, collect the work motor vehicle and then go to Mike and Judy Boast's residence where Sharon resides.

As at the alleged incident date, Boast was in respite at Orchard House located at the back of Spiral. On that day I was also asked if I could pick up somebody else's client from Orchard House as the support worker had not arrived at work yet.

I went to Orchard House and I did a changeover (of duty) with Janet McNamara. I also informed her that I would be taking Marcus, a consumer, as whoever was looking after Marcus that day was running late. I collected Boast, all of her gear, including wheelchair, her swimming bag, her drink bottle and esky together with Marcus and his gear and took them back to Spiral. As I was doing this Marcus stood on my shoe and broke my shoe. I had a conversation with the office girls at Spiral after the incident. After this I took Sharon with me and I collected Amber Thornburrow

(Thornburrow) and her client, Sarah Asher from Buderim. On the way to Picnic Point I stopped in at Mobile Phone Solutions on Sugar Road and collected my work mobile. I also stopped at Shoe Value on Sugar Road to collect a replacement pair of shoes for that day.

Upon arrival at Picnic Point we had morning tea and I toileted Boast.

...

I say that we had arrived at Picnic Point at approximately 10.30 to 11.00 am. I would estimate the walk would normally take approximately half an hour. I normally park the car under a tree near the barbecue tables and I walk Sharon all the way to the canals and back to where I park the car.

On the alleged incident day Amber Thornburrow was walking her client in front of me. I say that this is the normal procedure because if somebody is behind us Sharon will want to turn around and see what they are doing and she loses concentration and falls over.

I say that we walked to the canals, turned around and we were walking back when the incident is said to have occurred. On the way to the turn around point under the bridge Sharon grabbed a fellow who was fishing on the canal, she grabbed his hair. On the way back I made a comment to this person and I made a joke about it, I said to him 'Lucky you have short hair' and he laughed about it. As we arrived at the boat ramp Sharon was becoming very excited by all of the people that were around as it was school holidays. I was having difficulty holding her so I made her sit in the shade to settle her down before we went any further. Amber Thornburrow and Sarah also stopped with us for a little while and they started walking back to the car before we did. Sharon then wet herself while we were sitting there. I got her up and we started walking back to the toilets, which are just before the car.

I say that when we were almost at the toilet I was having some trouble with Sharon and she stumbled and dragged me along. To get her to keep her momentum moving forward I tapped her on the hip/top of the thigh with the shoe in my right hand. This was to stop us from falling. I say that I gave her a tap three times. I say that this was not in any way forceful and there was no anger involved in the tap. It was an automatic reaction. I say that it is not unusual for me to do this when I fear Sharon is about to fall.

To the best of my recollection I also said to Sharon at the same time 'Okay Sharon, you are being silly, concentrate on what you are doing, concentrate on getting to the toilet' or words to that effect. I did not shout these words at Sharon. I say that to the best of my recollection this was the only time during the walk which I had cause to physically prompt Sharon. The physical and verbal prompts are necessary to assist Sharon walk properly and save injury to Sharon and myself.

I recall that the walk on this particular day was difficult as Sharon had been staying at Orchard House. Sharon usually becomes hyperactive and excited when she is staying in Respite.

Another support worker, Frances Hounsome was also at the park with her client. Frances appeared before me as we were almost at the toilet block and she asked me whether or not I needed a hand. She must have noticed that I was struggling a little bit with Sharon. I said to her words to the effect that I would be OK, that I was going to change her straight away for a swim. I don't remember seeing Amber Thornburrow at this time.

I then changed Sharon into her togs and took her for a swim in the ocean. I recall that Marion and her client, Frances and her client and Amber and her client were also present. They had already had their swim and it was only Sharon and myself that were swimming at the time. One of the support workers assisted me to get Sharon in and out of the water. At no time did Amber say anything to me about the matters she had claimed.

After the swim, I took Sharon back to the toilet block where she showered, changed and then we had lunch. I moved her around in a wheelchair at that time.

After lunch I drove Sharon to Nunjarra on Image Flat Road. This is used by Spiral for our clients to have a therapeutic massage. I say that is the normal course for Sharon to have a walk then a massage.

After the massage I dropped off Amber and Sarah at Buderim, I then returned Sharon Boast to Spiral and we spent a little bit of time at Spiral before I took her to Orchard House."

In regard to the allegations by Ms Thornburrow, the cross-examination of Ms Kajewski by Mr Alexander is as follows:-

"What is in question in this room is the using of the shoe, whether it was patting or tapping or hitting with the shoe, on this particular occasion. Now, that is the sort of activity that is not permitted by Spiral, isn't it? I would assume that, yes, assaults were not the kind of activity that is promoted by Spiral.

No, I'm not using the word promoted, not permitted by Spiral? Not permitted certainly.

At that meeting you admitted either patting or hitting with the shoe on three separate occasions the client, Sharon Boast? - I never admitted to hitting Sharon Boast at all. I gave her a physical prompt to actually save her from falling and myself, that's called self-preservation, Mr Alexander."

On Thursday 1 February 2001 in company with Michael Hooley, Ms Kajewski worked with Sharon.

According to Ms F. J. Hounsome, a support worker with Spiral, she was performing activities with another consumer. After swimming Ms Hounsome left the consumer in her care with another support worker while she went to change. While walking towards the toilet block she observed Ms Kajewski and Sharon. At the time Ms Kajewski was walking with Sharon and Ms Kajewski was holding the support belt with one hand and she had a shoe in the other hand. They had a conversation and she asked Ms Kajewski if she required any assistance as it is not unusual for support workers to provide assistance to one another. At the time Sharon and Ms Kajewski were heading towards the beach. Ms Hounsome outlined that she did not observe and cannot recall any unusual behaviour, which Sharon displayed at that time. Sharon did not seem in anyway distressed. She did not observe Ms Kajewski verbally abuse or strike Sharon with her shoe on that day or at all during the period of employment. She reiterated that at no time had she observed Ms Kajewski acting inappropriately towards Sharon by either verbally or physically abusing her. In regard to the fact that Ms Kajewski was carrying a shoe Ms Hounsome outlined that Ms Kajewski had told her that she had broken her shoe in the morning when a consumer stood on it. She stopped on the way to Picnic Point to purchase a new pair of thongs from a discount store and that these had rubbed and given her a blister.

In evidence Dr Paul White, Consultant Physician in Psychiatry saw Ms Kajewski, Ms Sharon Boast and Mrs Judy Boast. He confirmed to the Commission his report of 26 July 2001 (Exhibit 13) which stated, inter alia:-

“... ”

I saw Ms Kajewski, Ms Sharon Boast and Mrs Judy Boast at the New Farm Consulting Suites on the 26th July 2001. Ms Kajewski and Mrs Boast were both aware that the interview was for the purpose of an independent medico-legal report. They were aware that the contents of the interview were not to be considered confidential.

... ”

At the time of interview, Ms Boast was seeing Ms Kajewski for the first time in several months. She was clearly very fond of Ms Kajewski. She cuddled and petted her throughout the interview.

Despite Ms Boast lacking verbal communication, she is able to use non-verbal means. Her mother informs me that she is able to indicate if she wants to drink, if she wants food and if she is uncomfortable with people around her. Her mother informs me that she has at times indicated discomfort with support workers other than Ms Kajewski. Mrs Boast stated that at no times has her daughter ever indicated discomfort or dislike of Ms Kajewski.

