



The Queensland Government Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$297 + GST

ISSN 0155-9362

Vol. 168

FRIDAY, 28 SEPTEMBER, 2001

No. 4

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
CA83/00	Subway Mackay City - Certified Agreement	28/3/00	
CA329/01	Day Dawn Pty Ltd Maintenance Employees - Certified Agreement	5/9/01	
CA404/01	Abigroup Contractors Pty Limited, Civil Construction - Certified Agreement 2001	6/9/01	CA7/97
CA396/01	Mater Misericordiae Hospital Townsville Ltd - Clerical Staff – Certified Agreement 2001	10/9/01	CA248/99
CA386/01	CSR Limited - SEQ Readymix Cement Tanker Transport – Certified Agreement 2001 – 2004	11/9/01	CA521/99
CA387/01	CSR Limited - SEQ Readymix Concrete Transport – Certified Agreement 2001 - 2004	11/9/01	CA516/99

E. EWALD
Industrial Registrar

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application for new award

SEPR Australia Pty Ltd AND The Australian Workers' Union of Employees, Queensland (No. B956 of 2001)

SEPR AUSTRALIA PTY LTD – AWARD 2001

COMMISSIONERS BLADES, BROWN AND ASBURY

21 August 2001

NEW AWARD

THIS matter, coming on for hearing before the Commission at Brisbane on 19 July and 21 August 2001, this Commission Awards, *by consent*, as follows as from the twenty-first day of August, 2001:—

SEPR AUSTRALIA PTY LTD – AWARD 2001

ARRANGEMENT OF AWARD

Subject Matter Clause No.

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PART 1 – PRELIMINARY**1.1 Title**

This Award shall be known as the SEPR Australia Pty Ltd – Award 2001.

1.2 Award Coverage

This Award shall be binding on SEPR Australia Pty Ltd (hereinafter referred to as “The employer”) and its employees and The Australian Workers’ Union of Employees, Queensland (hereinafter referred to as “The Union”) in or in connection with or incidental to the manufacture of industrial ceramics:

Provided that the provisions of this Award (other than clause 3.4 – Occupational Superannuation, clause 5.1 – Annual Leave, clause 5.3 – Sick Leave and clause 5.4 –Long Service Leave) shall not apply to employees in wage levels 1, 2 and 3 where such employees are in receipt of a weekly wage rate not less than 33¹/₃ per cent in excess of the weekly rate prescribed in clause 3.3 of the employee’s level.

1.3 Date of Operation

This Award shall take effect and have the force of Law as from the 21 August 2001 and shall remain in force for a period of three (3) years.

1.4 Award Posting

A true copy of this Award shall be exhibited in a conspicuous and convenient place on the premises of the employer so as to be easily read by employees.

PART 2 – TERMS & CONDITIONS OF EMPLOYMENT**2.1 Contract of Employment**

2.1.1 *Employment* – Except has herein provided employment shall be by the week, and any employee not specifically engaged as casual shall be deemed to be employed by the week.

2.1.2 For other than fixed-term and casual employees, employment shall be terminated in the following manner:-

Notice of termination by employee – The notice of termination required to be given by an employee shall be the same as that required by an employer, save and except that there shall be no additional notice based on the age of the employee concerned.

Notice of termination by employer – In order to terminate the employment of an employee the employer shall give to the employee the following notice –

Employee's period of continuous service with the Employer	Period of Notice
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

2.1.3 In addition to the notice in subclause 2.1.2 hereof, employees over 45 years of age at the time of the giving of the notice with not less than two years continuous service, shall be entitled to an additional week's notice.

2.1.4 Compensation in lieu of notice must be calculated as if the employee had continued in his/her normal employment for that period.

2.1.5 Nothing in this clause shall affect the right of the employer or an officer duly authorised by the employer to instantly terminate the services of an employee for misconduct or other grounds that justify summary dismissal.

2.1.6 The Company may engage an employee on a probationary basis for a maximum period of 3 months. This period shall permit induction, initial company training and for the assessment of the employee's performance.

During the period of probationary employment, the employee's service will count for the purposes of accruing leave entitlements, but shall not be entitled to any paid leave, other than sick leave or bereavement leave, during that probationary period.

2.1.7 Fixed-Term Employment –

(a) A fixed-term employee is one who is engaged for a fixed term.

(b) A fixed-term employee may also be engaged on a part-time basis.

(c) Fixed-term employees will accrue all annual accruals in the same proportion as their fixed-term bears to a calendar year.

(d) Fixed-term employees on a contract for less than 12 months will not become eligible for termination, change and redundancy payments at the end of the fixed term engagement.

(e) Should a fixed-term employee be engaged on a weekly basis during the term of engagement the accrued service entitlements shall form part of the employee's period of continuous service.

(f) The details of the fixed-term of employment shall be reduced to writing and retained by the parties. The employer's copy shall be retained and used to support the time and wages record of the employee concerned.

(g) The terms of the fixed-term agreement may only be varied in writing by the parties, *by consent*, at any time.

2.1.8 "Part-Time Employee" shall mean a weekly employee who is engaged to work on predetermined days of the week for a regular number of hours less than 38 per week.

2.1.9 "Casual Employee" shall mean an employee engaged by the hour and who works less than 32 hours per week averaged over the work cycle. Casual employees are not entitled to Annual Leave or Sick Leave but are entitled to Long Service Leave calculated in accordance with the *Industrial Relations Act 1999*.

2.1.10 The employer may direct an employee to carry out such duties as are reasonably within the limits of the employee's skill, competence and training consistent with the classification structure of this Award provided that such duties are not designed to promote deskilling.

The employer may direct an employee to carry out such duties and use such tools and equipment as may be required provided that the employee has been properly trained in the use of such tools and equipment.

Any direction issued by the employer pursuant to the subclauses herein shall be consistent with the employer's responsibility to provide a safe and healthy working environment.

2.1.11 The employer may stand down any employee without pay on any day, or for part of any day, on which the employee cannot be usefully employed because of the occurrence of anything for which the employer is not responsible or over which the employer has no control.

2.2 Introduction of Changes, Termination of Employment in Cases of Redundancy

Except as provided for in clause 2.1 hereof, employers and employees to whom this Award applies shall observe the terms and conditions of the Statement of Policy of Termination of Employment, Introduction of Changes and Redundancy contained in the decision of the Full Branch of the Commission dated 16 June 1987, and published in the *Queensland Government Industrial Gazette* Vol. 125, folios 1119-1121, as amended by 125 QGIG 1377 and 126 QGIG 188:

Provided that the provisions of clause A (Termination of Employment) contained in the aforesaid Statement of Policy shall not have application under this Award, except in circumstances resulting from introduction of changes and/or redundancy as set out in clauses B and C respectively of that Statement of Policy.

The employer shall display a copy of the aforementioned decision of the Full Bench of the Commission in such a position as to be easily read by the employees.

2.3 Grievance & Dispute Settlement Procedure

- 2.3.1 The matters to be dealt with in this procedure shall include all grievances or disputes between an employee and the employer in respect to any industrial matter and all other matters that the parties agree on and are specified herein. Such procedure shall apply to a single employee or to any number of employees.
- 2.3.2 In the event of an employee having a grievance or dispute, the employee shall in the first instance attempt to resolve the matter with the immediate foreperson/supervisor, who shall respond to such request as soon as reasonably practicable under the circumstances or in any case within 24 hours of the matter being raised.
- 2.3.3 If the grievance or dispute is not resolved under subclause 2.3.2 hereof, the employee or the employee's representative may refer the matter to the next higher level of management for discussion. Such discussion should, if possible, take place within 24 hours after the request by the employee or the employee's representative.
- 2.3.4 If the grievance or dispute is still unresolved after a further 24 hours following discussions listed in 2.3.3 hereof, the matter shall, in the case of a member of an Industrial Organisation of Employees, be reported to the State Secretary of the relevant Organisation of Employees and the relevant senior Management of the employer or the employer's nominated Industrial Representative. This should occur as soon as it is evident that discussions under subclause 2.3.3 hereof will not result in resolution of the dispute.
- 2.3.5 If, after discussion between the parties, or their nominees mentioned in subclause 2.3.4, the dispute remains unresolved after the parties have genuinely attempted to achieve a settlement thereof, then notification of the existence of the dispute is to be given in pursuance of section 229 of the *Industrial Relations Act 1999*.
- 2.3.6 Whilst all of the above procedure is being followed normal work shall continue except in a case of a genuine safety issue.
- 2.3.7 The *status quo* existing before the emergence of the grievance or dispute is to continue whilst the above procedure is being followed.
- 2.3.8 All parties shall give due consideration to matters raised or any suggestion or recommendation made by an Industrial Commissioner or Industrial Magistrate with a view to the prompt settlement of the dispute.
- 2.3.9 Any Order of the Queensland Industrial Relations Commission (subject to the parties right of appeal under the Act) will be final and binding on all parties to the dispute.
- 2.3.10 Discussions at any stage of the procedure shall not be unreasonably delayed by any party, subject to acceptance that some matters may be of such complexity or importance that it may take a reasonable period of time for the appropriate response to be made. If genuine discussions are unreasonably delayed or hindered, it shall be open to any party to give notification of dispute pursuant to section 229 of the *Industrial Relations Act 1999*.

PART 3 – DEFINITIONS, WAGES & ALLOWANCES

3.1 Definitions

- (1) "Day Shift" means a shift which commences at 6.00am or later, but finishes at or before 6.00pm.
- (2) "Afternoon Shift" means any shift commencing between 12 noon and 6.00pm.
- (3) "Night Shift" means any shift which commences between 6.00pm and midnight.

3.2 Wages

3.2.1 Weekly Wage Rates

			Relativity to Level 3 %	Total Per Wk \$
Refractory Employee	Level	1	120	647.28
Refractory Employee	Level	2	107	577.16
Refractory Employee	Level	3	100	539.40
Refractory Employee	Level	4	85	458.49

Note: The above relativities will only be varied by agreement of the parties.

The rates of pay in this Award include the arbitrated wage adjustment and Queensland Minimum Wage payable under the 1 September 2000 Declaration of General Ruling and earlier safety net adjustments. (Disputed cases are to be referred to the President.) Any increase arising from the insertion of the Queensland Minimum Wage clause may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award variations to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Cases or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated wage adjustments.

3.2.2 Structure Definitions

- (a) Refractory Employee Level 4 is an employee, who performs routine duties essentially of a manual nature and to their level of skill.

Exercises basic skill levels.

Works under direct supervision and is responsible for the quality of their own work within these parameters.

Works within Occupational Health and Safety Guidelines.

Will be taking structured training in the following so as to enable them to work at level 3.

- basic computer and keyboard skills;
- sieving, packing and bagging;
- sampling of products;
- batch preparation;
- sawing and fitting of ceramic pieces;
- quality Control techniques;
- OH&S greater awareness; and
- basic welding.

Without limiting the generality of the above duties of this level will also include any of or any combination of:

- cleaning and housekeeping all areas;
- general ground keeping including using the appropriate tools and equipment;
- basic process work and general labouring;
- record keeping within the scope of this grade;
- basic finishing skills in sawing and fitting ceramic;
- operation of a Fork Lift truck; and
- maintenance within statutory limits.

Reporting to Supervisor where more detailed maintenance is required.

Minimum Training Requirement

In-house training mainly on-the-job would normally be conducted by the Supervisor and/or the assistant with the purpose of explaining approved methods and ensuring that the tasks can be carried out safely, promote an understanding of all procedures relating to the furnace and/or the cutting, making jigs and installation of ceramic to enable them to up-grade to level 3.

- (b) Refractory Employee Level 3 is an employee who performs work above and beyond the skills of level 4 and to their level of skill.

All duties of level 4.

Works under a system of routine supervision either individually or in a team environment and is responsible for the quality of their own work within these parameters.

Can carry out breakdown, routine and preventive maintenance within the scope of this grade.

Understands and applies Quality Control Techniques.

Exercises general keyboard and computer skills.

Works within Occupational Health and Safety Guidelines, actively promotes OH&S awareness and good practice and ensures that obvious hazards are remedied.

Will be taking structured training so as to enable them to work at level 2.

- improved computer skills; and
- improved furnace and related equipment operations.

Without limiting the generality of the above duties of this level it will also include any of or any combination of:

- sawing of ceramic pieces;
- material handling and stores duties including –
 - inward and outward goods;
 - stock control; and
 - sieving and bagging products.
- general maintenance of Plant & Equipment; and
- basic welding skills.

Competent and uses initiative in all facets of ceramic sawing and fitting and able to set up jigging for sawing under instruction.

Minimum Training Requirement

In addition to the skills and Training outlined for level 4, production personnel who have also successfully completed Company training in the production operation of:

- crushing;
- batch preparation;

- sawing of ceramics;
- sieving, bagging and packing;
- advanced furnace operations;
- welding;
- fault finding in the hydraulic systems;
- electrode Changing; and
- QA awareness.

(c) Refractory Employee Level 2 is an employee who performs work above and beyond the skills of level 3 and to their level of skill.

All duties at Level 4 and 3.

Works under a system of general supervision individually or in a team environment, and can carry out breakdown, routine and preventive maintenance.

Understands and applies Quality Control Techniques.

Exercises good inter-personal communication skills.

Exercise discretion within the scope of this level.

Works within Occupational Health and Safety Guidelines, actively promotes OH&S awareness and good practice and assures that obvious hazards are remedied.

Without limiting the generality of the above duties of this level it will also include any of or any combination of:

- capable and confident of running the furnace and all related equipment in the absence of the Supervisor (Refractory Employee Level 1).

Which includes:

- furnace operation;
 - changing electrodes; and
 - batch preparation.
- perform repairs and maintenance work within statutory limitations;
 - is competent in the sieving and bagging and packing operation; and
 - advanced keyboard skills and computer literacy.

OR

- competent in all facets of ceramic cutting and fitting, and checking pieces to Quality Assurance and customer specifications; and
- is competent at packing all SEPR Australia outgoing goods.

OR

- mechanical and Electrical personnel who are competent in mechanical or electrical maintenance, repair and installation.

Minimum Training Requirement

In addition to the skills and Training outlined for level 1 & 2, is undergoing Company training in:

- supervision; and
- Quality Assurance/Quality Control best practices.

Would generally hold a Tradespersons Certificate in either the mechanical or electrical/ electronic stream or may hold a Tradespersons Rights Certificate.

However:

If the employee has been "doing the job" satisfactorily for 3 years the Tradespersons Certificate or a Tradespersons Rights Certificate is not necessarily required.

(d) Refractory Employee Level 1 is an employee who performs all duties of the lower levels and supervises the activities of a section or number of sections.

works under limited supervision;
 provides trade guidance and assistance;
 provides training for employees at lower levels;
 understands and implements QA/QC techniques;
 exercises cross-skilling in technical fields;
 exercises good interpersonal communication skills;
 works within Occupational Health and Safety Guidelines, actively promotes OH&S awareness and good practice and assures that obvious hazards are remedied;
 exercises discretion within the scope of this grade;
 supervises and performs all duties of lower levels; and
 understands and is competent in the complete production process.

Is also competent at producing samples of product for evaluation in the XRF machine and based on the results of this test decides whether any parameters of the furnace or ancillary equipment should be changed to satisfy QA/customer specifications.

Electrical personnel who are competent and understand and maintain all facets of the SCADA, PLC and electrical systems.

- 3.2.3 *Casual Employee* (as defined) – The hourly rate of pay for casual employees shall be ascertained by dividing the appropriate weekly minimum wage rate for employees of the same class by 38 and adding a loading of 21% thereto.

The casual loading will be adjusted to 22% from 2 October 2001 and to 23% from 2 April 2002.

- 3.2.4 *Part-Time Employees* (as defined) – The hourly rate of pay for part-time employees shall be ascertained by dividing the appropriate weekly minimum wage rate for employees of the same class by 38. Part-time employees will receive, on a *pro rata* basis, all other provisions of the Award relevant to weekly employees.