Ms Boast was in respite care at the time of the alleged assault. Mrs Boast stated that nothing had been said and there was no indication of any distress by her daughter at the time. Her daughter has available to her at respite a body figure on which she can indicate any injuries or discomfort. She stated she had not done so.

She stated that Ms Boast’s pattern of sleep was unchanged, as was her diet. In short there is no evidence that I am able to ascertain any distress or damage which might have been caused by an alleged assault.

With specific reference to the letter by Ms Muir, she states, ‘there is little doubt in my mind that Sarah Asher (this is an error it ought be Sharon Boast) would have been damaged by the behaviours displayed towards her by the support worker’. Ms Muir presumes that the allegations of assault had been found to be true. Notwithstanding this, I have not been able to find any evidence of any ‘damage’ to Ms Boast. Quite the opposite.

... ”.

Ms Judy Boast, mother of Sharon, outlined the walking style of Sharon. She indicated that Sharon is unable to verbally communicate and it is necessary to physically prompt her but over the years and as a result of the relationship she provided non-verbal prompts. Mrs Boast described Sharon as physically very slow.

By her affidavit Mrs Boast advised:-

“On Wednesday morning the 7th February, 2001, myself, my husband and my daughter, Emma, went to SPIRAL and we had a meeting with Virginia Watson and Eric Jones, the Manager of Spiral. We had a conversation. I made it known that I did not believe the allegations and that I was not happy with the way it was handled in that the complaint was not made until the Monday morning. I was not informed of any investigations, which were undertaken, and I was not shown a copy of the letter of complaint. After the meeting I wrote two letters of complaint to SPIRAL.”.

Mrs Boast outlined that in her experience and observation Ms Kajewski treated Sharon in a loving, caring manner and in a trusting way. In continuing she outlined that Sharon would sit at the window waiting for Ms Kajewski to arrive.

The Commission has placed considerable weight on the mannerism and responses of Mrs Boast when giving evidence together with the evidence of Dr White and accepts that Ms Kajewski provided a beneficial and valuable contribution to the maintenance of Sharon’s lifestyle.

In considering the evidence presented in regard to the meeting the Commission makes reference to the evidence of Mr Jones and Ms Watson.

Mr Jones outlined that at 2.00 pm on Monday 5 February 2001 he received a call from Amber Thornburrow seeking an urgent meeting which was arranged for 3.15pm. At the meeting Ms Thornburrow made serious allegations about Ms Kajewski.

Ms Kajewski received a call at approximately 4.00pm on that day, i.e. Monday 5 February 2001 from Mr Jones requesting her to return to the office of Spiral as he wished to discuss an urgent matter with her.

In evidence Ms Kajewski advised that during the interview she was at no stage:-

- warned about her behaviour at Spiral;
- warned about her behaviour when dealing with Sharon Boast; and
- during the outset of the meeting provided with a copy of the Statutory Declaration by Amber Thornburrow.

By his evidence Mr Jones stated in his affidavit regarding Ms Thornburrow as follows:-

“I asked if there was anything that had happened between her and Leteica that would cause her to hold a grudge or ill feelings. She said that she had no reason to get Leteica into trouble. Her concern was Sharon.”.

Yet in response to a question from Ms Callaghan, Ms Thornburrow said:-

“Were you upset with Leteica that day for actually keeping you waiting in the car while she saw to the mobile phone? I was – yes, I was.”.

Mr Jones advised he questioned Ms Thornburrow as to the reason for the delay in reporting the incident as well as other facts. As a result he requested Ms Kajewski to attend his office at which time allegations were put to her. Mr Jones did not give a copy of the allegations to her. On concluding the interview with Ms Kajewski he indicated that he had no option but to terminate her employment and he advised Ms Kajewski “I’m afraid you’ve got to go”.

Ms Watson supported the evidence of Ms Kajewski except for the use of the word “disturbs” and she did not recall him using the word “dismissal”. In her notes (Exhibit 18) she stated:-

"Leteica arrived approximately 4.20 pm. We all sat down. Eric told Leteica that he had received information that disturbed him and he needed to clarify the information."

In considering and examining the evidence of Ms Thornburrow, the Commission is concerned about the inconsistency and her mannerism when giving evidence. Ms Thornburrow made no contemptuous notes about the incident but prepared a document on 5 February 2001 at the request of Mr Jones.

She was anxious to give answers, which with minimum relevance to the questions and exhibited an enthusiasm to elaborate on answers in a way, which attempted to redirect the line of thought to her opinion. On the day in question she was upset as she had to wait whilst Ms Kajewski had collected her mobile phone.

As an example Ms Callaghan asked Ms Thornburrow the following question four times before she was prepared to answer. The question was:-

"You physically have to prompt Sharon don't you, really to get her to do that?"

The resulting record of transcript indicates as follows: -

"Well, you see, Ms Thornburrow there's no evidence of any physical damage to Sharon at or arising out of all of these incidents that you've actually talked about. Do you have any comment about that? I have no personal vendetta against Leteica. I --

It's not what I asked you? Mmm

It's not what I asked you. Once again, listen to the questions and you'll get out of here a lot more quickly. There is no evidence at all from anybody about any physical damage to Sharon that day. Do you have any comment about that? -- I just told what I saw".

In evidence she stated as follows:-

"Is that what this is about, political correctness? -- No, it's not about that at all."

In giving this decision the Commission records that Support Workers and other persons performing duties in this field are given onerous responsibilities to ensure that their consumers receive care of the highest standard. If a person but especially a minor or a person with a disability is assaulted or abused or treated in an unfavourable way by a person to whom they are entrusted the action could only be described as deplorable. In this case the Commission must make a decision on the evidence and material available and not be influenced by emotions. Families must be able to send their loved ones to respite care and support with the confidence that they will receive excellent care by well-trained and enthusiastic staff. If unfortunate situations arise, management must be in a position to investigate events and make informed decisions on how to manage the situation to ensure that the confidence to which I have already made reference is maintained. Any investigation must be thorough and conducted in a professional manner.

In considering this application the Commission:-

- (a) does not accept the evidence from Amber Thornburrow;
- (b) accepts the evidence of Leteica Kajewski as not only credible but compelling;
- (c) accepts the evidence of Judy Boast that her daughter enjoyed and looked forward to being with Leteica Kajewski as she had an excellent understanding of the needs of her daughter;
- (d) accepts the evidence of Dr P. White;
- (e) accepts that Disability Services Queensland held no record of an incident;
- (f) accepts that when the client returned to respite care at Orchard House at approximately 3.30 pm on Tuesday 30 January 2001 she showed no signs of distress and was her normal self;
- (g) notes that Mr Jones failed to accept his responsibility as an employer by considering contemporary industrial process of dealing with such a situation. As such when faced with the evidence of two employees he accepted the evidence of one employee without full consideration of the fact. The Commission acknowledged that Mr Jones was very concerned about the consumer with all parties agreeing that if such did occur it was inappropriate. On this occasion Mr Jones had to consider the employer/employee relationship as well as satisfy himself that an incident did occur. Processes of an investigative nature needed to be initiated upon an incident being reported. No investigation except for the consideration of the views of the two employees was undertaken.

On consideration of all the evidence, exhibits and submissions, the Commission is satisfied the dismissal was harsh, unjust and unreasonable. In the circumstances the Commission accepts the evidence of the parties that reinstatement would be impractical.