3.3 Occupational Superannuation

The subject of superannuation is dealt with extensively by legislation including the *Superannuation Guarantee (Administration) Act of 1992*.

The Superannuation Guarantee Charge Act of 1992, the *Superannuation Industry (Supervision) Act of 1993* and the *Superannuation (Resolution of Complaints) Act 1993*. This Legislation as varied from time to time governs the superannuation rights and obligations of the parties.

For the purpose of this Award, the Company shall pay superannuation entitlements for each employee into an appropriate scheme.

Contribution rates to their funds shall not be less than the amounts prescribed by the Superannuation Guarantee Levy.

Definitions

- (a) "The Fund" shall mean the SunSuper Superannuation Fund or other fund which complies with the *Occupational Superannuation Standard Act 1987*.
- (b) "Ordinary Time Earnings" shall mean the actual ordinary rate of pay the employee receives for ordinary hours of work including shift loading and leading hand, in-charge or supervisor allowances where applicable. The term includes any overaward payment as well as casual rates received for ordinary hours of work. Ordinary time earnings shall not include overtime, disability allowances, commission, bonuses, lump sum payments made as a consequence of the termination of employment, annual leave loading, penalty rates for public holiday work, fares and travelling time allowances or any other extraneous payments of a like nature.

3.4 Allowances

- 3.4.1 *First Aid* – An employee holding the necessary First Aid Certificate and recognised by the employer as a "First Aid Person" shall be paid an allowance of \$10 per week.
- 3.4.2 *Disability* – All employees will be paid a weekly allowance equivalent to 4% of the level 3 rate. This allowance will be for all disabilities (which means and includes wet or hot work, work in confined spaces, dirt money) incurred. This allowance will be paid for all purposes of the Award.
- 3.4.3 *Standby* – An employee required to remain on call outside his/her ordinary working hours shall be paid one hour's ordinary pay for each day during which he/she remains on call.

3.5 Payment of Wages

- 3.5.1 All wages shall be paid fortnightly into a bank account or other financial institution nominated by the employee.
- 3.5.2 All employees shall be issued with a payment advice explaining the make-up of wages and all deductions.
- 3.5.3 Where an employee is paid off on some day other than the regular pay day, such payment may in any case be paid by cheque. Not more than 3 days' pay shall be held as back time.
- 3.5.4 When an employee has been discharged or resigns, the employee shall be paid all wages and holiday pay due to him/her within 24 hours of such discharge or resignation (provided that in the case of resignation the employer has received written notice of resignation from the employee) except where a Saturday, Sunday or holiday intervenes, when the period of 24 hours shall be increased accordingly.
- 3.5.5 Where an employee has given the prescribed notice to the company, the employee shall be paid all wages and holiday pay at time of termination or beforehand. If the employee is not so paid he/she shall, for such time as shall elapse between his/her termination and his/her being paid, be paid at his/her ordinary rates of wages.

PART 4 – HOURS OF WORK, OVERTIME

4.1 Hours of Work

- 4.1.1 *Dayworkers* – Except as provided elsewhere the ordinary hours of work for day workers shall not exceed 8 hours in any one day, or 38 hours in any one week Monday to Friday inclusive.

The ordinary hours of work prescribed herein shall be worked continuously, except for meal breaks, between 6.00am and 6.00pm:

Provided that the actual ordinary hours of work shall be determined by agreement between an employer and the majority of employees in the plant or work section or sections concerned.

- 4.1.2 *Shift Work* – The ordinary hours of work for continuous shift workers shall not exceed 10 hours in any one shift and may be worked according to a roster which shall provide for an average of 38 ordinary hours per week over a 2, 3, 4, 5 or 6 week cycle.

Provided that the actual roster shall be determined by agreement between the employer and the majority of employees in the plant or work section or sections concerned.

4.1.3 The ordinary hours of work prescribed herein shall not exceed ten on any day:

Provided that:

- (a) In any arrangement of ordinary hours where the ordinary working hours are to exceed eight on any day, the arrangement of hours shall be subject to agreement between an employer and the majority of employees in the plant or work section or sections concerned; and
- (b) By arrangement between an employer, and the majority of employees in the plant or work section or sections concerned, ordinary hours not exceeding twelve on any day may be worked subject to:
 - (i) proper health monitoring procedures being introduced;
 - (ii) suitable roster arrangements being made; and
 - (iii) proper supervision being provided.

Provided that agreement will not be unreasonably withheld and in the event that agreement cannot be reached, the matter will be referred to the Queensland Industrial Relations Commission for resolution.

4.1.4 Shift workers working on rostered afternoon and/or night shifts, Monday to Friday, shall be paid 15% in addition to the ordinary rates prescribed in clause 3.3. This allowance shall not be paid for shifts worked on Saturdays or Sundays or Public Holidays.

4.1.5 An employee shall be paid one and one-half times ordinary rates for ordinary hours worked between midnight Friday and midnight Saturday, and double time for ordinary hours between midnight Saturday and midnight Sunday.

4.2 Meal Breaks & Crib Time

4.2.1 Day workers shall be allowed a meal break of not less than 30 minutes and not more than 1 hour as agreed between the company and the majority of employees, which shall not be included in working time.

4.2.2 Shift workers shall be allowed a crib break of 30 minutes during each shift which shall be taken as time worked and at such time as will not interfere with the continuity of work where continuity of work is necessary.

4.3 Rest Pauses

4.3.1 All employees shall be entitled to a rest pause of 10 minutes in both the first half and the second half of a shift which shall be counted as time worked.

4.3.2 The rest pause shall be taken at such time as will not interfere with the continuity of work where continuity of work is necessary.

4.3.3 Where the majority of employees on a shift agree, the two separate rest pauses may be combined into a single 20 minute break.

4.4 Overtime

4.4.1 *Dayworkers* – All time worked by day workers outside the ordinary hours fixed in accordance with clause 4.1.1 shall be paid for at the rate of time and a-half for the first three hours on any one day Monday to Friday inclusive, and at the rate of double time thereafter:

Provided that overtime worked on a Saturday shall be paid for at the rate of time and a-half for the first three hours and double time thereafter, with a minimum of three hours' work or payment therefore.

4.4.2 *Shiftworkers* – All time worked by shift workers outside the ordinary hours fixed in accordance with clause 4.1.2 shall be deemed overtime and shall be paid for at the rate of double time:

Provided that overtime shall not be payable in circumstances where excess time is worked as a result of mutual agreements between the employees themselves (with the consent of the employer) to exchange all or part of the day or shift.

4.4.3 *Overtime – Meal Breaks and Meal Allowances* –

(a) Should an employee be required to work overtime after the completion of his/her rostered hours, the employee shall be entitled to:

- a meal break of 30 minutes duration after the completion of one hour's overtime; and
- a meal break of 30 minutes after each further four hours of overtime worked if the employee is continuing to work after such meal break.

(b) All meal breaks taken on overtime shall be allowed without deduction of pay, i.e. paid at the appropriate overtime rate.

(c) The company shall provide a meal, or provide a meal allowance of \$7.50 at each overtime meal break.

4.4.4 *Call Back* – An employee recalled to work overtime after leaving his/her employer's business premises on Monday, Tuesday, Wednesday, Thursday or Friday (whether notified before or after leaving the premises) shall be paid for a minimum of four hours' work at the appropriate rate for each time the employee is so recalled:

Provided that, except in the case of unforeseen circumstances arising, the employee shall not be required to work the full four hours if the job he/she was recalled to perform is completed within a shorter period. This subclause shall not apply in cases where it is customary for an employee to return to the employer's premises to perform a specific job outside his/her ordinary working hours, or where the overtime is continuous (subject to a reasonable meal break) with the completion or commencement of ordinary working time.

Overtime worked in the circumstances specified in this subclause shall not be regarded as overtime for the purpose of subclause 4.4.5 of this clause when the actual time worked is less than 4 hours on such recall or on each of such recalls.

4.4.5 *Rest Period*

- (a) When overtime work is necessary, it shall, wherever practicable, be arranged so that an employee has at least 10 consecutive hours off duty prior to the commencement of the employee's next shift.
- (b) Should an employee work so much overtime that the employee is continuing to work within the 10 hour rest period prior to the commencement of his/her next shift, at the completion of overtime work he/she shall then take a 10 hour break without loss of pay for the period not worked during his/her next shift.
- (c) If at the company's instruction an employee resumes or continues work without having had such 10 hour break, the employee shall be paid an additional single time payment for the time worked until he/she is able to have 10 hours off duty.
- (d) The provisions of this subclause shall apply in the case of shift workers who rotate from one shift to another as if eight hours were substituted for ten hours when overtime is worked:
 - (i) for the purpose of changing shift rosters; or
 - (ii) where a shift worker does not report for duty; or
 - (iii) where a shift is worked by arrangement between the employees themselves.

PART 5 – STATUTORY HOLIDAYS, LEAVE

5.1 Annual Leave

5.1.1 Every employee (other than a casual employee) covered by this Award shall at the end of each year of his/her employment be entitled to annual leave on full pay as follows:

- (a) Not less than five weeks if employed on continuous shift work.
- (b) Not less than four weeks in any other case.
- (c) Where an employee during his/her year of service is employed upon work carrying an entitlement of five weeks' leave as well as upon work carrying an entitlement to four weeks' leave then the employee's entitlement at the end of a years employment shall be *pro rata* thereto.

Annual leave shall be exclusive of any statutory holiday which may occur during the period of that annual leave and shall be paid for by the employer in advance.

5.1.2 The annual leave provided for by this clause shall be allowed and shall be taken and except where employment is terminated, payment shall not be made in lieu of annual leave.

5.1.3 Reasonable notice of the commencement of annual leave shall be given to the employee.

5.1.4 On termination an employee shall be entitled to any accrued untaken leave entitlement, including any *pro rata* entitlement for his/her current year of employment.

5.1.5 *Calculation of Annual Leave Pay* – In respect to annual leave entitlement to which this clause applies, annual leave pay (including any appropriate payments) shall be calculated as follows:

- (a) **Shift Workers** – Subject to provision (c) hereof, the rates of wages to be paid to a shift worker shall be the rate payable for work in ordinary time according to the employees' roster or projected roster, including Saturday, Sunday or Holiday shifts.
- (b) **Leading Hands, etc** – Subject to provision (c) hereof, leading hand allowances and amounts of a like nature otherwise payable for ordinary time worked shall be included in the wages to be paid to employees during annual leave.
- (c) **All Employees** – In no case shall the payment by an employer to an employee be less than the sum of the following amounts:
 - (i) the employee's ordinary wage rate as prescribed by the Award for the period of annual Leave (excluding shift premiums and weekend penalty rates);
 - (ii) leading hand allowance or amounts of a like nature; and
 - (iii) a further amount calculated at the rate of seventeen and one-half per centum of the amounts referred to in paragraphs (i) and (ii) of this provisions.

5.2 Statutory Holidays

5.2.1 Except as provided in subclause 5.2.2 of this clause, an employee other than a casual employee shall be entitled to a holiday without deduction of pay on any day gazetted as a Public Holiday under the *Holidays Act 1983* in the district in which the employee works for the following days:

New Year's Day	1 January
Australia Day	26 January
Good Friday	
Easter Saturday	The day following Good Friday
Easter Monday	The Monday following Good Friday
Anzac Day	25 April

Labour Day	The first Monday in May
Birthday of the Sovereign	The second Monday in June
Brisbane Show Day	Varies
Christmas Day	25 December
Boxing Day	26 December

- 5.2.2 Employees rostered to work on Easter Saturday will be entitled to payment in accordance with subclause (4) hereof. However, employees rostered off on Easter Saturday will not be entitled to the provisions of subclause (1) hereof.

If a public holiday falls on a day that a continuous shift worker is rostered off, the employee will be credited with an additional day's leave or be paid out an additional payment of the ordinary hours per day in accordance with the roster at the time of occurrence.

- 5.2.3 Where an employee is required to work on a Public Holiday and the employee does not report for work as required, without reasonable cause (proof where of shall lie upon the employee) the employee shall not be entitled to payment for the Public Holiday.

- 5.2.4 An employee, for time worked on a Public Holiday will be paid as follows:-

For all time outside the ordinary starting and ordinary finishing times for the day of the week on which the holiday falls, double the rate for such time when worked outside such time on an ordinary working day.

For all other time at the rate of double time and a-half.

For the purposes of this provision where the rate of wages is a weekly rate, "double time and a-half" shall mean one and one-half days' wages in addition to the prescribed weekly rate, or *pro rata* if there is more or less than a day.

An employee required to report for work on a Public Holiday will be paid for a minimum period of four hours.

For the purpose of this clause, double time and a-half shall mean one and one-half days' wages in addition to the weekly rate provided and *pro rata* if there be more or less than a day.

- 5.2.5 Any employee, with two weeks' or more of continuous service, whose employment has been terminated by the employer or who has been stood down by the employer during the month of December, and who is re-employed in January of the following year, shall be entitled to payment for the Public Holidays of Christmas Day, Boxing Day and New Year's Day.

- 5.2.6 By agreement between the employer and a majority of the employees in a plant or section of a plant and subject to statutory limitations, another day may be substituted for a Public Holiday.

- 5.2.7 In the event of an employee being required to work on a substituted day, the employee shall be paid at the rate applicable for work on the Public Holiday which has been substituted.

- 5.2.8 Subclauses 5.2.6 and 5.2.7 shall not be construed to confer on an employee of the same employer an entitlement to a paid holiday or payment for work on that holiday on more than one occasion for each public holiday in each calendar year.

5.3 Sick Leave

- 5.3.1 Every employee shall become entitled to not less than 60.8 hours sick leave for each completed year of his/her employment with the employer. However, in respect of any completed periods of employment of less than one year with the employer, an employee shall become entitled to one day's sick leave for each six weeks of such period.

- 5.3.2 Every employee absent from work through illness on the production of a certificate from a duly qualified medical practitioner specifying the nature of the illness of the employee and the period or approximate period during which the employee will be unable to work, or of other evidence of illness to the satisfaction of the employer shall, subject as herein provided, be entitled to payment in full for all time is so absent from work.

- 5.3.3 Provided that it shall not be necessary for an employee to produce such a certificate if the absence from work on account of illness does not exceed two days in any one year.

- 5.3.4 Sick leave shall be cumulative, but unless the employer and employee otherwise agree, no employee shall be entitled to receive, and no employer shall be bound to make, payment for more than thirteen weeks' absence from work through illness in any one year.

- 5.3.5 (a) The continuity of employment of an employee with an employer for sick leave accumulation purposes shall be deemed to be not broken by any of the following:

- (i) absence from work on leave granted by the employer;
- (ii) the employee having been dismissed or stood down by the employer or the employee having terminated the employment with the employer, for any period not exceeding three months:

Provided that the employee shall have been re-employed by that employer.

- (b) The period during which the employment of the employee with the employer shall have been interrupted or determined in any of the circumstances mentioned in paragraph (a) hereof shall not be taken into account in calculating the period of employment of the employee with the employer.

5.4 Long Service Leave

Long service leave shall be taken in accordance with the provisions of Chapter 2 Part 3 of the Queensland *Industrial Relations Act 1999*.

Save for the accrual factor which shall be 13 weeks' long service leave after 10 years' service with a proportional amount, after 7 years of service, for the purpose of termination for reasons specified in section 43 (4) of the Queensland *Industrial Relations Act 1999*.

5.5 Bereavement Leave

A weekly hired employee shall on the death within Australia of a wife, husband, father, mother, mother-in-law, father-in-law, brother, sister, child or step-child, be entitled on notice to leave up to and including the day of the funeral for such relation, and such leave shall be without deduction of pay for a period not exceeding the number of hours worked by the employee in two ordinary days of work. Proof of such death shall be furnished by the employee to the satisfaction of the employer.