The Commission accepts the submission of Ms Callaghan as amended by correspondence to the Industrial Registrar that the loss to the applicant was \$2,850.15. The Commission orders that Spiral Inc. pay the amount of \$2,850.15 to the applicant within 22 days of the date of this decision.

The Commission will consider an order for costs.

K.L. EDWARDS, Commissioner.

Appearances:-

Ms B. Callaghan instructed by Mr M. Devine, of McColm Matsinger Lawyers on behalf of the applicant.

Released: 11 September 2001

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

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch, Union of Employees AND Local Government Association of Queensland (Incorporated) (No. B46 of 2001) and The Australian Workers' Union of Employees, Queensland AND Local Government Association of Queensland (Incorporated) (No. B128 of 2001)

LOCAL GOVERNMENT EMPLOYEES' (EXCLUDING BRISBANE CITY COUNCIL) AWARD - STATE

DECISION

Background

These are applications by the Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch, Union of Employees (FEDFA) and The Australian Workers' Union of Employees, Queensland (AWU) to amend the *Local Government Employees' (Excluding Brisbane City Council) Award – State*. The applications seek to increase the allowance prescribed by clause 4.7 of the Award for employees using their own vehicles to travel to a work site. Leave was granted for the applications to be joined.

Argument in Support of the Applications

The basis of the claim is that the increases sought are in line with similar allowances prescribed in what are said to be other related Awards of the Commission, as follows:–

- *Brisbane City Council Engine Drivers Award;*
- *Brisbane City Council Construction and Maintenance Award;*
- *Building Trades Public Sector Award – State; and*
- *Civil Construction, Operations, Maintenance General Award – State.*

It was argued that the allowance prescribed by these Awards is 69c per kilometre, while the allowance under the *Local Government Employees' (Excluding Brisbane City Council) Award – State* is 57.08c per kilometre. This was said to disadvantage employees under the *Local Government Employees' (Excluding Brisbane City Council) Award – State*. Some material was put before the Commission in an attempt to establish that due to contracting out of work, employees under the *Local Government Employees' (Excluding Brisbane City Council) Award – State* are often required to work side by side with employees under the above Awards. This situation was said to be becoming more prevalent.

The applicants also submitted that grant of the application would be consistent with the Declaration of Policy by a Full Bench of the Commission regarding Wage Fixing Principles ((1999) 162 QGIG 356). In particular, the applicants submitted that the Full Bench in that Declaration had stressed that the principles *inter alia* contribute to equitable outcomes. Further, the Full Bench stated that the Principles are fundamentally guidelines, which do not (subject to the availability of appeal by leave) absolutely bind a Commissioner sitting alone. The Full Bench also stated that:–

“The role of awards has been enhanced. Awards are intended to provide secure, relevant and consistent wages and employment conditions, and to provide fair standards for employees in the context of living standards generally prevailing in the community.”.

It was further submitted by the applicants that the current Declaration of Policy regarding Wage Fixing Principles ((2000) 164 QGIG 375) states under the heading “Role of Principles” that their purpose is to provide guidance to a single Commissioner sitting alone, and that however constituted, the Commission will have regard to s. 3 of the Act, and must have regard to s. 126.

The grant of the application was argued to be consistent with and further the objects of the *Industrial Relations Act 1999*, including in particular, ss. 3(c) and (f). Those sub-sections provide as follows:–

“The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by:–
 ...
 (c) preventing and eliminating discrimination in employment, and ensuring equal remuneration for men and women; and
 ...
 (f) ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community.”.

It was also submitted that grant of the application would be consistent with and further the operation of ss. 125(1); 126 (d); 126(e) and 273(1)(a) of the Act.

Argument in Opposition to the Applications

The applications are opposed by the Local Government Association of Queensland (Incorporated) (the LGA). Mr Beer for the LGA argued that the applications were clearly claims to import conditions under the *Civil Construction, Operations and Maintenance General Award – State*, into the local government arena. Mr Beer submitted that the issue of whether the exclusion in that Award should be removed, was considered by a Full Bench of the Commission in 1993 when the *Local Government Employees' (Excluding Brisbane City Council) Award – State* was made (1993) 142 QGIG 515 at 517.

The Full Bench at that time, rejected an application by the FEDFA to remove the exclusion. Mr Beer also pointed to a decision of Fisher C, which states that travelling arrangements for employees not living in camps were determined by reference to the draft Award provisions submitted by the LGA. The provisions submitted by the LGA were derived from the Federal Award applicable to local government, which was in turn, based on a directive issued under the then *Public Service Act*. The amounts thus established, have been increased in line with wage fixing principles allowing increases to expense related allowances.

The applications currently before the Commission are seeking to create a new nexus, by increasing the travelling allowance in the *Local Government Employees' (Excluding Brisbane City Council) Award – State* based on the quantum of the travelling allowance in the *Civil Construction, Operations and Maintenance General Award – State*, rather than actual increases in the cost of running a vehicle, as provided for by current Wage Fixing Principles.

Mr Beer also tendered material to illustrate the cost of operating motor vehicles in the current economic environment, to support the argument that the current travelling allowance in the *Local Government Employees' (Excluding Brisbane City Council) Award – State*, is adequate. In concluding his submissions, Mr Beer said that the purpose of the allowance was to reimburse employees for the expense of operating their own vehicles, not to pay an allowance on the basis of some standard, which may exist elsewhere.

Conclusions

It is undoubtedly the case, that the *Industrial Relations Act 1999* has enhanced the role of Awards. However, it should also be noted that the Act provides for declarations of policy to be issued by the Commission, and this has occurred on a number of occasions since the commencement of the Act. While the current Wage Fixing Principles are a guide, and do not absolutely bind a Commissioner sitting alone, in my view, they must be given weight in any application for an increase under an Award.

This is because the objects of the Act while being directed at ensuring that wages and employment conditions provide fair standards, are also directed at providing a framework for industrial relations that supports economic prosperity and social justice by:-

- providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers (s. 3(a)); and
- providing for an effective and efficient economy (s. 3 (b)).

Wage Fixing Principles are established following detailed submissions, generally including economic argument, from industrial parties including peak councils representing the interests of both employers and employees. As such, they play an important role in ensuring that the objects of the Act are balanced, when consideration is being given by a Commissioner sitting alone, and considering an increase to wages or allowances, or an improvement in working conditions under an Award.

The arguments put forward by the applicants in support of the increase to travelling allowance under the *Local Government Employees' (Excluding Brisbane City Council) Award – State*, may very well have substance, and be capable of giving rise to the increase sought.

Indeed, it would appear from a perusal of the 1993 decision when the *Local Government Employees' (Excluding Brisbane City Council) Award – State* was made, that one of the considerations in the Commission refusing the claim for the removal of the exclusion in the *Civil Construction, Operations and Maintenance General Award – State*, was the fact that the removal of the exclusion would result in some employees enjoying better conditions than those then enjoyed by employees of the Brisbane City Council.

I accept that when employees receiving a higher travelling allowance are required to work along side employees receiving a lesser amount, that issues of equality and community standards may very well arise. I also accept that there may have been significant changes in the local government industry, which have resulted in a situation where local authorities are tendering for work outside of their usual areas of operation. These changes, if they have occurred to the extent submitted by the applicants, could very well have resulted in employees under the *Local Government Employees' (Excluding Brisbane City Council) Award – State*, being called upon to work along side employees of other local authorities and employers in the private sector, who are covered by other Awards which prescribe higher allowances, wage rates or other conditions of employment.

In the present case I have no evidence in relation to the inequalities the applicants say the amendments sought are directed against. While some material has been tendered from the bar table, in my view, this material does not demonstrate that a departure from the current Wage Fixing Principles is warranted, on the basis of fairness, equity or justice, as outlined in s. 3 or s. 125 of the Act.

Given the lack of evidence, either in support of the applications or in opposition to them, I am not prepared at this time to determine the matter. Should the FEDFA and/or the AWU wish to further pursue their applications before the Commission, I will require the filing of appropriate material in support of the applications. Once such material is filed and served on the LGA I will then issue further directions for the conduct of this matter.

I.C. ASBURY, Commissioner.

Appearances:-

Mr J. Coogan of the Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch, Union of Employees.

Ms Y. D'ath of The Australian Workers' Union of Employees, Queensland.

Mr R. Beer of the Local Government Association of Queensland (Incorporated).

Released: 11 September 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – unpaid wages

Rodney Whitson of the Department of Industrial Relations AND Expressions By Cathy Pty Ltd (No. W19 of 2001)

COMMISSIONER ASBURY

5 September 2001

Recovery of unpaid wages – Claim in respect of meal breaks – General principles for determining whether an employee has had a meal break – Discussion of standard award provisions in relation to meal breaks – Case law in relation to meal breaks – Finding that in all probability employee was unable to take a meal break on a majority of occasions – Equitable approach applied – Application granted subject to discount.

DECISION

This is an application by Rodney James Whitson of the Department of Industrial Relations (the applicant), for an order that Expressions By Cathy Pty Ltd (ACN 087 971 838) (the respondent) pay unpaid wages to June May Dunbar. Essentially, the applicant's case is that Ms Dunbar was employed by the respondent under the terms of the *Retail Industry Interim Award – State* (the Award) as a casual shop assistant. During the period from July 1997 to 7 July 1999, it is contended that Ms Dunbar regularly worked 8 hours per day over four days per week, between 9.00 am and 5.00 pm. The applicant also contends that the respondent told Ms Dunbar that she would be required to work for 32 hours a week but would only be paid for 30 hours a week, to avoid Ms Dunbar being classified as a part-time employee.

It is further contended that Ms Dunbar regularly worked 32 hours per week, because she was not provided with, or able to take, a thirty minute meal break during her working day, as required by the Award. Accordingly, it was argued by the applicant that Ms Dunbar was not a casual employee as defined by the Award during the period covered by the claim, and had been underpaid an amount of \$3,416.17, for annual leave and *pro rata* annual leave. Alternatively, it was argued that if the Commission was not satisfied that Ms Dunbar ceased to be a casual employee as defined by the Award, that she was entitled to payment at the casual rate for the meal breaks worked, in the amount of \$3,607.32.

The applicant called evidence from the following persons:-

- Ms June May DUNBAR;
- Ms Carol Ann IRELAND, retailer and former employee of the respondent;
- Ms Susan Deborah HEALEY, self-employed person and former employee of the respondent; and
- Ms Correen STUBBS-MILLS, interior designer, employed by retailer in premise adjacent to the respondent's from June 1998 to January 2000.

In defending the application, the respondent argued that the applicant worked only 30 hours over four days of the week, and that on each day on which work was performed, Ms Dunbar took a 30 minute meal break. It was also argued that Ms Dunbar was not required to work through meal breaks and was provided with an opportunity to take meal breaks, by virtue of the following systems:-

- The presence of the owner of the respondent, Ms Whitaker, in the shop in which Ms Dunbar was working, for the majority of the time when Ms Dunbar was working;
- The ability for Ms Dunbar to close the shop and utilise a sign kept on the premises, to indicate that she would be "back soon" or "back in 5 minutes".

Further, it was argued that Ms Dunbar had worked flexible hours and had been given time off to attend to personal matters. Ms Dunbar had also been paid a number of days sick pay, to which she was not entitled as a casual employee. It was also contended that Ms Dunbar had worked less than four days in a significant number of weeks. In addition, the respondent made a number of allegations about Ms Dunbar, designed to call into question her credibility.

Evidence was called for the respondent from the following persons:-

- Ms Catherine WHITAKER, Owner of the respondent;
- Ms Sharon WILLS, Queensland Sales Representative for Jendi Fashion Accessories;
- Ms Wendy BEIKOFF, Private Secretary to Ms Whitaker's father;
- Mr Peter ROSS, Ms Whitaker's partner;
- Ms Rosemary CHELIN, employee of the respondent from 16 December 1999; and
- Ms Debbie SHANKS, employee of the respondent from March 1997.

There was a significant amount of evidence put before the Commission, some of which was not relevant to the issues for determination. I have considered all of the evidence, and determination of this case will depend on the evidence I accept.

Relevant Award Provisions

The Award defines a casual employee at clause 3.1(4) as follows:-

" 'Casual employee' shall mean an employee who is engaged as such and who is employed for not more than thirty (30) hours in any one (1) week."

At clause 4.3 the Award provides as follows with respect to meal breaks:-

"An employee's ordinary daily working hours according to the employee's roster shall be worked continuously except for the meal break (other than a clerk who is a shift worker). No employees shall be required to take more than one (1) hour or less than forty-five (45) minutes in one (1) continuous period for each meal break:

Provided that where the express agreement of the employee is obtained the midday meal break may be less than forty-five (45) minutes but not less than thirty (30) minutes.

The time for the midday meal break shall be between the hours of 11.00 a.m. and 3.00 p.m. An employee's meal break shall be a regular set period each day of the week and shall not be changed except upon seven (7) days' prior notice in writing:

Provided that if an employee's working day commences before noon an employee shall work three (3) hours before receiving a break:

Provided further that in non-exempt shops on the permitted day for late night trading, weekly employees required to work more than eight and one-half (8½) hours as part of their ordinary working hours and part-time employees required to work overtime in excess of thirty (30) minutes shall have a meal break of not less than thirty (3) minutes nor more than forty-five (45) minutes if such ordinary working hours or overtime hours (as the case may be) are to continue beyond 6.45 p.m. In such circumstances the meal break shall be allowed between 4.30 p.m. and 6.45 p.m.

Notwithstanding the foregoing, the time of taking an employee's midday meal may be brought forward in order that no employee shall be required to work longer than five (5) hours without a meal break.

Clerks Only -

Supper - If overtime be worked on any occasion between the hours of 9.00 p.m. and 8.00 a.m. the employer shall allow a break of half an hour between 11.00 p.m. and 11.30 p.m. and between 4.00 a.m. and 4.30 a.m.

All time work during the mutually agreed times or during the meal times where there is not mutual agreement shall be paid for at double ordinary rates."

Issues for Determination

The central issue for determination in this case, according to the parties, is whether Ms Dunbar worked in excess of thirty hours per week, by virtue of being required to work through meal breaks to which she would have been entitled under the Award. In my view, there was an obvious preliminary issue, of what constitutes a meal break, for the purposes of the Award provisions.