For the purpose of this clause, the words "wife" and "husband" shall include a person who lives with the employee as a *de facto* wife or husband.

Provided the employee shall be entitled to a maximum of two days' leave without loss of pay on each occasion and on the production of satisfactory evidence of the death outside Australia of an employee's husband, wife, father or mother, and where such employee travels outside Australia to attend the funeral.

5.6 Family Leave

The provisions of the *Family Leave Award* published in the *Queensland Government Industrial Gazette* apply to and are deemed to form a part of this Award.

PART 6 – MISCELLANEOUS PROVISIONS

6.1 Enterprise Flexibility

At each enterprise or workplace, consultative mechanisms and procedures shall be established comprising representatives of the employer and employees. The Union shall be entitled to be represented.

The particular consultative mechanisms and procedures will be appropriate to the size, structure and needs of the enterprise or workplace.

The purpose of the consultative mechanisms and procedures is to facilitate the efficient operation of the enterprise or workplace according to its particular needs.

Where agreement is reached at an enterprise or workplace through such consultative mechanisms and procedures, and where giving effect to such agreement requires this Award, as it applies at the enterprise or workplace, to be amended an application to amend shall be made to the Commission. The agreement shall be made available in writing, to all employees at the enterprise or workplace and to the union party to this Award.

When this Award is amended to give effect to an agreement made pursuant to this clause the amendment shall become a schedule to the Award and the amendment shall take precedence over any provision of this Award to the extent of any expressly identified inconsistency.

The agreement must meet the following requirements to enable the Commission to amend this Award to give effect to it:

- that the purpose of this agreement is to make the enterprise or workplace operate more efficiently accordingly to its particular needs; and
- that the majority of employees covered by the agreement genuinely agree to it.

6.2 Anti-Discrimination

- (1) It is the intention of the parties to this Award to achieve the principle object in s. 3(c) and (d) of the *Industrial Relations Act 1999* by helping to prevent and eliminate discrimination on the basis of sex, marital status, pregnancy, parental status, age, race, impairment, religion, political belief or activity, trade union activity, lawful sexual activity, and association with, or relation to, a person identified on the basis of any of the above attributes.
- (2) Accordingly, in fulfilling their obligations under the disputes avoidance and settling clause, the parties to the Award must make every endeavour to ensure that neither the Award provisions nor their operation are directly or indirectly discriminatory in their effects.
- (3) Nothing in this clause is to be taken to affect –
 - (a) any different treatment (or treatment having different effects) which is specifically exempted under the *Anti-Discrimination Act 1991*;
 - (b) an employee, employer or registered organisation, pursuing matters of discrimination, including by application to the Human Rights and Equal Opportunity Commission/Anti-Discrimination Commission.

Dated this twenty-first day of August, 2001.

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

Operative Date: 21 August 2001
New Award – SEPR Australia Pty Ltd – Award 2001
Released: 18 September 2001

INDUSTRIAL COURT OF QUEENSLAND

*WorkCover Queensland Act 1996 – s. 509 – appeal against decision of industrial magistrate***Sadriya Resulagic AND WorkCover Queensland (No. C36 of 2001)**

PRESIDENT HALL

14 September 2001

DECISION

The appellant waited quite some time for the decision of the Industrial Magistrate now appealed against. The hearing occurred on 18 February 2000. The decision, dated 8 November 2000, was not released until 18 May 2001.

The appellant's solicitor complains of the quality of the decision. The criticism seems to me to be legitimate. The findings are difficult to locate and the reasons for them either cryptic or a matter of inference. The language is infelicitous. A finding of fact is made which is plainly incorrect. However, for all of the criticisms which the appellant's solicitor (legitimately) makes of the decision, on a fair reading of the decision the conclusion to which the Industrial Magistrate came is perfectly plain and His Worship's reasons are discernible.

By a letter dated 20 November 1996 the Workers' Compensation Board informed the appellant that upon a review of his entitlement to weekly payment of compensation, it had been determined that payment would not be made beyond 18 November 1996. The matter before the Industrial Magistrate was an appeal against that decision. The appeal was dismissed. It is apparent from His Worship's reliance on s. 126(1) of the *Workers' Compensation Act 1990* which (relevantly) provides:–

“... the entitlement of a worker . . . to weekly payments under section 124B . . . stops when the first of the following events happens –

- (a) the incapacity as a result of the work related injury stops;
- (b) compensation payable under this division reaches the maximum amount prescribed under section 154(1)(a).”

from His Worship's reliance on the evidence of Dr Boys and from the citation of passages drawn from *Colbran v Workers' Compensation Board of Queensland* (1996) 152 QGIG 1180 that the Industrial Magistrate rejected the appeal because he was satisfied that the incapacity to earn flowing from an (admitted) earlier injury to the appellant had ceased by 18 November 1996.

There was ample evidence before the Industrial Magistrate to support that conclusion.

The conclusion was supported by the evidence of the orthopaedic surgeon called by the Board, Dr Boys who, by his second opinion of 30 August 1996, observed:

“Early return to paid employment or early finalisation of this man's claim would be strongly recommended.”

It was supported by the evidence of the orthopaedic surgeon called by the appellant who, like Dr Boys, considered that the appellant was capable of returning to light mechanical duties. It was supported by the circumstance that the appellant had been performing light mechanical duties (without remuneration and for a friend) for up to 40 hours* per week. (*The Industrial Magistrate wrongly found that the appellant often worked in excess of 40 hours per week. That was not the evidence. Whilst the Industrial Magistrate was plainly acting under a misapprehension, it is impossible to believe that the error made any difference.)

The appellant relies on the evidence of the treating general practitioner Dr Tatkovic. The difficulty is that Dr Tatkovic expressly said in cross-examination that he deferred to specialist opinion. It is argued for the appellant that in the course of re-examination Dr Tatkovic withdrew somewhat from that opinion. However, it was the Industrial Magistrate who had the advantage of hearing and observing the witnesses. It would go beyond all authority for this Court to go behind that advantage and re-assess what Dr Tatkovic should be taken to have said. The vigour of Dr Tatkovic's evidence-in-chief, it should be added, is not inconsistent with deferral to specialist opinion. Dr Tatkovic (wrongly) was of the view that the specialist opinions did not differ from his own.

The appellant's submission that on 18 November 1996 the appellant was still suffering the effects of his earlier injury is plainly correct. That is why Doctors Boys and Packer were recommending a return to light mechanical duties rather than the very heavy mechanical duties in which the appellant had previously engaged. But that is beside the point. It is plain from the decisions helpfully gathered together in *Colbran v Workers' Compensation Board of Queensland, op cit*, that the issue was whether by 18 November 1996 the injury was taking away or diminishing the power of the worker to earn wages in some suitable employment. Light mechanical duties was plainly suitable employment “in the labour market in which the employee was working, or might reasonably be expected to work”, *Arnotts Snack Products Pty Ltd v Jacob* (1984-5) 155 CLR 171, 177 per Mason, Wilson, Deane and Dawson JJ.

The appellant complains that the Industrial Magistrate failed to take into account the circumstance that the appellant had succeeded in criminal proceedings relating to his receipt of workers' compensation payments. The parties to the proceedings were not the same. There was no issue estoppel. The onus of proof was entirely different. The adverse findings about credit were adverse findings about a person who was not a witness in the proceedings before the Industrial Magistrate. The Industrial Magistrate was correct to treat the proceedings as entirely irrelevant.

The appellant complains also that the Industrial Magistrate assessed the appellant's incapacity to earn at the date of the hearing rather than at 18 November 1996. The infelicity of expression previously referred to at times suggests that. But the Industrial Magistrate's careful (and correct) analysis of the *WorkCover Queensland Act 1996* and the *Workers' Compensation Act 1990* to determine the piece of legislation applicable to the matters in issue makes plain that His Worship was fully aware that the relevant date was 18 November 1996.

I dismiss the appeal.

Dated this fourteenth day of September, 2001.

D.R. HALL, President.

Appearances:–

Mr S. McGhie of Richardson McGhie for the appellant.

Mr S. Sapsford of counsel instructed by WorkCover Queensland for the respondent.

Released: 14 September 2001

INDUSTRIAL COURT OF QUEENSLAND

*Industrial Relations Act 1999 – s. 342(1) – appeal against decision of industrial commission***The Australian Workers' Union of Employees, Queensland AND Thiess Contractors Pty Ltd (No. C34 of 2001)**

PRESIDENT HALL

18 September 2001

DECISION

Mr Bradley McGill, a member of The Australian Workers' Union of Employees, Queensland, (appellant) was one of a number of employees of Thiess Contractors Pty Ltd (respondent) whose engagement was regulated by the *Thiess Contractors Pty Ltd Ernest Henry Mine Operation Certified Agreement 1996*. The certified agreement did not make provision for redundancy benefits.

It was conceded at first instance that the certified agreement was to be read with the *Metalliferous Mining Award – State*, (now replaced by the *Mining (Non-Coal) Award – State*). The Award does adopt the Statement of Policy on termination of employment, introduction of changes and redundancy of 16 June 1987, 125 QGIG 1119, as amended by the further statements at 125 QGIG 1377 and 126 QGIG 188. That benefited employees such as Mr McGill not at all. The Statement of Policy has no application to “employees engaged for a specific period of time or for a specified task or tasks”. Mr McGill was such an employee.

The nominated expiry date of the agreement was 30 April 1999. Commencing on or about 22 April 1999 there were discussions between authorised representatives of The Australian Workers' Union of Employees, Queensland and Thiess Contractors Pty Ltd about an extension to the agreement and about variations to the agreement. Ultimately, agreement was reached. Amongst other things it was agreed that:

“Award redundancy payments to be made in the event that an employee loses employment due to a loss of Thiess Contract at Ernest Henry.”

The parties are unable to agree about the application of that clause to a worker in the circumstances of Mr McGill. The circumstances relevant to Mr McGill are that the respondent did lose its contract at Ernest Henry Mine, that in consequence Mr McGill lost his employment with the respondent, and that the next day Mr McGill (without interruption in time) continued to perform his normal work and carry on his calling at Ernest Henry Mine in the service of a new employer. The parties are unable to agree about the application of the agreed term to such a worker because they are unable to agree upon the meaning of the agreed term. It is the submission of the appellant that “employment” means “employment by the respondent”. It is the contention of the respondent that “employment” means “the status of being employed”. In the case of a worker in Mr McGill’s circumstances, the appellant says that the worker is entitled to a redundancy payment under the agreed term because the worker has lost his employment with the respondent. For the respondent it is contended that since a worker in Mr McGill’s situation has the status at Ernest Henry Mine which the worker had prior to his termination by the respondent, he has not lost employment and is not entitled to a redundancy payment under the agreed term.

At first instance, the industrial advocate who then appeared for the appellant conceded that the word “employment” could be, and here was, used ambiguously. That the word “employment” may be used ambiguously was accepted by Lord Justice Atkin (as he then was) in delivering the Court of Appeal in *Meadows v Ellerman Lines* [1920] 3 KB 544 at 549. I share the industrial advocate’s view that the word is used ambiguously here. It is not legitimate to start from the proposition that one or other of the two meanings contended for is the “ordinary meaning” of the word.

The hearing at the first instance took some days. There was much evidence about the meaning of the agreed term. In the end result, the Commissioner put the evidence to one side. He was right to do so. The evidence went to the actual intention, expectations and hopes of the negotiating parties. Such evidence is not admissible to aid in the construction of the agreement, compare *The Australian Workers' Union of Employees, Queensland v James Hardie Australia Pty Ltd* (2001) 167 QGIG 280 at 281. The evidence was, of course, admissible to prove what it was that the parties were negotiating about. However, it showed no more than that the parties were negotiating about making available to employees who had no entitlements in the event of redundancy induced termination a measure of entitlement based on the community standards embodied in the Statement of Policy previously referred to. In the circumstances of the case, where the competing meanings contended for reflect differing measures of generosity, that finding about the purpose and object of the negotiations is of little assistance.

The appellant bases its argument on certainty and subject matter.

There is some force in the submissions about certainty. Mr McGill may present a clear case. Other workers may not. What of a worker who did not secure employment with the respondent’s successor at Ernest Henry Mine but acquired employment with the local shire council (on quite different terms and conditions) building a road to improve access to the Ernest Henry Mine? Would the distance of the roadworks from Ernest Henry Mine be a consideration? Is a worker who obtained such employment the day after his engagement with the respondent came to an end to be treated differently to an employee who did not obtain such employment for a week? The possible examples are endless. There would be difficulty in enforcing the agreed term in an Industrial Magistrates Court or in the Commission. It cannot be supposed that experienced industrial negotiators would walk away from the bargaining table with an agreement calculated to cause future difficulty and (potentially) disputation.

As to “subject matter”, the submission is that the risk of a period of unemployment flowing from a position becoming redundant is not the only reason that the Statement of Policy makes provision for payments to be made to retrenched workers. It is put that as a matter of history one reason for the level of benefits prescribed by the Statement of Policy is that the benefits are intended to compensate retrenched workers for the loss of “entitlements”. The “entitlements” referred to are not entitlements to pay in lieu of annual leave or long service leave which vest upon termination. The “entitlements” referred to are the “entitlements” to sick leave, which is contingent upon the worker becoming ill while the engagements subsists, and the “entitlement” to long service leave which will arise from service rendered if the engagement subsists until the minimum qualifying period of service is reached. Payments made pursuant to the agreed term would only compensate for the loss of such “entitlements” if the payments were triggered by the cessation of the engagement with the respondent.

As to the first argument, both the Industrial Magistrates Court and the Queensland Industrial Relations Commission are well used to dealing with questions of mixed fact and law which may be resolved only on a “pith and substance” basis. One cannot suppose that experienced industrial negotiators could walk away with an entirely uncertain agreement, but may well suppose that by inadvertence and error they succeeded in doing precisely that, blissfully unaware of what they had done.

As to the submission about “subject matter”, one may wonder what the “entitlements” were. The “extension and variation agreement” elsewhere provides for payment in lieu of unused sick leave to be made to employees retrenched by the respondent. An agreement to make payments to compensate for the loss of credits towards a period of long service leave, which in the case of an employee engaged for a specific period or task could not accrue, is a little difficult to comprehend. Additionally, the agreed term does not refer to the making of payments in the nature of the payments available under the

Statement of Policy to persons terminated in consequence of a position becoming redundant. Rather, payments in the nature of redundancy payments – which it is common ground means payment based upon the Statement of Policy – are to be made available in the event of “loss of employment”.

The respondent relies heavily upon contextual considerations. One must always be moderate in giving weight given to such arguments in the case of agreements drafted by laymen (not lawyers) with a close acquaintance with the facts to which the agreement relates. That is particularly so here where the “extension and variation agreement” is not written in structured prose or grammatically correct and numbered clauses, but is a series of “dot points”. That said, it is clear that if the construction contended for by the appellant be correct, very few employees working under the Certified Agreement would not have been entitled to payment of monies in the way of redundancy payments. Of those who held their employment until retrenched in consequence of the respondent’s loss of the contract, only those offered alternative employment by the respondent would be denied payment. Indeed, only those offered employment by way of a variation of contract would be denied payment. On the appellant’s submission, an employee who was re-engaged after termination would be entitled to a payment of money. If that be so, there are some very simple ways of drafting the clause. If that be so, the respondent was extraordinarily generous. Section 9 of the Statement of Policy permits an employer who has obtained acceptable alternative employment for an employee to make application to the Commission to have the general severance pay prescription varied.

Although there is force in each of the submissions, I consider that the clause relating to “sick leave” tilts the balance towards the respondent’s contention. The clause about “sick leave” in the “extension and variation agreement” is as follows:–

“Sick leave accrued from 1/5/99 to end of contract to be paid out (on retrenchment only, not other termination) at the rate applicable when it accrued.”.

That “agreed term” clearly makes the payments in lieu of sick leave payable to all employees retrenched by the respondent whilst expressly excluding persons who resign or are dismissed for cause. That is the very operation which the appellant seeks to attribute to the “agreed term” about redundancy. If that was the purpose which the parties had in view, it is difficult to understand why they did not utilise the concepts which they had so successfully employed in dealing with the matter of “sick leave”. In a poorly drafted document such as this, different words need not necessarily be given different meanings, but there seems to be justification for not seeking different meanings here. One of the problems with the “agreed term” about redundancy is the awkwardness of the expression “loses employment”. I should have thought that laymen speaking loosely would have used the phrase “loses his employment”. On balance, I consider the respondent’s contention to be correct. So also did the Commission.

I dismiss the appeal.

As a matter of prudence I reserve the question of costs.

Date this eighteenth day of September, 2001.

D.R. HALL, President.

Appearances:–

Mr A. Herbert instructed by Sciacca’s Lawyers for the appellant.

Mr K.F. Watson instructed by Freehills Lawyers for the respondent.

Released: 18 September 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 156 – application for approval of certified agreement

**Coco’s Fresh Food Markets AND Shop, Distributive and Allied Employees Association
(Queensland Branch) Union of Employees (No. CA367 of 2001)**

COCO’S FRESH FOOD MARKETS – CERTIFIED AGREEMENT

COMMISSIONER BLADES

13 September 2001

Certified agreement – Saturday and Sunday penalty rates traded off for 3% pay increase – Union objection – No-disadvantage test – Employees probably worse off – Test not met – Suggested parties include a clause providing for an accounting exercise after six months.

DECISION

Application has been made by Coco’s Markets Pty Ltd, Coco’s Trading Pty Ltd, Emmaland Pty Ltd, Riklime Pty Ltd and Cela Pty Ltd as employers, (Coco’s), and Margaret Taylor on behalf of the employees of the employer companies for the certification of an agreement replacing an earlier agreement.

Objection to the certification of the Agreement has been made by the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) on the ground that the Agreement does not meet the “no-disadvantage test”. SDA submits that other employers, seeing favourable results of this application, would all endeavour to join the “Me too Club”, thereby making negotiation of agreements in this Industry most difficult.

There are some minor errors in the Agreement, properly termed clerical or which do not adversely affect a relevant employee’s interest and which Coco’s has undertaken to have remedied. There is no point in making further reference to them.

The Agreement provides for an initial 3% wage increase which would deliver to all employees an across the board wage increase of \$11.80 per week over and above that provided for in the relevant Award, ie, the *Retail Industry Interim Award – State* (the Award). It is further provided that the rates of pay will not be less than the minimum rates specified in the Award and shall be amended annually in accordance with the findings of the National Wage Case. The Agreement also provides that there shall be no penalties paid for Saturdays and Sundays during ordinary working hours, hence the objection.

Ordinary working hours for permanent employees on Saturdays are between 5.30 a.m. and 10.00 p.m. and on Sundays between 6.00 a.m. and 7.00 p.m.

Coco’s is a seven-day trader. The SDA has submitted that to achieve the extra \$11.80 per week payable over 52 weeks, the employees have given up a possible \$48.42 for a Sunday shift of 7.6 hours or \$24.21 for a Saturday shift of 7.6 hours. There is a similar shortfall in rates of pay for casuals.

It is submitted by the employer that taken on a regular rotational roster basis, the extra 3% for all purposes for the entire year more than compensates for the occasional few hours on a Sunday. The 3% is payable for all leave, i.e., annual leave, sick leave, long service and an annualised approach should be taken.

The employers have also submitted that if they are forced to pay penalty rates for weekend work, there will be a social consequence. In an affidavit sworn by Mr McPhee, the General Manager, Coco's would be compelled to substantially adjust the ratio of "in store" junior employees to "in store" senior employees so as to predominantly engage junior employees, in order to reduce or avoid the effect of punitive penalty rates payable to senior employees. Mr McPhee says that if penalty rates become payable to adult employees, their employment would have to be predominantly confined to Monday to Friday opening hours.

Rates of pay for junior labour ranges from 45% for under 16 years of age to 50%, 55%, 67.5%, 80%, 90% until the full adult wage is paid at age 21. It was submitted that long serving adult employees who wish to work weekends and who have voted for this Agreement will be denied the opportunity to receive that income.

There is evidence that on Saturdays throughout the stores, 25 juniors to 72 seniors are employed and on Sundays, 30 juniors to 75 seniors. There is no evidence as to how many occasions an individual employee would work on a weekend. There may be those who, because of other commitments, cannot work during the week yet are pleased to work weekends for normal weekly rates. This may be a real alternative to no work at all, but those who work only weekends will suffer a disadvantage *vis a vis* other weekend employees under the Award. Employees who work a full complement of hours during the week are of course, required by the Agreement to be paid the usual rates of overtime. It may be that weekend work is rotated. To then receive an across the board increase of around \$620 per annum in lieu of weekend penalties may soon prove a disadvantage to a worker performing work on more than about 12 Sundays per year. The affidavit of Mr McPhee reveals that at one store there are only about 9 employees. It is difficult to see these employees working less than 12 Sundays per year. In these circumstances, there may well be a significant disadvantage to those employees and I am unable to conclude that they work an "occasional few hours" on a weekend.

An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their working conditions. It disadvantages employees only if the Commission considers it would result in a reduction in the employees' entitlements or protections – s. 160 *Industrial Relations Act 1999* (the Act). These entitlements or protections are those provided for in an appropriate award [s. 160(6)].

The no-disadvantage test is to be applied on a global basis. Provided that any disadvantage in wages and conditions is offset overall by improvements such that employees do not suffer an overall reduction compared to the Award, the no-disadvantage test is taken to be satisfied – see *Waggamba Shire Council – Certified Agreement 1997* 158 QGIG 171. While it is not always appropriate to approach a determination on a purely mathematical basis, even that approach is impracticable in this case because of the uncertainty or unpredictability of the roster system to establish over how many weekends an employee might work in a given period of time.

It should be emphasised that it is the Award against which comparisons are to be made, not the previous Certified Agreement from which penalty rates on Saturday and Sunday were also apparently excluded. It is of some relevance that the previous Agreement, although certified by the Commission, obtained Union approval, probably because it provided for annual increments superior to those in this Agreement.

In all the circumstances, I am unable to come to a conclusion that the no-disadvantage test has been met. There is insufficient evidence to satisfy me that the result would not be a reduction in the employees' entitlements or protections. To the contrary, what appears to be the case is that there may well be a reduction, at least for some employees.

Section 160(4) of the Act provides in effect that if there is a reduction in entitlements or protections, the subsection is not to apply if the Commission considers that in the context of the employment conditions as a whole the reduction is not against the public interest.

The term "public interest" is not defined. However in *O'Sullivan v Farrer* (1989) 168 CLR at 216 the High Court said:

"Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable . . . given reasons to be (pronounced) definitely extraneous to any objects the legislature could have had in view'."

The objects of the Act are set out in s. 3 and all are applicable. In particular, the Act requires the support of economic prosperity and social justice for all employees and employers, helping to balance work and family life, promoting the effective and efficient operation of enterprises and industries and ensuring wages and conditions of employment provide fair standards in relation to living standards prevailing in the community. Meeting the needs of emerging labour markets and work patterns has particular relevance. These objects must be taken into account in assessing whether the reduction in entitlements is not against the public interest, although the Company is not limited to those matters providing whatever is taken into account is not in conflict with them.

An award sets the standard and is binding on all to whom it applies. It prevails over a contract of service where there is an inconsistency in that contract less favourable to the employee.

When an agreement does not provide for a sufficient counter-balance, it is clearly against the public interest for employees to trade off entitlements provided for in an award. This is not a temporary measure during a short-term crisis for the survival or revival of the business as mentioned as an example to s. 160(4).

The submission that the jobs of adult employees may well be lost to juniors is probably relevant to a public interest test. There is also a similar submission where some employees are unable to work full-time during the week so that weekend work makes up their full-time hours. Other matters that could equally be considered to be in the public interest would be that some encouragement might be given to the employment of juniors. The public interest may not be served where a particular employer can achieve a commercial advantage over competitors by paying wages that in truth, turn out to be less than those set by law for the greater community. All of these matters may fall within the scope of the public interest, revealing competing public interests which are not determinative.

I am unable to come to a conclusion that in the context of the employment conditions considered as a whole, the reduction is not against the public interest.

However, having said all of that, it would seem to me to be appropriate to indicate that should the employers be prepared to include in the Agreement a clause that an accounting exercise be conducted after six monthly intervals and that any employee shown to have been disadvantaged by weekend work without penalty rates be reimbursed so as to receive not less than the Award would have provided for, I would see no objections to the Agreement.

I order accordingly.

B.J. BLADES, Commissioner.

Released: 13 September 2001

Appearances:-

Mr A. Herbert, Counsel, instructed by Colwell Wright Solicitors, for Coco's Fresh Food Markets.

Mr L. Gillespie for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 74 – application for reinstatement
s. 72(1)(a) – application for exclusion

Dionne Lee Hawley AND Star Hospitality Services Pty Ltd (No. B353 of 2001)

COMMISSIONER BLADES

13 September 2001

Unfair dismissal – Probation – Excluded employee – Date of commencement of employment – Issue of fact – Applicant completed her probation period – Held not excluded.

DECISION

The respondent company, Star Hospitality Services Pty Ltd, makes application for a ruling on a jurisdictional point in this unfair dismissal proceeding that the applicant Dionne Hawley is an excluded employee under the provisions of s. 72(1)(a) of the *Industrial Relations Act 1999*, alleging that at the time of her dismissal on 19 February 2001, she was on probation.

The respondent alleges that the applicant was employed on and from 1 December 2000. The applicant alleges she commenced employment on 30 October 2000.

There is a written contract in existence. While the respondent continually referred to the document as a draft, it was clearly not a draft. It consisted of a written offer of employment dated 1 November 2000 and it was accepted, with some minor variations, by the applicant on 22 December 2000. It contained a provision that the employment commencement date was 30 October 2000 and that a probation period of three months was to expire on 31 January 2001. There was no allegation the offer was not authorised, nor indeed could there be. In my view, that document is conclusive against the respondent and cannot be controverted in these proceedings. The applicant was clearly out of her probation period when her employment was terminated.

The respondent gave extensive oral evidence that the commencement date was the date the contract was signed on 22 December 2000, or perhaps it was 1 December 2000 being the date the respondent concedes the applicant commenced work. In my view that stand is inconsistent but in any event, I do not accept that the commencement date was either 1 December or 22 December.

Oral evidence to affect the interpretation of a written document is inadmissible. Lord Morris in *Bank of Australasia v Palmer* (1897) AC 540 said that “*parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract, or the terms in which the parties have deliberately agreed to record any part of their contract*”. Obviously, there is good reason for the rule. The result is that the oral evidence given by the respondent as to some other commencement date, being in conflict with the commencement date recorded in the written document was strictly speaking, inadmissible. Although the applicant drew the Commission’s attention to the existence of the rule, an objection was not specifically taken to the admissibility of the evidence.

However, what is contained in that written document, if for some reason it is not conclusive against the respondent, is evidence of what the parties agreed to. There is no relevance in the fact that the applicant did not sign the document until 22 December 2000. It took until then to iron out the few minor matters which were not in agreement. It can be inferred that the other non-contentious matters contained in the document were at all times agreed. Furthermore, the applicant has pointed to evidence that she was paid from 30 October at roughly the rate of payment contained in the written document. Broadly speaking, these payments were admitted. She gave evidence that the discrepancy between the rate in the document and the rate paid to her was the amount of tax required to be deducted that had not yet been properly calculated. Mr Wright, one of two major shareholders in the company, admitted that he gave the applicant some money but claimed it was as a reward for some work that she did for him. That work was all about setting up the company which was registered on 3 November 2000 and commenced on 13 November 2000. The applicant, he said, developed sales plans and did preparatory work but he claimed that the business did not exist on 30 October and could not have employed her. It was claimed that the company did not start operating until about 13 November and therefore could not have employed her before then. I reject this claim.

The applicant produced copies of numerous fax messages dated in early November dealing with advertisements, launch advertisements, stationery quotes, a web site, logo designs and telephone quotes. There was also a fax dated 1 November dealing with sales for the week and locking in existing clients. It is obvious that all of this work was for the respondent Star Hospitality Services Pty Ltd and not the shareholder Mr Wright.

The applicant annexed to her affidavit a draft of an affidavit prepared for Supreme Court proceedings in early December 2000. That affidavit contained clauses that claimed she accepted the position and commenced employment on 30 October 2000 with the respondent. It also alleged that since commencing that employment she had made 25 to 30 sales calls. In cases where recent invention is alleged, prior consistent statements are admissible. That statement in my view is a prior consistent statement. When it was made in early December 2000, the applicant had no reason to fabricate evidence as to her date of commencement with Star Hospitality Services Pty Ltd. It provides sound corroborative evidence as to her date of commencement.

I am satisfied that the applicant commenced work on 30 October, that she was paid cash on 3 November of \$692, being the gross less tax, that she was paid \$692.30 on 13 November, that she was paid \$1331.10 on 24 November and on 1 December was paid \$1429.35. During this period of time, she devoted the whole of her time to the business.

While it was always claimed that the applicant did not commence work for the respondent until 1 December 2000, Mr Wright’s affidavit contains the following paragraph:

“In the period between 20 November and 1 December I had several conversations with Ms Hawley regarding the performance of the sales function against initial budgets within Star and listened to concerns that she, Ms Hawley, had with the performance review discussion that had occurred between Kirsty and Ms Hawley. I indicated that I was not happy with the lack of organisation and lack of communication of pre-organised work that was occurring and urged Ms Hawley to complete the formalised work schedule provided and be more open about her activities. I also discussed the fact that initial sales calls were resulting in a greatly reduced success rates than budget (actual 20-30% of budget).”

This paragraph indicates to me that Ms Hawley was employed prior to 20 November and attempts by both Mr Wright and Ms Kirsty Wright to explain otherwise were not convincing.

Mr Wright claimed that clause 7 of the letter of offer (the contract) states that a probationary period of 3 months will apply from the date of acceptance of the offer. It says nothing of the sort but merely that “you are required to serve a 3 month probationary period ...”.

The claim that the company did not exist until 3 November has to be viewed in the light of other evidence that prior to the registration of the company, the respondent had registered a business name Star Hospitality Services but later continued on with the registration of the company instead. That indicates that there was significant activity prior to 3 November 2000.

The claim that the company did not exist prior to 3 November and therefore could not enter into any arrangement has to be viewed in the light of its power to ratify agreements entered into prior to incorporation. It can be readily inferred that if a contract of employment is entered into prior to incorporation and continues on thereafter, that the contract has been ratified by the company or even adopted by it. However, conceding to the respondent that the employment did not commence until the company came into being, that employment was then from 3 November at least.

On the whole of the evidence I am satisfied on the balance of probabilities that the applicant commenced work for the respondent company on 30 October 2000 and was outside her three month probation period when her employment was terminated. She is not an excluded employee.

The respondent's application is dismissed.

I order accordingly.

B.J. Blades, Commissioner.

Released: 13 September 2001

Appearances:-

Ms M. Hindman, Quinn & Scattini Solicitors, for the Applicant.

Mr K. Law, The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers, for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 319 – application for representation

Grant Leslie Patrick Fitzgerald AND Lifeline, Mackay-Whitsunday (No 4) (No. B1022 of 2000)

COMMISSIONER BLADES

14 September 2001

Unfair dismissal – Termination – Evidence – Proof – No act of employer that brought about the termination – No dismissal – Application dismissed.

DECISION

By way of an application filed on 17 July 2000, Mr Fitzgerald sought relief under the provisions of the *Industrial Relations Act 1999* (the Act) regarding his employment with Lifeline Mackay – Whitsunday (Lifeline). He has alleged that his dismissal was harsh, unjust or unreasonable, that it was for an invalid reason and was an act of discrimination by treating him less favourably than the current incumbent.