The applicant's submissions were that Ms Dunbar was under instructions to keep the respondent's premises open between the hours of 9.00 am and 5.00 pm. Further, Ms Dunbar was not free to leave the respondent's premises, and was required to consume her meal while monitoring those premises for customers. If customers entered the respondent's premises, then Ms Dunbar was required to cease her meal break to attend to them. The applicant also submitted that Ms Dunbar could only take a toilet break, by arranging with customers, or staff of nearby retail establishments, to watch the respondent's premises while she took such a break. Accordingly, Ms Dunbar had not been provided with meal breaks, in accordance with Award provisions.

The respondent's representative argued that the provision of the "back soon" sign, and the presence of Ms Whitaker on the majority of occasions, meant that the applicant did have a reasonable opportunity to take meal breaks. Further it was contended that on many occasions, trade in the shop had been very slow, and in all probability Ms Dunbar had a reasonable opportunity to take a meal break. The respondent's representative declined an opportunity to put submissions in the alternative, to cover the possibility that the Commission found that these systems did not exist in the workplace, maintaining the position that the systems did exist.

If the Commission is reasonably satisfied that Ms Dunbar did not have meal breaks as required by the Award, the issue is whether she ceased to be a casual employee in terms of the Award definition, by virtue of working in excess of 32 hours per week, and became entitled to annual leave and other benefits of weekly employment. In the event that it is found that Ms Dunbar did not have meal breaks, but did not cease to be a casual employee because of this, the issue is whether Ms Dunbar has any entitlement to additional payment for work performed during meal breaks.

What constitutes a meal break for the purposes of clause 4.3 of the Award?

It would appear that Queensland awards deal generally with meal breaks in a number of ways. In some cases, awards prescribe that a meal break will be taken, usually between certain hours, and provide some flexibility about altering the time at which such a break is taken. In other cases, awards contain an additional penalty, for work during a recognised meal period. The *Retail Industry Interim Award – State*, adopts the former approach with respect to shop assistants, and the latter approach with respect to clerical employees. Generally, meal breaks for day workers are unpaid, and are not counted for the purposes of establishing when overtime payments commence.

In *Ipswich Kindergarten Incorporated v Christensen and Gardiner* (1992) 140 QGIG 167, Moynihan P considered an award provision which provided for an unpaid meal break of between 30 minutes and one hour, after five hours work, or by mutual agreement, a 30 minute paid crib break. Moynihan P was dealing with an appeal arising from complaints by two employees that they had worked during meal breaks. The employer had set up a mutual agreement in terms of the provisions of the Award, as a defence against the claim. At first instance, a Magistrate had found that there was no mutual agreement. At 168, Moynihan P addressed what is meant by a crib break, as follows:–

“The Award does not define it, and it is not necessarily a concept which one would expect to find having a widespread usage in respect of the work of those covered by the Award. It is a term, the origins of which appear to be from the mining industry and later the construction industry. It apparently has its origins, in the context relevant to current consideration, in a meal packed in a container and eaten on the job; see for example the Macquarie Dictionary. A crib break then, subject to the specific provisions of an award, is an opportunity to spread over a reasonable period to partake of a meal on the job without interruption; see e.g. *Mining – Mt Coolon Gold Mines – Industrial Agreement. The Australian Workers’ Union of Employees, Queensland v Mt Coolon Gold Mines* ((1937) 22 QGIG 297-298). In this case, what the Award seems to have contemplated was a break of one-half hour satisfying such criteria...the finding that the meals were consumed with the employer’s consent “during the less busy periods of supervising the children” may be capable of satisfying the requirement of a crib break ...”.

In *Queensland Nurses’ Union of Employees and Bethlehem Nursing Home* (2000) 165 QGIG 216 Hall P considered a provision entitling employees to an allowance, when required to remain on the premises of the employer during a meal break. It was argued that employees were entitled to the allowance where the completion of the scheduled workload required them to remain on the premises during the meal break, or where there was an absence of direction from the employer that the employees were able to leave the premises during a meal break. It was held by the President that only employees directed by the employer to remain on the premises during the meal break, were entitled to the allowance. Employees who could only complete their workload by working through a meal break were entitled to treat the work schedule as an implied request to work during the meal break, and to be paid (under the terms of the relevant award) at overtime rates for such work. An employee who voluntarily stayed on the premises during a meal break and was required to perform work during the break, was entitled to payment at the overtime rate under the terms of the Award, but not to the payment of the allowance for employees required to remain on the premises during the meal break.

The *Australian Concise Oxford Dictionary* defines “break” as “make or become discontinuous otherwise than by cutting or tearing, divide or disperse into two or more parts...short spell of recreation or refreshment between periods of work...”. A meal break is simply a break from work to enable an employee to partake of a meal.

Where an award prescribes a penalty for work during a meal break, a breach of the Award will not occur where such work is performed, provided that the appropriate penalty is paid. Where an award does not provide for a penalty where work is performed during a meal break, it is arguable that this constitutes a breach of the Award. Alternatively, it could be argued that the absence of a penalty for work during a meal break, means that the Award contemplates the possibility that employees may perform some work during a meal break, and then resume the break. In the absence of argument on this point, I am not prepared to determine it.

However, where an employee is prevented from leaving the employer’s premises during a meal break, either specifically at the direction of the employer, or impliedly by the workload or other operational requirements, the employee cannot in my view, be said to have had a meal break. I am also of the view that it is not necessary for an employee to have been able to leave the employer’s premises for the entire period of a meal break, for the employee to be considered to have had a meal break. It will be sufficient, if the employee is free to leave the employer’s premises for part of the meal break, for example to purchase food to consume on the employer’s premises.

An employee who consumes a meal on the employer’s premises, may be said to have had a meal break, if the consumption of the meal is reasonably uninterrupted. Where an employee is required to monitor the employer’s operations or to interrupt their meal break to perform work, the question of whether that employee has had a meal break, will be one of fact. An important consideration may be that the employee concerned is reasonably able to consume a meal and to rest, or able to take additional time after any interruption, to consume a meal. In these circumstances, it may also be argued that an employee has had a meal break. Obviously, the consideration of this issue will be different when an award provides a penalty or other payment for work performed during a meal break.

The meal break provisions of the *Retail Industry Interim Award – State* relating to shop assistants, do not define the conditions which must be satisfied before an employee can be said to have had a meal break. The Award does not require that a meal break be continuous. In my view, the use of the term “continuous” in clause 4.3 is in the context that work must be continuous except for meal breaks. This means that arrangements such as split shifts cannot be worked. Further, that Award does not prescribe a penalty payment for employees who perform work during a meal break, or provide for a paid crib break when employees take their meal “on the job”. Further, the Award does not provide for a payment in the event that a meal break is interrupted.

In my view, the minimum meal break entitlement which employees under the *Retail Industry Interim Award – State* have, is a break of at least thirty minutes, which is reasonably uninterrupted, to enable the consumption of a meal, and a break from work. Further, employees under that Award must be free to leave the employer’s premises for at least part of the meal break, if they so desire. If these conditions are met, then an employee under the *Retail Industry Interim Award – State* can be said to have had a meal break, as required by the Award. An employee who is required to cease taking a meal break to attend to customers, to the extent that the employee does not have thirty minutes break from work in a reasonable period of time, cannot be said to have had a meal break.

Conclusions

In her witness statement, Ms Dunbar said that she worked between 9.00 am and 5.00 pm on Mondays, Tuesdays, Thursdays and Fridays. In her evidence Ms Dunbar said that on some occasions, she swapped working days with other employees. Mr Alexander for the respondent, produced a number of documents known as “day sheets”. Essentially, staff of the respondent would attach tags from garments sold during each day, cash register dockets, eftpos records and other details of daily trading to these sheets. Mr Alexander established during cross-examination of Ms Dunbar, that there were a number of Mondays, Tuesdays, Thursdays and Fridays where Ms Dunbar’s handwriting did not appear on the day sheets, and in all probability, that she had not worked on those particular days.

Mr Alexander then put to Ms Dunbar that this established that in the weeks where these days fell, Ms Dunbar had not worked for 30 hours, much less 32 as she had claimed. In response, Ms Dunbar said that in all probability, she had swapped those days with another employee. Further Ms Dunbar pointed to the fact that she had been paid for 30 hours in each of the weeks in question, and it was unlikely that the respondent would have paid her for four days work, if she had only worked on three days. I agree with Ms Dunbar on this point.

In my view, all that this evidence established was that Ms Dunbar did not work on a particular day. In the absence of evidence about the entire week in which each of the days in question fell, which was not put to Ms Dunbar, I am unable to be satisfied that she did not work on any other day in that week, as a result of swapping days with another employee. In my view, it is highly improbable that Ms Whitaker would have paid Ms Dunbar for four days in a week, where only three days were worked. Further, Mrs Healy gave evidence that she swapped days with Ms Dunbar on a number of occasions. On the balance of probabilities, I find that Ms Dunbar worked on four days of the week, during the period covered by this claim. The very few occasions when Ms Dunbar may have worked less than four days in a week because of averaging or other arrangements, are not relevant to the determination of this matter.

I also accept Ms Dunbar's evidence that she worked between the hours of 9.00 am and 5.00 pm. Evidence was called for the respondent which showed that the cash register in the shop in which Ms Dunbar was working, was often not opened until after 9.00 am, and was closed before 5.00 pm. In my view, the respondent did not establish that Ms Dunbar's starting and finishing times coincided with the opening and closing of the cash register. The evidence clearly shows that it was common for the cash register to be opened some time after the shop was opened and for it to be closed from as early as 4.30 pm, to enable daily balances to be calculated and the routine for the closing of the shop to be undertaken before 5.00 pm.

I do not accept that Ms Whitaker was in the shop with Ms Dunbar for the majority of time. Evidence called by the respondent, established at best, that Ms Whitaker was present in the shop on only some occasions, while Ms Dunbar was working. In reaching this conclusion I have considered the evidence of Mr Ross, who said that Ms Whitaker was present in the shop 50% of the time, and Ms Wills who visited the shop on a regular basis, said that she had only seen Ms Dunbar in the shop at the same time as Ms Whitaker, on a few occasions.

I have given extensive consideration to the day sheets, which were put into evidence for the respondent. Ms Dunbar was examined at length on whether or not her writing appeared on a significant number of day sheets. However, it was not put to Ms Dunbar that the handwriting of any other person appeared on the same day sheets. Under cross-examination, Ms Whitaker identified her own handwriting on a number of day sheets which also contained the handwriting of Ms Dunbar.

In deciding what weight to place on this evidence, I have considered the following matters:-

- At all times, the day sheets were in the control of the respondent;
- The existence of the day sheets was not disclosed in accordance with the directions order, which required a list of all relevant documentation to be provided to the applicant;
- It was a critical aspect of the respondent's case that Ms Whitaker was present in the shop on the majority of days on which Ms Dunbar worked, and relieved Ms Dunbar for meal breaks;
- If the respondent had evidence to support this contention, that evidence at very least, should have been put to Ms Dunbar during cross-examination;
- Due to a misunderstanding of the case to be answered by the respondent, which was not reasonable in my view, the hearing of this matter was not completed in the allocated time;
- During the break before the resumption of the hearing, Ms Dunbar who had given her evidence and been excused, was required to travel to Sydney, due to the illness of her mother and was not able to be recalled;
- The day sheets in question were not even canvassed with Ms Whitaker during her evidence in chief;
- The evidence of Ms Whitaker under cross-examination, did not establish that she wrote on the day sheets while working in the shop.

Further, I do not accept the submission for the respondent that Ms Dunbar could not have identified the handwriting of Ms Whitaker, and that there was no value in asking her to do so. The critical point is that Ms Dunbar had alleged that she was working alone, and because of this, was unable to take a meal break. It could have reasonably been put to Ms Dunbar, that another person's handwriting on the day sheets, indicated that Ms Dunbar was not alone in the shop on a number of the days in question.

In the absence of the contents of the day sheets being put to Ms Dunbar, and being dealt with in the evidence in chief of Ms Whitaker, I am unable to be reasonably satisfied that the day sheets establish that Ms Whitaker was working in the shop on the majority of occasions with Ms Dunbar. I am however reasonably satisfied on the basis of the day sheets, that trade in the shop where Ms Dunbar was working was often slow.

I am also unable to be reasonably satisfied that the respondent provided a sign for use by Ms Dunbar, which indicated that she would be "back soon", or back in "5 minutes". The evidence of the applicant's witness was consistent, and established on balance that such a sign had not been available to be used by Ms Dunbar. The evidence of the respondent's witnesses was not convincing on this point. After each of the applicant's witnesses had been shown a sign which was said to have been available for use by Ms Dunbar, Ms Whitaker said that another version of the sign may have been used. The existence of the sign was a significant part of the respondent's case, was not supported by the evidence.

The fact that Ms Dunbar may have made arrangements with staff of other retail establishments, or customers, to watch the respondent's premises while she took toilet breaks, is not sufficient for me to find that she had meal breaks in accordance with Award requirements.

Other matters raised by the respondent, designed to attack the credibility of Ms Dunbar, were not relevant to the matters for determination, and were not supported by the evidence. Much of the evidence in relation to these matters was hearsay, or involved self serving statements made at times which could not be accurately pinpointed, or related to events which could be proven to have occurred. I am also not satisfied that Mrs Whitaker deliberately set out to breach the Award by requiring Ms Dunbar to work 32 hours, but to be paid only for 30 hours. In all probability, the situation at the respondent's premises arose from the demands of operating a small business, rather than a systematic avoidance of Award requirements.

In all of the circumstances of this case, I am unable to be reasonably satisfied that Ms Dunbar had a meal break as required by the Award, on each day upon which she performed work for the respondent. However, I am also satisfied that on some occasions, in all probability, Ms Dunbar was able to take a meal break. In my view, the most probable version of events is that on the majority of days upon which she worked, Ms Dunbar had time to consume a meal each day, but that on a significant number of occasions, that time was not continuous. It is also probable that on some occasions, Ms Whitaker was present in the shop while Ms Dunbar was working, and could have relieved her on those occasions, or that trade was sufficiently slow to have enabled Ms Dunbar to take a meal break. Accordingly, I am not satisfied that on every day that Ms Dunbar worked for the respondent, she was unable to leave the respondent's premises for at least part of her meal break.

I am also not satisfied that the fact that Ms Dunbar did not have meal breaks as required by the Award on each day that she worked for the respondent, means that she worked 32 hours in each week, and therefore ceased to be a casual employee.

In the circumstances of this case, I propose to adopt the equitable approach followed by Bechly C in *ALHMMWU v Armstrong* (2000) 165 QGIG 248, and determine that in all probability, Ms Dunbar was unable to take a meal break on 50% of occasions when she worked for the respondent.