Mr Fitzgerald has alleged that he commenced duties with Lifeline as a casual truck driver on 19 May, 1999. In a nutshell, his case is that his hours were reduced to only one day per week of about three hours doing the “rag run” on a Thursday because the Business Manager, Mr Wright, wished to employ his friend Mr Greg Rose in the position of truck driver. He alleges that on 11 July 2000, he was told by Ms Lewis that there would be no “rag run” that week. He remained unconvinced of the veracity of that information so he wrote to Mr Rob Evans, the Director of Lifeline, on 11 July. He received no reply. On Thursday 13 July he was in the City and saw Ms Lewis delivering rags on the “rag run”. He again wrote to Mr Evans on 13 July advising that the matter would be referred to the Queensland Industrial Commission. He received a group Certificate for the 1999/2000 financial year dated 12 July 2000 and that was the only response (if it was a response) to his two letters. His last pay period ended 7 July 2000. The only other matter to be mentioned is that on 5 July, 2000 he received a telephone call from Ms Hansen asking him to come in and fill in a log book.

The respondent's version is that the employment was abandoned. When Mr Evans received the letter of 11 July, because Mr Wright, the Supervisor, was in Townsville as Mr Fitzgerald well knew, he wrote to Mr Fitzgerald and advised him he would discuss the matter with the Supervisor. On 14 July Mr Fitzgerald's letter of 13 July indicating the imminent lodgment of the unfair dismissal application, was received in the office but remained unseen by Mr Evans until Monday 17 July when he also received the unfair dismissal application. He alleged that there was no basis to suggest that Mr Fitzgerald had been or was intended to be terminated. A letter was written to Mr Fitzgerald to that effect.

The applicant bears the onus of proof on the balance of probabilities. He must prove that there was a dismissal, i.e. that there was some act of the employer that was the principal contributing factor that brought about the termination of the relationship.

This dispute would appear to have had some unfortunate ramifications for Lifeline in that staff and volunteer morale has suffered because of the allegations. Some of the witnesses, including Mr Fitzgerald himself, performed volunteer work in addition to paid duties. Because the matter was heard before the Commission on 20 November 2000 and this is a re-hearing, the evidence has been rehashed and in some cases re-written.

While many of the allegations that have been made were irrelevant to a determination of the facts in issue, some matters should be referred to. Ms Wilson, on behalf of the applicant, was permitted to give evidence by telephone although the problems associated with the assessment of credibility were drawn to the applicant's attention. It is clear that she had an axe to grind against Lifeline. She had experienced difficulties with two staff members over suspected theft. She said she had dismissed them but was told two days after a Court case on 20 November (the previous hearing) that she was to reinstate them. This was against her wishes. She believed that there was a conspiracy against her by the two. She was displeased with the direction to reinstate. She claimed that during that visit on 22 November, her superior Ms Lewis, in the company of Mr Evans, the Director, admitted to her that she (Ms Lewis) had told a few white lies on the previous Monday at the hearing and that Ms Lewis had admitted to her words to the effect that “we had to put off a driver”, meaning Mr Fitzgerald. While Ms Wilson's testimony is unclear as to whether she had knowledge of the complaints, Ms Lewis maintained that at the time she had possession of two complaints by the two subject women alleging theft by Ms Wilson. I find it probable that Ms Lewis had possession of those two complaints for I thought it was a better reason for her to direct Ms Wilson to reinstate them, both volunteers, rather than some fear of unfair dismissal proceedings which were in fact, unavailable. In the circumstances, I find it difficult to accept that the conversation alleged by Ms Wilson occurred. It was denied by Ms Lewis and I could see no reason why Ms Lewis, being aware there were theft allegations against Ms Wilson, would take Ms Wilson into her confidence to admit to perjury, let alone make such an admission in front of the Director. I am unable to accept Ms Wilson's evidence.

When Mr Fitzgerald first started with Lifeline, he worked as a casual truck driver alongside another truck driver. A Ms Hansen gave evidence that Mr Fitzgerald had been offered “full-time” work under instruction from Mr Wright on 26 November 1999 when the other truck driver left. She claimed that “full-time” work implied that he was to be the only driver. Mr Fitzgerald also claimed the contract was for full-time work. It is clear that it was not full-time work and it was an unusual way for both Ms Hansen and Mr Fitzgerald to describe the alleged arrangement. Mr Fitzgerald was employed as a

casual and paid as a casual and it was readily apparent from the Table admitted as Exhibit 23, that he worked as a casual performing about 18 hours per week on an average during the period when he was the only truck driver employed. While Ms Hansen maintained there was an agreement that Mr Fitzgerald was to be the only truck driver, she made no allegation that he was to be given a certain minimum number of hours. Ms Hansen also claimed that Mr Fitzgerald's hours went basically from 5 days per week of work "that was agreed upon" to one day. That proposition was also incorrect. Mr Fitzgerald rarely worked 5 days in the week as evidenced by the hours he put in. He may have been on call for five days of the week but that is an entirely different matter. He certainly did not go from "five days of work per week to one day for a couple of hours". Furthermore, Ms Hansen testified to this Commission that she had personally heard Mr Wright say that he was going to get rid of Mr Fitzgerald. She knew that an allegation was being made that Mr Wright had told Mr McNichol of that intention. Ms Hansen was involved in the prior proceedings concerning this case and has made two affidavits. At no time had she mentioned this important piece of first hand information until now and her explanation was that she did not think to write it down. Moreover, since the prior proceedings, her volunteer position was made into a paid position and her application for it was unsuccessful. She was devastated by the decision. In all of these circumstances, it is my view that her evidence lacks veracity and the allegation that she heard Mr Wright say he was going to get rid of Mr Fitzgerald in my finding is recent invention and a product of collusion. Her other evidence relating to Mr Fitzgerald's engagement being on a full-time basis is also the product of collusion.

A Mr McNichol attended to give evidence for Mr Fitzgerald under compulsion. It was clear that he had made inconsistent statements about whether Mr Wright had told him in May 2000 that he intended to get rid of Mr Fitzgerald. While he was a reluctant witness and while there was some indication he lacked an education sufficient to understand "big words" as he put it, it was clear from his demeanour that he was fairly easily overcome. His evidence however leads me to accept that there was some truth in the allegation that Wright had told him in May 2000 either that Mr Fitzgerald was to go or at least that Wright was thinking about it, and that Mr Fitzgerald was at that time made aware of what Mr Wright had said. It appears to me that Mr Fitzgerald was well aware that Mr McNichol would prove an unreliable witness and this knowledge has probably led to Ms Hansen's evidence attempting to verify this conversation.

I saw no reason to doubt the evidence of Mr Evans, the Director of Lifeline, now retired. Mr Evans was also a Deacon in the Uniting Church. His evidence corroborated the evidence of Ms Lewis and Ms Potts that Mr Fitzgerald's employment was at no stage terminated. Ms Pott's explanation for the final group certificate being dated for the period ending 21 July, 2000 because no one knew what the situation was with Mr Fitzgerald generally confirms the respondent's position. It was not fraudulent as Mr Fitzgerald alleged but there was a perfectly legitimate explanation for its contents.

The evidence revealed, and I am satisfied, that Mr Fitzgerald last worked for Lifeline on 4 July 2000. On Tuesday 11 July, Mr Fitzgerald was informed by Ms Lewis that there was no "rag run" for that week. In his written statement Mr Fitzgerald said:

"Ms Lewis said there was no rag run this week and that she thought that everyone was nervous about the GST. I in turn asked her if I was going to have any work at all. Ms Lewis became nervous and said 'I think so, no one has told me any different'."

Because he was not convinced of the veracity of what she had said, he wrote a letter to the Director of Lifeline, Mr Evans, dated 11 July where he said in part:

"Since June 2000 there has been an extra Casual Driver employed at the Warehouse, Mr Greg Rose who has since been employed to do the hours that I had been enjoying. I have not been receiving regular hours of the same since then, and I have not been advised by anyone at Lifeline why this has been necessary."

After due consultation with Ms Lyn Lewis at the Warehouse today I am wondering whether in fact if I am still employed with Lifeline. I say this as Mr Rose has been employed to perform the duties that I had been employed to do, and I understand he is a friend of Mr Wright, Business Manager for Lifeline Mackay/Whitsunday."

Under the circumstances, and with Mr Wright in Townsville I seek some clarification from yourself if I have been dismissed ... ?"

It was then on Thursday 13 July when he was in the City that he saw Ms Lewis in the Lifeline utility delivering rags. He was outraged, he said.

He returned home to find in his letter box an envelope from Lifeline containing his Taxation Group Certificate for the period ending 30 June, 2000 but there was no other response to his letter of 11 July. He took it that the Group Certificate was the response.

He then wrote to the Director of Lifeline on 13 July advising Lifeline that he proposed to instigate unfair dismissal proceedings.

On Monday 17 July he received a letter dated 15 July from Lifeline acknowledging receipt of the 11 July letter and advising that a copy had been passed on to the Business Manager for response. The day after, on 18 July, he received a letter from the Business Manager (Mr Wright) advising him that his casual employment continued with Lifeline under the same arrangements as previously pertained. He did not respond.

However, on 17 July Mr Fitzgerald had already filed his unfair dismissal application, sworn 14 July 2000 in the Industrial Commission. There was a message left on his answering machine on 17 July for him to do the Mirani run but again, he did not respond.

Mr Fitzgerald may have had some reason to believe that Mr Wright was reducing his hours with a view to his final termination. He had had a heated verbal dispute with Mr Wright in February or March 2000 in an incident in the Warehouse and there was the employment of Mr Rose, the second truck driver. Combined with these facts, his discovery of Ms Lewis delivering rags on 13 July when he thought he should have been, understandably led to his outrage. I have no doubt that outrage has coloured everything that happened thereafter and contributed to his belief on 14 July that his employment had already been terminated.

Ms Lewis explained why she was delivering the rags. She said that with the little demand in that early part of July, there was no need to bring Mr Fitzgerald in. Normally there would be 15 to 20 deliveries in a run and because there were only 4 on 13 July, she did them herself. I accept this explanation on the balance of probabilities and find it to be a perfectly reasonable explanation as to why Mr Fitzgerald was not called in.

What then was the act of the employer which brought this employment to an end?

Mr Fitzgerald claimed he was a full-time employee but that claim just does not stand up to scrutiny. He was hired as a casual truck driver, paid as a casual and his hours reflect irregular and uncertain employment over the whole of the period he was employed. Even his application indicates he was a casual truck driver. He alleges he was told on 29 November 1999 that he was the only truck driver and he swore that over a 6 month period from 29 November to 9 June he worked 38 hours per week. A perusal of a document (the Table, Exhibit 23) reveals that in that period, he worked more than 38 hours in a week on one occasion and more than 30 hours in a week on one other occasion. His average hours over the period were about 18 per week, far from the 38 from which he eventually and reluctantly resiled when giving evidence. There was in addition, upon examination, no pattern to these hours. In the affidavit attached to his application, Mr Fitzgerald made no allegation that he was employed as the only driver. Because of the exaggeration and reluctance and the apparent collusion with Ms Hansen combined with the late raising of the matter, I have difficulty in accepting as credible and reliable

the allegation that Mr Fitzgerald's contract of employment stipulated he was to be the only truck driver. Ms Lewis, the assistant to Mr Wright, was unaware of any such agreement and I would have expected her to have had some knowledge. Exhibit 23 does not corroborate any suggestion of a "minimum" number of hours and Mr Fitzgerald concedes there was no agreement to perform any particular minimum. I am satisfied that Mr Fitzgerald was called in as required and that there was no guaranteed minimum number of hours. I am unable to accept that the letter from the Uniting Church Superannuation Plan dated 21 July 2000, Exhibit 7, is evidence of the terms of the contract of employment. It is in conflict with Exhibit 23 and Mr Fitzgerald in fact worked beyond 30 June, 2000.

Towards the end of his employment, he worked 7.5 hours on 28 June, 7.25 hours on 29 June and 5.5 hours on 4 July. It was also on 5 July that he was told to come in and sign the "Sign On" Book or he would not be paid. Ms Lewis denied to him on 11 July that there was to be no further work. I am satisfied on the balance of probabilities that Mr Fitzgerald was still in employment when he lodged his unfair dismissal application.

Ms Lewis informed Mr Fitzgerald on 11 July that the rag run for that week had been cancelled because of the nervousness associated with the GST's introduction. She has explained to the Commission that at the commencement of July 2000, a lot of customers did not even have their ABN numbers, that some did not have the appropriate software for GST, that some were not set up and that the Tax Office was sending conflicting messages. She explained that in the last period in June, they did double runs and left everyone alone in early July. That explanation is accepted on the probabilities for the reduction in hours worked during that period.

Mr Fitzgerald knew that Mr Wright was in Townsville when he wrote his letter of 11 July. He seemed reluctant to admit to that knowledge during his evidence but so much is clear from that letter. Why then was it not reasonable to allow Mr Evans some time to confer with Mr Wright? 11 July was a Tuesday. There were some weeks in the past when Mr Fitzgerald had received no work at all. He had been given an explanation about the GST. It was the end of the financial year, a period of time when most employees would expect to receive their Group Certificates. There was nothing unusual about Mr Fitzgerald receiving his Group Certificate on 13 July, dated 12 July. It must have been obvious to him that it was not a final Group Certificate because it did not cover the work he did on 4 July 2000.

Ms Potts has explained the issue of the Group Certificate. She said they were all issued and that for those employees who were at work, they were personally delivered and for those who were not at work, they were posted. I am unable to find on the balance of probabilities that the Group Certificate was a reply to Mr Fitzgerald's letter of 11 July. I am satisfied it was not a reply.

On the balance of probabilities, I summarise what occurred over these final few days:

Tuesday	11 July	Fitzgerald told by Lewis there was no rag run due to nervousness about the GST. Fitzgerald wrote to Lifeline seeking clarification as to whether he had been dismissed. Mr Fitzgerald knew that the Business Manager (Wright) was in Townsville.
Wednesday	12 July	Director of Lifeline received the letter. As he was going to Townsville himself on 13 July, arranged to discuss it with Wright then.
Thursday	13 July	Evans travelled to Townsville. Fitzgerald observed Lewis delivering rags in the City. Fitzgerald received his group certificate for year ending 30.6.00. Fitzgerald wrote to Lifeline advising he intends to instigate proceedings in Industrial Commission, <i>inter alia</i> seeking reinstatement. This letter was received at Lifeline on Thursday and faxed through to Mr Evans and Mr Wright in Townsville that afternoon although it is noted that Mr Evans says he did not see it until the Monday.
Friday	14 July	Fitzgerald signed the Reinstatement Application.
Saturday	15 July	Evans signed a letter dated 15 July acknowledging receipt of 11 July letter and advising it has been passed to Business Manager for response. This was received by Fitzgerald on Monday 17 July.
Monday	17 July	Business Manager responded to Fitzgerald's letter of 11 July advising that his casual employment continues with Lifeline under the same arrangements as previously pertained. This letter was generated on 15 July. Lifeline received the Unfair Dismissal application. Ms Lewis left a message on Mr Fitzgerald's answering machine requesting him to do the Mirani run, a message that was not answered.
Tuesday	18 July	Letter of 17 July placed under Fitzgerald's door.

To be successful the applicant must prove that there was an act on the part of the employer which brought about a termination. I am satisfied that the employer did nothing to bring about a termination. The employer wrote to Mr Fitzgerald assuring him that his casual employment continued and assuring him the arrangements had not changed. There had been some earlier attempts at telephoning his residence without success and a message left on his answering machine. Mr Fitzgerald had already filed the unfair dismissal application and he did not respond to the letter or the message on the answering machine. I am satisfied that the procedure was that the casual driver would normally ring in to find out when he was required or the driver would be contacted by Lifeline. There was an explanation why work had not been offered to Mr Fitzgerald in early July. It is difficult to envisage what else the employer was reasonably expected to do.