Accordingly, I have determined that Ms Dunbar has been underpaid by an amount of \$1,803.70. I have calculated this amount by taking 50% of the amount claimed in the event that I found that Ms Dunbar was a casual employee and had worked through her meal breaks.

I order that Expressions By Cathy Pty Ltd pay to Ms June May Dunbar, the amount of \$1,803.70. I accept that the respondent is currently encountering difficult trading conditions, as is the retail industry generally. The amount of \$1,803.70 is to be paid in two equal instalments. The first instalment is to be paid within 28 days of the date of release of this decision, and the second instalment within 28 days of the date of the payment of the first instalment.

I.C. ASBURY, Commissioner.

Released: 6 September 2001

Appearances:-

Mr R.J. Whitson, of the Department of Industrial Relations for the Applicant.

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

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Jay Berends AND Gillilodge Pty Ltd (Case No. B362 of 2001)

COMMISSIONER ASBURY

6 September 2001

Termination of employment – Finding that applicant was constructively dismissed – Finding that dismissal was unfair – Finding that reinstatement or re-employment impracticable – Further evidence required to determine amount of compensation to be awarded – Further evidence provided by applicant in affidavit – Respondent declined opportunity to cross-examine applicant about contents of affidavit – Compensation awarded.

DECISION

In a decision released on 3 August 2001, I found that Mr Jay Berends (the applicant) had been unfairly dismissed, and that the remedies of reinstatement or re-employment were impracticable. I also found that insufficient evidence had been called by the applicant in relation to non-refundable remuneration received in the period following his dismissal, to enable compensation to be calculated. Accordingly, within seven days of the release of that decision, the applicant was directed to file in the Commission and serve on the respondent, an affidavit containing information upon which an assessment of compensation could be made.

Within fourteen days of the release of that decision, the respondent was directed to advise the Commission in writing, of whether or not cross-examination of the applicant in relation to the contents of the affidavit was required. No advice has been received from the respondent.

This decision relates to the amount of compensation to be awarded to the applicant. The purpose of such an award is to compensate the applicant for the loss caused by the dismissal (*Griggs v Health Equipment Hire and Supplies Pty Ltd* (1995) 149 QGIG 131 at 134).

In a significant number of cases the Commission has formulated compensation according to the factors identified in *Chenery v Klemzig Nursing Home* (1988) 55 SAIR 54 and the global approach laid down in that decision, of considering those factors which are relevant to the particular circumstances of each case.

In this case, I have considered factors which include:

- the qualifications and experience of the applicant;
- the fact that the applicant was employed on a casual basis;
- the relatively short period of time which the applicant had worked for the respondent;
- the fact that the applicant's hours were reduced;
- evidence that the hours of other casual employees were subsequently increased;
- the fact that the applicant obtained alternative employment within a relatively short period of time.

Section 79(2) of the *Industrial Relations Act 1999* (the Act) provides that in deciding the amount of compensation to be paid to an employee found to have been unfairly dismissed, and for whom reinstatement or re-employment is found to be impracticable, the Commission must not award an amount which is greater than the wages the employer would have been liable to pay the employee for the six months immediately after the dismissal, paid at the rate the employee would have received immediately before the dismissal.

In this case, the determination of an appropriate amount of compensation is made difficult by the fact that the respondent had reduced the applicant's hours of work, prior to the dismissal. In my view, the limit on compensation provided by s. 79(2) is global in nature, and does not restrict the Commission as to how the amount of compensation, within that limit, is to be calculated. For example, I am not restricted in calculating compensation, by the fact that the applicant worked thirty hours per week immediately prior to his dismissal, provided that the total amount of compensation awarded is equal to or less than the maximum provided by s. 79(2) of the Act.

I am not satisfied in the circumstances of this case, that the applicant would have continued to work only thirty hours per week. The evidence from the applicant's own witnesses, indicated that hours for casual employees had been reduced because of advice about the provisions of the relevant Award, and were subsequently increased to previous levels, based on a change to that advice.

The applicant was being paid an hourly rate of \$14.75, immediately prior to his dismissal. Before the reduction in his weekly working hours, the applicant worked at least thirty-eight hours each week. The applicant was dismissed on 8 February 2001, and had obtained other employment by 22 March 2001. The applicant was employed on a casual basis by the respondent, and has obtained casual employment following his dismissal. The applicant received a total of \$768.40 from Centrelink payments during the period from 8 February to 22 March 2001. I have brought these payments into account in the calculation of the compensation (*Lucas v Steven Paul Lather trading as Radcliffe, Lather and Buckland and Another* (1996) 153 QGIG 1542 at 1543). I have not taken into account the fact that the respondent had not paid the applicant for the week he worked prior to his dismissal, in determining the amount of compensation. The applicant is still at liberty to pursue such payment.

I have decided to award the applicant compensation in the amount of \$2,500. That amount is a global sum, which I have determined by reference to the factors outlined elsewhere in this decision.

I order that Gillilodge Pty Ltd, trading as Campmart pay to the applicant, Mr Jay Berends, the amount of \$2,500 within 21 days from the date of this decision.

I.C. ASBURY, Commissioner.

Appearances:-

Mr J. Berends, the Applicant, on his own behalf.

Mr D. Matley of Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) for the Respondent.

Released: 6 September 2001

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INDUSTRIAL COURT OF QUEENSLAND

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

WorkCover Queensland AND Shagadelic Pty Ltd (No. C5 of 2001)

PRESIDENT HALL

11 September 2001

DECISION (Correction of Error)

The Decision reported at 166 QGIG 422 is amended by deleting the WorkCover Industry Classification Code of 2412 218 in the second last paragraph on page 423 and inserting the WorkCover Industry Classification Code of 241218 in its place.

Dated this eleventh day of September, 2001.

D.R. HALL, President

Released: 12 September 2001

#####

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. B507 of 2001)

CLAY PRODUCTS INDUSTRY AWARD – STATE

COMMISSIONER SWAN

24 April 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 24 April 2001, this Commission orders that the said Award be amended as follows as from the twenty-fourth day of April, 2001:-

By deleting subclause (2) of clause 4.4 (Shift Work – Extra Payment) and inserting the following in lieu thereof:-

“(2)(a) *Afternoon and Night Shift Allowances* – In addition to the rates of pay prescribed by clause 3.3 (Wages) of this Award, employees whilst engaged on afternoon shift and night shift, as established pursuant to clause 4.1 (Hours of Work) of this Award, shall be paid an additional penalty rate for each such shift as follows:-

(i)	Afternoon shift (from 24/4/2001)	11% (or \$9.70 whichever is the greater)
	Night Shift (from 24/4/2001)	12.5% (or \$9.70 whichever is the greater)
(ii)	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)
(iii)	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 any shift finishing after 6.00 pm and at or before midnight;
- (ii) ‘Night shift’ shall mean any shift finishing after midnight and at or before 8.00am;
- (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 extra shift rate shall apply to shift work performed on Saturday and Sunday where extra payments apply to continuous shift work.

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

Dated this twenty-fourth day of April, 2001.