Mr Fitzgerald alleged the 17 July letter was not a genuine response but that it was issued because of the unfair dismissal application. However, it is clear that although it was signed on 17 July, it was generated on 15 July, as Mr Fitzgerald himself has pointed out, before Lifeline received the unfair dismissal application. I am satisfied on all of the evidence that the response by Lifeline was genuine and not merely as a result of the lodging of the unfair dismissal application.

Mr Fitzgerald also alleged that there had been a constructive dismissal because of the reduction in his hours and perhaps even because of the employment of the other truck driver Mr Rose. I have already found that the reduction in the hours has been adequately explained by the introduction of the GST and I am unable to find that there was any guaranteed minimum number of hours. For the first 6 weeks of Mr Rose's employment with Lifeline, Mr Fitzgerald's hours were 56.25 which also includes the period where hours were reduced because of the GST. For the 6 week period immediately before Mr Rose's employment, his hours were 99. That reduction may have given rise to a suspicion that Mr Wright was reducing his hours but because of the haphazard nature of the employment, the absence of guaranteed minimum hours and because of the GST explanation, I am satisfied can achieve no higher status than that.

Much was made by Mr Fitzgerald about Mr Wright’s power to “hire and fire”. While Mr Wright was not called as a witness, I am satisfied that it was Mr Evans who had the ultimate control and that Mr Wright did what Mr Evans allowed him to do. Even if Mr Wright was intent on an eventual termination of Mr Fitzgerald’s employment, I am satisfied that the ultimate decision rested with Mr Evans, who had no such intent.

Mr Fitzgerald raised no objection when the second truck driver, Mr Rose, was employed in early June 2000. During the week ending 16 June, Mr Fitzgerald did not work at all. Had he suspected that his hours were being purposefully reduced or had he been initially given a guaranteed number of hours, it was then that I would have expected a complaint to have been made to Mr Evans. In any event, I would have expected Mr Fitzgerald to have given Mr Evans some time to respond to the eventual complaint on 11 July, knowing as he did, that Mr Wright was absent. Mr Fitzgerald became aware on 17 July that Mr Wright had decided to move to Townsville, evincing a very good reason to take the matter of his employment up directly with Mr Evans. There was no reason he did not do so except that, as far as he was concerned, Mr Evans could have rung him. But Ms Lewis had already rung him and Mr Wright had written, under the letterhead of Lifeline assuring him his employment was still intact.

Where abandonment is alleged, the intention of the employee is an important consideration – *Stone v Stylesetter Office National* 167 QGIG 339-343. The filing of a reinstatement application very soon after an event may be evidence that there was no such intention. The failure to respond to the message on the answering machine and the letter of 17 July is evidence of such an intention. But this case is not really about abandonment. It is about whether the applicant was dismissed, a matter which the applicant must prove before he can seek relief under the Act. In this regard, because of his apparently premature action, he has failed. Whether the failure to respond to the telephone call and the 17 July letter was motivated by pride, rage or a desire to have his day in Court is conjecture. He did not allow enough time to elapse for an inference to be drawn that the employer repudiated the contract by failing to offer work.

On the whole of the evidence, I am not satisfied that there was a dismissal or that the employer in any way repudiated or varied the contract of employment.

The application is dismissed.

I order accordingly.

B.J. BLADES, Commissioner.

Appearances:-

Mr G.L.P Fitzgerald, applicant, on his own behalf.

Mr C. Joy, Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers, for the respondent.

Released: 14 September 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – unpaid wages

Kenneth William Ross AND Alliance Facilities Management Pty Ltd trading as Alliance Cleaning Services (No. W109 of 2001)

COMMISSIONER ASBURY

17 September 2001

Wages Claim – Alleged non-payment of superannuation – Calculation of contributions – Application granted – Respondent ordered to pay superannuation contributions plus interest.

DECISION

This is an application by Kenneth William Ross (the applicant) alleging an underpayment of wages by Alliance Facilities Management trading as Alliance Cleaning Services (the respondent). The applicant contends that during the period of his employment with the respondent, the respondent failed to pay superannuation contributions to an approved superannuation fund, in accordance with Award and legislative requirements.

This matter was originally listed for preliminary hearing on 28 June 2001. The respondent was not represented at the preliminary hearing, and no advice was provided to the Commission to indicate that the application was contested. Following telephone contact with the respondent from my associate, the matter was listed for further hearing on 10 July. On that date, the respondent also failed to appear.

Following communication with the respondent, during which indications were given that the application would be contested, a further hearing date of 9 August was set. A further directions order was issued on 10 July requiring a response to the application from the respondent, and the filing of witness statements. The directions order also indicated clearly that failure on the part of the respondent to attend the hearing on 9 August 2001, may result in a decision being given against the respondent. The respondent failed to comply with the requirements of the directions order in relation to a response to the application and the filing of witness statements.

At the hearing on 9 August 2001, the respondent was represented by Mr Tomic, who arrived 18 minutes after the commencement of proceedings. Mr Tomic complained about the service of the documentation and maintained that the person whom my associate had communicated with on previous occasions when the respondent had failed to appear at the Commission had no authority to speak on behalf of the respondent. Mr Tomic did concede that he had received the documentation in relation to the application. As Mr Tomic was not in a position to respond fully to the claim at the hearing, he was given an opportunity to make submissions and to file an affidavit outlining any additional matters and evidence which he believed was relevant to the issue of why the claim should be refused. Mr Tomic filed an affidavit on 17 August 2001 admitting that superannuation payments had not been made to the applicant.

In my view, every opportunity has been given to the respondent to be represented at proceedings in relation to the application and to put his argument and material supporting it to the Commission. The applicant has travelled from Nerang to Brisbane on three occasions, in order to appear at the Commission. On the basis of the opportunities given to the respondent to put its case, the affidavits filed by the parties, and the admissions made by Mr Tomic in his affidavit on behalf of the respondent, I intend to determine this matter without conducting a further hearing.

The uncontested facts are that the applicant was employed by the respondent as a cleaner, from 28 February 1997 to 12 March 2000. The respondent admits that no superannuation contributions have been made to an approved fund for the applicant for the entire period of his employment.

The applicant claims that unpaid superannuation contributions amount to \$5,481.49. This amount is said to be comprised of superannuation contributions noted on the applicant’s pay slips for the period of 28 February 1997 to 30 June 1998 totalling \$2,328.42, and a further amount of \$3,153.07, which is

calculated by applying the required percentages to the applicant's gross income for the period from 1 July 1998 to 12 March 2000. The amount claimed by the applicant also includes a component for interest, which has been calculated at the rate of 10%.

The respondent, through the affidavit of Mr Tomic, maintains that the applicant failed to complete an enrolment form to enable superannuation contributions to be made on his behalf for the first year of his employment. The respondent also challenges the amount claimed by the applicant on the basis that it is calculated on his gross earnings including overtime.

After considering the submissions of the parties, the affidavits filed by the parties and the supporting material attached to the applicant's affidavit, I make the following findings:-

- while neither the applicant nor the respondent made any submissions about the Award which covered the work performed by the applicant, I am reasonably satisfied on the evidence before me, that the work performed by the applicant was covered by the *Contract Cleaning Industry Award – State*;
- the wages slips attached to the applicant's affidavit, for the period from 28 February 1997 to 30 June 1998, clearly establish that the respondent calculated superannuation entitlements for the applicant during that period on the basis of his gross earnings including loadings paid for work on Saturdays and Sundays;
- there is nothing on the pay slips to indicate that work on Saturdays and Sundays was considered by the respondent to be overtime;
- I am reasonably satisfied that the additional loadings paid to the applicant were for ordinary work performed on those days;
- the ability to work ordinary hours on Saturdays and Sundays, with such work being paid for at overtime rates is provided in clauses 4.1 and 4.6 of the *Contract Cleaning Industry Award – State*;
- clause 3.8(6) of the *Contract Cleaning Industry Award – State* requires employers to make employees aware of their entitlements to superannuation and to take all reasonable steps to ensure that employees receive, complete, sign and return necessary application forms to become members of the appropriate fund;
- I am unable to be reasonably satisfied that the respondent took all reasonable steps to ensure that the applicant completed necessary forms to join the fund; and
- when the applicant did complete the necessary forms the employer opened an account for the applicant with the Australian Retirement Fund, but failed to make any contributions to that account.

In my view, failure on the part of an employer to make superannuation contributions to an employee as required under an Award or legislation, is a serious matter. Employees not only lose those contributions, but also the interest that they would have accrued. In addition, many funds make provision for death and disability cover and failure on the part of the employer to meet obligations with respect to superannuation, denies the protection of this insurance to employees. In this case, the situation is compounded by the fact that the applicant was advised by the Australian Retirement Fund that an account had been opened on his behalf by the respondent in March 2000, when in fact no contributions were ever made to that account.

With the permission of the applicant, and with the knowledge of the respondent, I have obtained information from the Australian Retirement Fund about his superannuation account, and the interest which contributions to that account would have attracted, had they been made as required by the respondent. I am advised that interest would have been payable on the applicant's superannuation contributions as follows:-

- 1996/1997 – 16.6%
- 1997/1998 – 9.5%
- 1998/1999 – 11.3%
- 1999/2000 – 14.3%

In the circumstances the amount of interest claimed by the applicant is not unreasonable, and I propose to grant the application, and order that the respondent, Alliance Facilities Management Pty Ltd do pay the amount of \$5,481.49 to the Australian Retirement Fund Account of Kenneth William Ross. Details of the Account Number of Mr Ross are provided to the respondent with this decision. The payment is to be made within seven days of the date of release of this decision. Further, in light of the advice received from the Australian Retirement Fund in relation to interest, leave is granted to the applicant to put any additional evidence in relation to interest which would have been paid on his superannuation contributions to the Commission and to seek a further order with respect to payment of the difference between that amount of interest and the amount awarded in this decision.

I order accordingly.

I.C. ASBURY, Commissioner.

Released: 17 September 2001

Appearances:-

Mr K. Ross, the Applicant, on his own behalf.

Mr I. Tomic, on behalf of Alliance Facilities Management Pty Ltd.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Queensland Breweries Enterprise Development – Certified Agreement 2001 (No. CA401 of 2001)

COMMISSIONER FISHER

18 September 2001

ORDER

THIS matter coming on for hearing before the Commission at Brisbane on 6 September 2001, this Commission orders as follows as from the eighteenth day of September, 2001:-

“This Agreement is also binding on the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees pursuant to an order made under s. 166 of the *Industrial Relations Act 1999* on 18 September 2001.”.

Dated this eighteenth day of September 2001.

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

Operative Date: 18 September 2001
Order – persons bound
Released: 18 September 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 156 – application to certify agreement

Queensland Breweries Enterprise Development – Certified Agreement 2001 (No. CA401 of 2001)

COMMISSIONER FISHER

18 September 2001

Application to certify agreement – Union not given notice – s. 166(2) requirements met – Agreement binds the Union – Case Law – Employee representative – Union not to be recorded in Agreement – Order binding the Union to be attached to Certified Agreement – Agreement approved.

DECISION

The Commission has before it an application to certify the Queensland Breweries Enterprise Development – Certified Agreement 2001. Submissions were heard from the parties to the Agreement, viz. Queensland Breweries Pty Ltd and certain employees of Queensland Breweries Pty Ltd employed at the Yatala brewery, and the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU) which seeks to be bound by the Agreement. Having heard those submissions and having read the Agreement and the affidavits of Noel Jago, the General Manager – Operations Queensland and Northern Territory of Queensland Breweries Pty Ltd, the Commission is satisfied the Agreement meets the requirements for certification provided by the *Industrial Relations Act 1999* (the Act).

The matter which has delayed the certification of the Agreement relates to the binding of the Union. Section 166 of the Act nominates the persons bound by a certified agreement. Section 166(2) provides that:

“For a certified agreement made between the employees and employer, the commission must decide that the agreement also binds an employee organisation if –

- (a) before the agreement is certified, the organisation gives the commission and employer notice that it wants to be bound by the agreement; and
- (b) the organisation satisfies the commission that –
 - (i) the organisation has at least 1 member –
 - (A) whose employment will be subject to the agreement; and
 - (B) who asked the organisation to give the notice; and
 - (ii) the organisation –
 - (A) is bound by an award or industrial agreement that binds the employer, or would bind the employer apart from an award under the Commonwealth Act; or
 - (B) if there is no award or agreement that binds, or would bind, the employer – is entitled to represent the industrial interests of the relevant employees.”.

Queensland Breweries raised a minor technical difficulty that the Union had not met the requirement of paragraph (a) above because the Union had given notice before the agreement was made. However, this point was not pressed and Queensland Breweries conceded that the requirements of s. 166(2) of the Act had been met. The Commission agrees.

Section 166(2) makes it mandatory for the Commission to decide that an agreement binds an employee organisation if the requirements of paragraph (a) and (b) are satisfied. Accordingly, having decided those requirements have been met, the Commission decides the Queensland Breweries Enterprise Development – Certified Agreement 2001 also binds the ALHMWU. The difficulty arises over how the binding of the Union is to be recorded.

Initially, Queensland Breweries opposed the inclusion of the Union in the body of the Agreement. The Commission drew to the attention of Queensland Breweries, the employee representatives and the Union, a decision of Hall, P. in *Rihga International Australia Pty Ltd trading as Rihga Colonial Club Resort and The Australian Workers' Union of Employees, Queensland* [(2001) 167 QGIG 181]. That decision considered a decision of the Commission which added in the agreement coverage clause of an agreement made between an employer and employees a provision recording the fact that the Union was also bound. In his decision the President determined the Commission had the power to add such a provision. The President noted though,

“The matter has been argued purely in terms of power. It is unnecessary to consider whether the power was appropriately exercised.”.

The Commission made the decision available to the Agreement parties and to the Union and briefly adjourned the hearing to allow them to consider their respective positions. On resuming, Queensland Breweries acknowledged the Court’s finding that the Commission had the power to include a provision in an agreement recording that the Union was bound by it but argued that in the circumstances of this case, the Commission should not exercise the power.

Queensland Breweries put forward the following arguments in support of its contention:–

- (i) The intentions and wishes of the parties should be given great consideration. In this case the intention and wish of the parties was that an agreement be made directly between the employer and the employees.

- (ii) The position of the employer is that it does not wish the Union to be included in the Scope of Agreement clause.
- (iii) The history of the site should be taken into account. This site has a 13 year history of direct dealings between the employer and the employees. Initial coverage of workers at the site was by Voluntary Employment Agreements. (The site was formerly Power Brewing).
- (iv) The level of Union input into negotiations should be a factor. In this case the Union did not negotiate the Agreement. Negotiations were undertaken by a group of employees on behalf of other employees. When the Union attended negotiations, they were present only as observers.
- (v) There is a relatively low level of union membership at the site.
- (vi) Another Union, the ETU, has members at the site and provided advice to their members during the negotiations. It has not sought to be bound by the Agreement.

The Union put submissions seeking to be bound, be named as a party and to sign the Agreement. In support of its position, it put the following submissions:-

- (i) A member of the Union had been involved in the negotiations of the Agreement.
- (ii) When officials of the Union had not attended negotiations, this member represented the Union.
- (iii) The members of the Union wanted the Union to be named in the Agreement as being bound.
- (iv) It was unfair or inappropriate that member(s) of the Union could sign the Agreement as employee representatives but the Union as an organisation registered under the Act could not.
- (v) The Union had actively participated in the process by providing advice to members. Reference was made to the three ballots which needed to be conducted before the agreement was approved and its participation in stop work meetings.

Despite expressing reservations about the authority to make submissions on this matter because of an absence of opportunity to consult with employees affected, the Commission also gave an employee representative an opportunity to be heard. The employees, after all, are the other party to the Agreement. Notice of the hearing had contained a request that an employee representative selected by other employees, be present at the hearing and be available to answer questions from the Commission if required. Four employee representatives attended, including the Union member mentioned above. A spokesperson was nominated to address the Commission on relevant matters. The employee representative opposed the naming of the Union as being bound in the Agreement for the following reasons:

- (i) The union members who participated in negotiations represented employees and not just union members.
- (ii) Employees do not want any provision of the Agreement altered. If this were to happen, employees would need to reconsider whether they wished to be a party to the Agreement.

The Commission has taken into account the submissions made by the Agreement parties and the Union. As mentioned earlier, the Commission is obliged to decide an agreement binds a union if certain requirements are met. That decision has been made. The question that remains is how that decision should be recorded.

Queensland Breweries and the employee representative strongly oppose the inclusion in the Agreement of a provision in similar terms to that included in the Rihga Colonial Club Resort – Certified Agreement, that is, the Agreement before Hall, P. The Commission notes the following comments of Hall, P., in that matter:

“... the Order made by the Commission did not amend the Certified Agreement. No new right was created. No new obligation was imposed. No change was made to the parties who made the Agreement.”.

In effect, these comments dispose of the major plank of the argument raised by the employee representative and one of the arguments of the employer.

In the Rihga Colonial Club Resort matter, the Commission at first instance noted the extensive involvement by the Union in the negotiations including the serving of a log of claims. The Commissioner said,

“In these circumstances it is appropriate that the Agreement reflect the level of participation of the Union by its inclusion of its name in clause 1.4 (Agreement Coverage) . . .”. (3/4/01).

From the submissions made in the present matter, it is apparent the Union has not participated as extensively as the Union involved in the Rihga Colonial Club Resort matter. The Commission has also taken into account that this is a site where industrial negotiations have traditionally taken place mainly between the employer and the employees.

In the circumstances the Commission is not minded to add a provision to the Agreement recording the binding of the Union. I am of the view that a record should be made that the Union is bound to provide clarity and certainty for those who seek to access the Agreement. Accordingly, I have decided to issue an Order in the following terms:-

“This Agreement is also binding on the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees pursuant to an order made under s. 166 of the *Industrial Relations Act 1999* on 18 September 2001.”.

This Order is to be attached to the Certified Agreement and is to form part of its official record.

The Agreement is certified today, 18 September 2001.

Order accordingly.

G.K. FISHER, Commissioner.

Appearances:-

Mr A. Aspromourgos (Livingstones Australia) and with him Mr J. Saliba and Mr N. Jago on behalf of Queensland Breweries.

Mr R. Robinson and Ms V. Graham for the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.

Mr B. MacDonald and with him Mr P. Agius, Mr K. Morgan, and Ms W. Purviss on behalf of the employees.

Released: 18 September 2001

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 277 – injunctive orders

The Australian Workers' Union of Employees, Queensland AND Mount Isa Mines Limited (No. B1613 of 2001)

COMMISSIONER THOMPSON

18 September 2001

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 16 July 2001, Commissioner Thompson stated:-

“This matter was an application filed by The Australian Workers' Union of Employees, Queensland (AWU), on 11 September 2001 in which they sought orders pursuant to s. 277 of the *Industrial Relations Act 1999* (the Act) against Mount Isa Mines Limited (MIM). Those orders sought in the application itself were an interim order pursuant to s. 277(1)(a) of the Act compelling MIM to comply with the provisions of the *Mining Area Mount Isa Mines Limited Certified Agreement 1996* (CA435 if 1996) until such time as a decision, determination or order of the Commission is made with respect to D256 of 2001.

An interim order, the second order, sought, that was dealt with by the Commission in this matter today, was that an interim order pursuant to s. 277(1)(b) of the Act restraining MIM from contravening or continuing to contravene provisions of the agreement until such time as a decision, determination or order of the Commission is made with respect to D256 of 2001.

Mr Ben Swan, on behalf of the applicant, tendered the following material:-

- an outline of submissions;
- affidavit of Roy Harris;
- recommendation of Commissioner Bechly;
- a decision of North J in the matter of *The Australian Paper Limited v CEPU* that was handed or released on 2 April 1998; and
- a copy of the *Mining Area Mount Isa Mines Limited Certified Agreement 1996*.

The matter in contention between the parties overall was a decision by MIM to change the roster system that has been in place now for a period, as I understand it, of at least the last five years. In brief terms, due to the limited time available to the Commission, I have listed some of the relevant points of the argument put forward by Mr Swan, but there has been, as you would expect, many excluded from being mentioned, but not from being considered.

The matters that I list in relation to the comments made by Mr Swan are as follows:-

- the matter has been before Commissioner Bechly on three occasions, those being 20 August, 6 September and 12 September 2001;
- in each of the cases, a recommendation was made by Commissioner Bechly and was complied with by the union in that the opinion of members employed at the lead mine were sought in respect of changes to the roster;
- meetings were arranged with members on site and votes were taken;
- results of those votes were conveyed to the company and the changes as it was were rejected by – those proposed were rejected by employees at that meeting;
- a further meeting occurred of employees to consider further changes and they again were rejected – in both cases overwhelmingly; and
- the union argued that clause 5.6, the introduction of new rosters prohibited Mount Isa Mines from implementing new rosters if the AWU had grounds to be reasonably opposed to such rosters. Clause 5.6, just for the record, states that new rosters must satisfy health and safety, employee needs and business needs. Agreement to introduce new rosters shall not be unreasonably withheld.

Mr Swan dealt with, to some extent, the contents of the affidavit provided by Mr Roy Harris who was the official of the union who dealt with the matter on site in Mount Isa. He indicated too that the orders being sought were not final, that there is a serious issue to be tried in respect of this matter and clause 5.6 of the agreement gives a positive right to the union and its members to refuse to accept a new roster arrangement.

In terms of the balance of convenience, he argued that they favoured the grounding of the relief sought by the union – that the roster changes were substantial requiring the increase in working time of extra shifts for members employed at that site. The introduction of the new rostering arrangement does not comply in clear terms with the agreement.

Further points were that MIM, for some time, have known quite clearly what the position of the union and the members were and the reasons for the union position, though not expanded on, dealt with health and safety and with employee needs.

Mr Jim Murdoch, SC, for the respondent, tendered two documents to the Commission:-

- an outline of his submissions; and
- an affidavit from Mr Gary Varley.

Again, due to the limited time, I have listed some of the relevant matters raised by Mr Murdoch. Many others were not listed but again were considered by the Commission. Those matters include:-

- the applicant, if successful in obtaining the interim injunctions as sought, would be provided with a final, rather than an interim, relief;
- there was lack of support material from the union; and
- the injunctive powers, principles of case law, were dealt with in his submission.

At paragraph 19 of Mr Murdoch's outline of submissions, the Commission's attention was drawn to matters where the Commission needed to determine whether or not the applicant would, in effect, be subject to irreparable harm whilst, at the same time, there was a need to have a look at how that might injure the respondent. Matters arising out of the affidavit of Mr Gary Varley were dealt with at some length by Mr Murdoch. In terms of the balance of convenience, arguments were put forward that indicated that the decision, in respect of the matters, favoured MIM.

There was reference made to the lack of the strength of the case being put forward by the Union.

Again, further matters were made in respect of the capacity of the mine and that being that the mine was suffering shrinkage, in fact 'dying' was the term used. It was further provided to the Commission that equipment and staff had already been relocated from the mining question to other locations and that the three panel roster system had to be introduced this weekend.

The *status quo*, according to Mr Murdoch, could not remain. He indicated that the company would be happy to return back to what was called 'the Bechly process', that is that the roster be introduced as of 16 September 2001, and the parties continue to take the matter forward with, or under the guidance or stewardship of, Commissioner Bechly.

Mr Murdoch argued about, and questioned, the abstract rights of the Union in terms of the claim that they were putting forward. He questioned some of the evidence contained in the affidavit of Mr Harris, and he indicated that the draft orders, in respect, were fundamentally unsuitable. He called upon the Commission to reject the application that was before it.

Mr Swan, in response, argued that the AWU orders were quite clear: that it was not an application for final relief in the matter, and in relation to what was called 'the Bechly process', he indicated that he was of the view that for the matter to go back to Commissioner Bechly, with the roster being implemented, was not, in effect, a genuine offer from MIM and, in effect, would have allowed for implementation of change to the roster and quite clearly disadvantaged his Union.

He indicated too that the implementation had originally been sought for 1 September 2001 and the company had, at some time, gone to the date of 16 September and was of the view that the matter could continue to be deferred until such time as the matter – the points of contention – were resolved. The three panel roster system being the 48 hour week is the issue and the point of contention, according to Mr Swan, is that his Union and the members have. To introduce that now would seriously disadvantage the Union.

In relation to a question from the Commission in respect of what might be involved for this matter to be determined by way of arbitration, Mr Swan provided some information in terms of witnesses. He thought there might be in the area of ten witnesses. It was information that was provided on a 'without prejudice' basis and one that was just really required by myself to get a general overview.

Mr Murdoch, in responding to that, indicated that in his view, the matter couldn't be concluded within any time of less than two months, due to the logistics involved with having the matter heard in Mount Isa and of all of the witness statements that needed to be prepared and exchanged between the parties and forwarded to the Commission.

In terms of the consideration of this matter, I have examined all of the material, be it limited, placed before the Commission and have relied upon my notes taken during the course of the hearing. The parties would be aware that due to the time constraints, transcript wasn't available for me to be able to either clear, or refresh, my mind in respect of some of the points raised. In terms of the impact of the interim orders that have been sought, I have taken into account: the time that may be taken to determine an outcome in the matter in dispute; the period of time that the matter has been subject to consultation between the parties; and, in the later stages, the involvement of the Commission through Commissioner Bechly.

Further, I have taken into account the difficulties that may occur if the new roster is implemented and some time passes before an outcome is determined and the arrangement that is in place, for the want of a better word, maybe has to become 'untangled'. I have also taken into account, from my own perspective, what I perceive to be the overall advantages and disadvantages for each of the parties.

I have not been convinced by MIM that the proposals they wish to implement at 8.00 p.m. on 16 September 2001, are compliant with the certified agreement that exists between the parties. I have formed a view that, on the material available to the Commission, I cannot reject the argument of AWU that the terms of clause 5.6 of the agreement have not been satisfied.

Accordingly, I intend to issue the interim orders as requested, be it in amended form, from those provided by the applicant in Exhibit 6.

Further to that, I will, at my earliest convenience, contact the Commission Administrator, Commissioner Bloomfield, and request that this matter be dealt with as expeditiously as possible by either Commissioner Bechly or a Commissioner that he so determines. In terms of the orders, I will now hand them to the parties and I would indicate that in point 3 of the orders that I have issued, the following is said:

'This order shall be deemed to have been served on Mount Isa Mines Limited and its officers and agents and employees, by reading it to Mr J. Murdoch Senior Counsel for the respondent.'

Now it is not my intention to read the order as such, and I would ask the parties to take it as if it has been read. There were some changes, however not significant, to the order which deals with a reference to s. 230 of the Act. I am not dealing with that matter today, and so, I have made adjustments in respect of that. I have also added a further clause at point 4, which indicates that this order shall come into effect from 12.00 midnight on Friday 14 September 2001.'

Dated this eighteenth day of September, 2001.

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

Released: 18 September 2001

Appearances:-
Mr B. Swan, of The Australian Workers' Union of Employees,
Queensland, for the Applicant.
Mr J. Murdoch, SC, for the Respondent.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement***Mark Golding AND Pendon Pty Ltd (No. B880 of 2001)**

COMMISSIONER BLOOMFIELD

19 September 2001

Reinstatement – Dismissal – Termination of Employment – Manager of towing company – Witness evidence – Arbitrated Matter – Applicant engaged in towing for alcohol contra arrangements – Termination not harsh, unjust or unreasonable – Application dismissed.

DECISION

Mr Mark Golding has sought relief regarding his alleged unfair dismissal as Operations Manager by Pendon Pty Ltd trading as Beenleigh Towing. Mr Golding had worked for the company from 4 April 1999 to 10 May 2001. He alleged that he was unfairly dismissed over the telephone by the Financial Controller whilst he was at home on sick leave.

Mr Golding said that although he had been told his termination was because he had accepted alcohol in payment for performing towing jobs, the real reason was the ongoing dispute between himself and the company's Managing Director. This dispute had culminated in Mr Golding writing a detailed letter on 17 April 2001 setting out his concerns and how they might be addressed in the presence of a mediator. Included in the letter was a request for a substantial increase in his base rate and a request for a comprehensive workplace job description outlining the employer's expectations of him as the Manager of its towing operations.

After considering all of the evidence in the matter I have concluded that Mr Golding has failed to make out a case that his termination of employment on 10 May 2001 was harsh, unjust or unreasonable.

In so deciding I have considered only the evidence presented during the course of the proceedings and have not been prepared to speculate – as Mr Golding urged me to – that the writing of the letter on 17 April 2001 was instrumental in the company's decision to effect his termination.

In my view there is sufficient distance between the letter, the events which followed its writing, the reason for termination and the date of termination, for me to conclude that it did not directly lead to the termination of Mr Golding's employment. Whilst the letter clearly reflects the poor status of the relationship between the parties as at the day of its writing it must be considered in the context of the relationship as a whole and the events which unfolded after it was written.

In that regard, the evidence of Mr Blain is most enlightening. His witness statement refers to a number of meetings with Mr Golding during late 2000 and 2001 when various performance and management issues were discussed with him. The pattern of such meetings showed that they had become more intense as 2001 had progressed and that Mr Golding's performance as Manager was increasingly under question.

Mr Blain said that he had spoken to Mr Golding on 5 December 2000 about removal of fuel from vehicles. He said, and I accept, that he told Mr Golding that any vehicle which was going to the wreckers was to have its fuel stored for the use of the company's RACQ breakdown service. The direct instruction was that no fuel was to be taken from any other vehicles.

Mr Blain also said that the profitability of the towing business was under review at that time and that he scheduled several meetings in January 2001 with Mr Golding to discuss various issues. Mr Blain said, and again I accept, that Mr Golding appeared to want to avoid accountability in his role as Manager of the towing business and made himself unavailable for the meetings. They were re-scheduled to February.

A further meeting was held on 27 March when Mr Blain raised his concern about the lack of results of the business and the need for an improvement in its performance. Mr Golding was also asked to produce call-sheets so that they could be passed on to the Managing Director as evidence of Mr Golding's business creation activities. Mr Golding failed to produce them.

At this same meeting Mr Blain also spoke to Mr Golding about taking fuel from vehicles. He put to Mr Golding that he had been observed taking fuel from a vehicle in the towing yard over the previous weekend. Mr Golding initially denied the allegation but, according to Mr Blain, admitted that he had taken the fuel after he was told that the company had a statement from an employee who had witnessed the incident. I accept Mr Blain's evidence.

Although Mr Golding denied that he had milked petrol from a vehicle on that weekend, I am satisfied, from the evidence of Ms Hollows, that he did. Mr Golding said that even if he had taken any petrol (which he denied) it was not contrary to any company policy that he knew about until the Managing Director issued a memorandum on 28 March 2001. In that regard, I am satisfied that Mr Blain clearly told Mr Golding in early December, as the Manager of the company's towing service, that petrol could only be removed from certain vehicles and only for the purposes of using it in the RACQ service vehicles. Accordingly, it should not have been necessary for the company to issue the memo of 28 March 2001 to Mr Golding in light of Mr Blain's instructions of December 2000. That it became necessary is a clear indication that the company had concerns about the way that Mr Golding was approaching his role as a Manager and the way that he was conducting himself.