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

Operative Date: 24 April 2001
Amendment – Allowance for Afternoon and Night Work
Released: 6 September 2001

#####

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. B508 of 2001)**

CONCRETE PRODUCTS AND CEMENT BATCHING AWARD – STATE

COMMISSIONER SWAN

6 April 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 6 April 2001, this Commission orders that the said Award be amended as follows as from the sixth day of April, 2001:–

By deleting subclause (4) of clause 4.1 (Hours of Work, Shift Work) and inserting the following in lieu thereof:–

“(4)(a) *Afternoon and Night Shift Allowance* – In addition to the rates of pay prescribed by clause 3.3 (Wages) of this Award, employees whilst engaged on afternoon shift and night shift, as established pursuant to clause 4.1 (Hours of Work) of this Award, shall be paid an additional penalty rate for each such shift as follows:–

(i)	Afternoon shift (from 6/4/2001)	11% (or \$9.70 whichever is the greater)
	Night Shift (from 6/4/2001)	12.5% (or \$9.70 whichever is the greater)
(ii)	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)
(iii)	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) 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) Provided that this extra shift rate shall not apply to shift work performed on a Saturday and Sunday where the undermentioned rates apply:

All ordinary time worked on Saturday and Sunday by employees covered by the Operating Stream as provided by clause 4.1(2) and (3) not being overtime within the meaning of clause 4.2, shall be paid for at the rate of time and a-half the ordinary rate between midnight Friday and midnight Sunday.

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

Dated this sixth day of April, 2001.

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

Operative Date: 6 April 2001
Amendment – Allowance for Afternoon and Night Work
Released: 6 September 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 Motor Trades Association of
Queensland Industrial Organisation of Employers and Others (No. B505 of 2001)**

**GARAGE AND SERVICE STATION ATTENDANTS' AWARD – STATE
(EXCLUDING SOUTH-EASTERN DISTRICT)**

COMMISSIONER SWAN

2 May 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 2 May 2001, this Commission orders that the said Award be amended as follows as from the second day of May, 2001:–

1. By deleting subclause (5) of clause 4 (Hours) and inserting the following in lieu thereof:–

“(5)(a) *Afternoon and Night Shift Allowances* – In addition to the rates of pay prescribed by clause 7 (Wages) of this Award, employees whilst engaged on afternoon shift and night shift, as established pursuant to clause 4 (Hours) of this Award, shall be paid an additional penalty rate for each such shift as follows:–

- (i) Afternoon Shift (from 2/5/2001) 12% (or \$9.70 whichever is the greater)
Night shift (from 2/5/2001) 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 any shift, finishing after 9.00 pm and at or before midnight;
- (ii) 'Night shift' shall mean any shift finishing after midnight and at or before 8.00 am or any shift commencing at or after midnight and before 5.30 am;
- (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) No employee shall as a result of this clause suffer any reduction to their current entitlement to shift allowance.”.

2. By deleting subclause (5) of clause 10 of the appendix and inserting the following in lieu thereof:-

“(5)(a) *Afternoon and Night Shift Allowances* – In addition to the rates of pay prescribed by clause 7 (Wages) of this Award, employees whilst engaged on afternoon shift and night shift, as established pursuant to clause 4 (Hours) of this Award, shall be paid an additional penalty rate for each such shift as follows:-

- (i) Afternoon Shift (from 2/5/2001) 12% (or \$9.70 whichever is the greater)
Night shift (from 2/5/2001) 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 any shift, finishing after 9.00 pm and at or before midnight;
- (ii) 'Night shift' shall mean any shift finishing after midnight and at or before 8.00 am or any shift commencing at or after midnight and before 5.30 am;
- (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) No employee shall as a result of this clause suffer any reduction to their current entitlement to shift allowance.”.

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

Operative Date: 2 May 2001
Amendment – Afternoon and Night Shift Allowances
Released: 6 September 2001

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

The Australian Workers' Union of Employees, Queensland AND The Private Hospitals Association of Queensland Inc (No. B268 of 2001)

PRIVATE HOSPITALS EMPLOYEES' AWARD – STATE

COMMISSIONER SWAN

27 February 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 27 February 2001, this Commission orders that the said Award be amended as follows as from the fifth day of March, 2001:-

By deleting clause 3.10 (Allowance for Afternoon And Night Work) and inserting the following in lieu thereof:-

“3.10 Allowance for Afternoon and Night Work

3.10.1 In addition to the rates of pay prescribed by clause 3.7 (Wages) 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:-

- (a) Afternoon shift (from 5/3/2001) 11% (or \$9.70 whichever is the greater)
Night Shift (from 5/3/2001) 12.5% (or \$9.70 whichever is the greater)
- (b) 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)
- (c) 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)

3.10.2 For the purposes of this clause:-

- (a) 'Afternoon shift' shall mean a shift, other than a night shift as defined herein, commencing at or after 12 midday;
- (b) '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;
- (c) 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.

3.10.3 This allowance shall not apply to work performed on Saturday and Sunday and statutory holidays where extra payments apply for such work."

Dated this twenty-seventh day of February, 2001.

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

Operative Date: 5 March 2001
Amendment – Allowance for Afternoon and Night Work
Released: 6 September 2001

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Queensland Nurses' Union of Employees (No. Q34 of 2001)

REGISTRAR EWALD

7 September 2001

Conduct of Election – Branch Elections – New Branches – Electoral Commission to Conduct Election.

DECISION

On 6 September 2001, the Queensland Nurses' Union of Employees lodged in the Registry under section 481 of the *Industrial Relations Act 1999*, the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* and supporting material in relation to its request for the conduct of an election by the Electoral Commission for each of the new branches of the Industrial Organisation as listed on Schedule "A" for the following positions:-

Office	Number
Branch President	1
Branch Vice President	1
Branch Secretary	1
Branch Assistant Secretary	1
Branch Delegate to the Committee of Regional Delegates..... }	As Listed
Branch Alternate Delegate to the Committee of Regional Delegates..... }	on Schedule "A"

Reasons for Election

In its supporting material, the Industrial Organisation has advised that the new Branches, as listed on Schedule "A" hereto have been set up with "the approval of Council" in accordance with Rule 43(a). The number of delegates for each Branch is apportioned in accordance with the scale of delegates set out in Rule 44 based upon the number of financial members of each branch.

Each branch consists of office positions of Branch President, Branch Vice President, Branch Secretary, Branch Assistant Secretary, and the number determined in Rule 44 for Branch Delegates to the Committee of Regional Delegates and Branch Alternate Delegates to the Committee of Regional Delegates.

The numbers of delegates and alternate delegates to be elected for each Branch are listed on Schedule "A".

Method of Voting

I am satisfied that the method of voting is by a direct voting system by way of a secret postal ballot.

Conduct of Elections

I have considered the request, supporting material, the Act and Rules, and I am satisfied that an election is required to be held under the rules for each of the above positions of Office for each of the new Branches listed on Schedule "A" for the Industrial Organisation.

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

Dated this seventh day of September, 2001.

E. EWALD,
Industrial Registrar.

Schedule "A"

Branches	Number of Delegates	Number of Alternate Delegates
Clermont Multipurpose Health Service.....	1.....	1
Jacana Centre	1.....	1

Branches	Number of Delegates	Number of Alternate Delegates
Monto	1.....	1.....
Mossman MPHS	1.....	1.....
Nubeena Nursing Home	1.....	1.....
Proserpine Hospital/Whitsunday Community	1.....	1.....
Ramsay Hospitals (previously Greenslopes).....	5.....	5.....
Townsville Nursing Home.....	1.....	1.....
Wesley Parkhaven.....	2.....	2.....
Wide Bay DONs	1.....	1.....

Released: 7 September 2001