On 11 April 2001 Mr Blain wrote to Mr Golding referring to several outstanding matters which had not been addressed from their previous meetings. Mr Blain also expressed his frustration that Mr Golding had not done several things which he had promised to do. In the memo Mr Blain bluntly informed Mr Golding that he seemed *"to be more intent on driving trucks than effectively managing the towing operation. If that is what you prefer we can certainly arrange for you (to) drive trucks on a full-time basis. This can be done under a contract similar to the one now in use by the drivers."* The memo programmed a further meeting on 17 April 2001 to discuss the matters.

As it turned out the 17 April meeting did not occur. However, in anticipation of it Mr Golding had prepared a detailed letter which set out the matters which he wished to discuss with his employers. Some of these related to his treatment, some related to the employer's expectations of him and some related to Mr Golding's expectations of his employer – including a rise in his salary from \$38,000 per annum to \$50,000 per annum. Mr Golding felt that he was being treated so poorly he suggested mediation of the "dispute" between he and his employer.

Read in the context of the company's increasing concern about his performance the letter suggests to me that Mr Golding had decided that the best method of defence was to attack.

Mr Blain met with Mr Golding again on 26 April 2001 and raised with him a number of performance issues including his failure to follow through with matters raised in the memorandum of 11 April.

A further meeting was convened on 3 May 2001. Whilst Mr Blain was interested in addressing performance concerns Mr Golding seemed more interested in talking about an increase in his salary. Mr Blain told Mr Golding that on his current performance an increase in salary was not justified. Mr Golding said that if he did not receive an increase in salary he would consider leaving the company. Mr Blain reiterated that there would be no increase in salary for Mr Golding because he was not going to pay \$50,000 for the quality of the work being received. Mr Blain told Mr Golding that if the company was going to pay that type of money for its manager it would declare the position open and choose the best candidate. Mr Golding then said that he had been offered another job at the salary level he was seeking, plus a car, and that if the company could not match it he would consider walking. Mr Blain told him that what he did was up to him.

A further meeting was arranged to discuss Mr Golding's intentions on 11 May 2001.

However, on 10 May Mr Blain became aware that Mr Golding had performed towing services in exchange for the receipt of alcohol, in the form of bottles of bourbon. Mr Blain asked the staff member who had drawn the matter to his attention to obtain a written statement from the person who had supplied alcohol for one such towing service. Mr Blain also conducted enquiries amongst the workplace and established that another staff member had been involved in a similar contra arrangement with Mr Golding and had been approached by him about another.

Although Mr Golding was at home sick on the day, Mr Blain decided to contact him for two reasons. The first was the severity of the situation. Mr Golding was the Manager and Mr Blain felt that it was "unbelievable" that he was participating in such practices. The second reason was that Mr Blain's mother had died earlier in the week and her funeral was to be on the following day. Mr Blain felt that the matter could not wait until the following Monday.

Mr Blain said he phoned Mr Golding and asked him whether he knew anything about doing contra deals where towing services were provided in return for alcohol. He said Mr Golding denied ever having done that type of deal for anyone. Mr Blain said he told Mr Golding he had proof in the form of a written statement from a Mr Penny, as well as comments from the staff. Mr Blain said that Mr Golding then admitted having done the contra deals. Mr Blain said that he informed Mr Golding that he viewed that type of behaviour as gross misconduct and that he was terminating his services with Beenleigh Towing. Mr Golding was subsequently paid two (2) weeks wages in lieu of notice.

Mr Blain said that Mr Golding's previous behaviour in denying that he had milked petrol from vehicles within the company's yard until told that the company had an eyewitness, together with his initial denial that he had exchanged towing services for alcohol until he was (again) confronted with the evidence, led him (Mr Blain) to conclude that Mr Golding's services should be terminated.

Mr Blain said that he had decided that termination was the appropriate step to take because he had lost complete confidence and trust in Mr Golding as an employee. As Manager of the towing operations, Mr Golding was in a position of trust and was the person who supposedly set the standard for the people who worked for the company.

Mr Golding attempted to defend his behaviour as Manager of Beenleigh Towing by stating that he had been told, at the time of his engagement, to run the business as if it was his own. He said that he did not see anything wrong with performing one towing service free of charge for a staff member and another for a manager of a business that was associated with Beenleigh Towing. He claimed not to have asked for payment for the towing services and had only suggested that each of the people provide a bottle of bourbon "for the staff" when they insisted that they do something for Mr Golding as a thankyou for having provided the towing services.

Mr Golding said that Mr Penny had helped him and Beenleigh Towing by re-grooving tyres on the company's vehicles. He said that Mr Penny had saved the company "thousands". What he failed to explain was that Mr Penny performed all of his services on a commercial basis. He was paid for what he did. Beenleigh Towing was not paid for its services when Mr Golding arranged the towing for alcohol contra deal. Mr Golding, alone, profited from that arrangement at his employer's expense.

Mr Golding's behaviour was deceitful and contrary to his obligations to Pendon Pty Ltd, both as Manager and as an employee.

Subsequent to Mr Golding's termination a statement from a supplier, addressed to Beenleigh Towing in the amount of \$182.20, was found in his desk drawer. Enquiries established that the statement related to an outstanding balance for a car stereo system which had been fitted to Mr Golding's private vehicle. Mr Blain said that Beenleigh Towing had never dealt with the supplier previously and no authorisation had been given to Mr Golding to purchase the car stereo system on his own account by charging it to Beenleigh Towing. The company regarded this transaction as a further example of breach of trust by Mr Golding.

The company is entitled to rely upon such after-acquired information to support its earlier decision to terminate his services (*Shepherd v Felt and Textiles of Australia Ltd* (1931) 45 CLR 359; *Lane v Arrowcrest Group Pty Ltd* (1990) 99 ALR 45 at 74-75; *Forward v Queensland Nickel Pty Limited* (1993) 144 QGIG 909 at 913; *Byrne and Frew v Australian Airlines Limited* 131 ALR 422 at 433 per Brennan CJ, Dawson and Toohey JJ and 462 463 per McHugh and Gummow JJ).

Mr Golding said that he had purchased a car stereo system at a cost of slightly under \$3,000 and that he had never authorised the supplier to charge it to Beenleigh Towing. He claimed that the supplier must have charged it to the business because they knew that that was where he worked.

I do not accept Mr Golding's evidence. He was a very unimpressive witness. Where there is any conflict in the evidence given by him, Mr Blain, Mr Penny, Ms Hollows and Ms Henderson, I accept their evidence totally.

The evidence – especially that of Mr Blain – suggested that Mr Golding's performance was seriously under question at the time that the towing for alcohol contra arrangements came to light. Further, he had engaged in inappropriate conduct in relation to the fuel milking incident just a short while previously.

His actions in both matters were incompatible with his obligations to Pendon Pty Ltd as a Manager. To compound matters, he denied both accusations until the company indicated to him that it had evidence of his involvement.

After considering all of the evidence I find that Mr Golding has failed to make out a case that his termination of employment was harsh, unjust or unreasonable. The application is dismissed.

As a postscript, it also came to light during the proceedings that Mr Golding had probably misled the company in relation to his absence on 10 May 2001 – the date of his termination. Far from being sick on that day Mr Golding let slip (at p. 47) that he had actually been shifting house. If that be so, it is a further example of Mr Golding's deceitful and inappropriate behaviour.

A.L. BLOOMFIELD, Commissioner.

Appearances:-

Mr M. Golding the Applicant appeared on his own behalf.
Released: 19 September 2001

Ms K. Evans, of the Motor Trades Association of Queensland Industrial
Organisation of Employers, with Mr T. Blain for Pendon Pty Ltd.

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Master Painters, Decorators and Signwriters' Association of Queensland, Union of Employers (No. Q35 of 2001)

REGISTRAR EWALD

13 September 2001

Conduct of Election – Prescribed Information – Reason for Election – Method of Election – Conduct of Election – Electoral Commission to Conduct Election.

DECISION

On 12 and 13 September 2001 the Master Painters, Decorators and Signwriters' Association of Queensland, Union of Employers 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* in relation to its request for the conduct of an election by the Electoral Commission of Queensland for the following Offices:-

<i>Office</i>	<i>Number of Positions</i>
President	1
Vice President	2
Treasurer	1
Councillor	Minimum of 6/ Maximum of 10
Trustee	2

Timing of Election

Rule 31(d) prescribes that the calling of nominations shall be by notice to all Members not less than forty-two days prior to the Annual General Meeting.

Under the Rules there is no way of determining the prescribed date under section 36(4) of the *Industrial Relations Regulation 2000*, "2 months before the first day on which a person may become a candidate in an election under the industrial organisation's or branch's rules,".

Rule 23 prescribes that the Annual General Meeting "shall be held in February of each year on such day and hour as may be determined by the Council". The Industrial Organisation advises that the Annual General Meeting will be held on 13 November 2001. The delay in calling the 2001 Annual General Meeting, as in previous years, is contrary to the presently registered Rules, but it has been recent practice to hold the AGM in September/October/November and this year it has been set for early November. Notwithstanding that, there is a greater public interest in ensuring the continuity of officials for registered Industrial Organisations and the election should proceed ensuring full terms of office are served.

Taking into account the indefinable time frame for the calling of nominations, the receipt of nominations and the holding of the election by the Returning Officer and the delayed Annual General Meeting, for the purpose of lodgement of the prescribed information (i.e. 2 months prior to the earliest date that a person can become a candidate) I find that the prescribed information was filed outside the time frame prescribed by the Act. Notwithstanding that, I am prepared to exercise my discretion and extend the prescribed time for filing of such information to 13 September 2001.

Reason for Election

Rule 29 prescribes that "the whole Council shall retire annually". Rule 42 provides for two Trustees to be elected at the Annual General Meeting while Rule 23(3) provides for the election of Office-Bearers at the Annual General Meeting.

Method of Election

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

Conduct of Election

I have considered the Application, the Act and Rules and I am satisfied that an election is required to be held under the Rules for the positions of Office set out above.

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 thirteenth day of September, 2001.

E. EWALD
Industrial Registrar

Released: 13 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 Queensland Retail Traders and Shopkeepers Association
(Industrial Organization of Employers) and Others (No. B1366 of 2001)****LIFEGUARD AWARD – STATE**

COMMISSIONER ASBURY

6 September 2001

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 6 September 2001, this Commission doth order that the said Award be amended as follows as from the first day of June, 2001:–

1. By inserting a new subclause 2.3.4 in clause 2.3 (Part-time Employment) as follows:–

“2.3.4 A part-time employee shall be engaged for a minimum of three hours per day and not less than 12 hours per week.”.

2. By deleting subclause 2.9.1(b) of clause 2.9 (Occupational Superannuation) and inserting the following in lieu thereof:–

“(b) Westpac.”.

3. By deleting subclause 3.3.1 of clause 3.3 (Wage Rates and Classification Levels) and inserting the following in lieu thereof:–

“3.3.1 *Wages*

The minimum wage rates payable to the following classes of employees shall be as follows:–

CLASSIFICATION	WEEKLY WAGE RATE	
	1/6/01 \$	1/9/01 \$
Level 1	435.40	448.40
Level 2	467.40	480.40
Level 3	475.80	488.80
Level 4	511.40	526.40
Level 5	563.10	578.10”.

4. By deleting subclause 3.3.2 of clause 3.3 (Wage Rates and Classification Levels) and inserting the following in lieu thereof:–

“3.3.2 *Safety Net Adjustments*

The rates of pay in this clause comprise the minimum rates payable under this Award. The rates of pay in this clause have been adjusted to include pay rates based upon the Surf Life Saving Queensland – Certified Agreement 2001-2004 (CA94 of 2001). The rates of pay in this clause include the arbitrated wage adjustment payable under the 1st September, 2001 Declaration of General Ruling and earlier Safety Net Adjustments. The rates of pay are not to be adjusted for State Wage Adjustments in the year 2001.”.

5. By inserting a new subclause 3.4.4 in clause 3.3 (Wage Rates and Classification Levels) as follows:–

“3.4.4 *Lifeguard Awards and Proficiencies*

The employer shall pay for all employees to retain their tickets as lifeguards, or the employer may pay an allowance of \$6.00 per week for full-time employees and *pro rata* for part-time and casual employees.”.

6. By deleting clause 5.4 (Long Service Leave) and inserting the following in lieu thereof:–

“5.4 Long Service Leave

5.4.1 All employees covered by this Award will be entitled to 13 weeks' accrued long service leave after the completion of 10 years' continuous service with the same employer.

5.4.2 Except as amended by this clause, all employees covered by this Award shall be entitled to long service leave on full pay under, subject to, and in accordance with the provisions of the *Industrial Relations Act 1999*.

5.4.3 An employee will be entitled to a proportionate payment for long service leave if:–

- (a) the employee has completed at least 7 but less than 10 years continuous service; and
 (b) the employee's service is terminated by –
 (i) the employee's death; or
 (ii) the employee; or
 (iii) the employer, for a cause other than serious misconduct.”.

7. By inserting a new clause 5.7 (Leave without Pay) as follows:-

“5.7 Leave Without Pay

- 5.7.1 Every employee will become entitled to make application for up to 12 months' leave without pay once they have completed one year of continuous employment with an employer. Approval of leave without pay applications will be at the employer's discretion and the conditions that will apply for leave accruals will mirror the Continuity of Service conditions at Chapter 2, Part 6 of the *Industrial Relations Act 1999*. However, the employer will not unreasonably withhold agreement for leave without pay.
- 5.7.2 Employees who take leave without pay will be assured of a position at the same classification level they departed upon, when they return to duty after a period of leave without pay.
- 5.7.3 Approval of leave without pay is on the condition employees return to work on the agreed date (or other date as the employer may agree) at the end of leave. Where an employee breaks this agreement by not returning to work – the employer will have the right to terminate the employment from the commencement date of the leave without pay.
- 5.7.4 Employees who commence leave without pay may be required to take all leave entitlements and time off in lieu balances at the commencement of the period of leave without pay.”.

8. By inserting new clauses 6.3 (Uniforms) and 6.4 (Hepatitis Vaccinations) as follows:-

“6.3 Uniforms

The employer shall supply employees the following free of charge:-

- Sunscreen;
- Sunglasses (annually);
- Shorts and collared shirts;
- Tracksuits (winter – June/August);
- Wet weather gear;
- Caps/Hats;
- Note Pad; and
- Rubber Gloves.

6.4 Hepatitis Vaccinations

- 6.4.1 Employees will be provided free Hepatitis B vaccinations upon successful completion of their probation period.
- 6.4.2 Any employee who organises such vaccinations for themselves and is intending to claim a Hepatitis reimbursement will be required to present evidence of expenditure which satisfies the employer that an entitlement to reimbursement exists. The amount to be reimbursed will not include any amounts covered by Medicare such as medical consultation fees etc.”.

9. By deleting items 2 and 3 from Schedule 1 to the Award and inserting the following in lieu thereof:-

2. The minimum wage rates payable to employees at Surf Life Saving Queensland shall be as follows:-

Classification	Weekly Wage	Weekly Wage
	Rate	Rate
	1/6/01	1/9/01
	\$	\$
Level 1	483.20	496.20
Level 2	524.00	539.00
Level 3	534.00	549.00
Level 4	574.00	589.00
Level 5	632.00	649.00

3. The above wage rates are inclusive of weekend penalty rates and accordingly clause 3.5 (Weekend Penalty Rates) shall not apply.

The rates of pay in this clause comprise the actual rates payable under this Award. The rates of pay in this clause have been adjusted to include pay rates based upon the Surf Life Saving Queensland – Certified Agreement 2001-2004 (CA94 of 2001). The rates of pay in this clause include the arbitrated wage adjustment payable under the 1st September, 2001 Declaration of General Ruling and earlier Safety Net Adjustments. The rates of pay are not to be adjusted for State Wage Adjustments in the year 2001.”.

Dated this sixth day of September, 2001

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

Operative Date: 1 June 2001
Amendment – Increase in Wages, Long Service Leave
Released: 14 September 2001