



The Queensland Government

Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$297 + GST

ISSN 0155-9362

Vol. 168

FRIDAY, 5 OCTOBER, 2001

No. 5

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
CA17/99	The Wesley And Turrawan Private Hospitals Clerical - Certified Agreement 1998 - 2000	4/2/99	
CA395/01	Queensland Country Credit Union Ltd - Certified Agreement	5/9/01	CA369/99
CA403/01	Wattyl Trade Paint Centre - Certified Agreement 2001	14/9/01	CA481/99
CA406/01	Duaringa Shire Council Enterprise Bargaining - Certified Agreement	14/9/01	CA279/99
CA401/01	Queensland Breweries Enterprise Development - Certified Agreement 2001	18/9/01	CA248/98
CA412/01	Swickers Kingaroy Bacon - Certified Agreement 2001	18/9/01	CA191/99
CA409/01	Sheldon College Academic Staff - Certified Agreement 2001	21/9/01	CA395/98
CA410/01	Greenslopes Private Hospital - Biomedical Engineering Employees - Certified Agreement 2001	21/9/01	
CA411/01	Friendly Society Private Hospital - AWU - Certified Agreement 2000	21/9/01	CA227/98
CA421/01	Reef Hotel Casino Cairns Complex and Staff - Certified Agreement 2001	24/9/01	CA520 and CA571 of 1998
CA426/01	Wondai Shire Council - Certified Agreement 2001	25/9/01	CA31/00
CA428/01	Isisford Shire Council State - Certified Agreement	25/9/01	
CA430/01	Cloncurry Shire Council - State Certified Agreement 2001	25/9/01	CA516/97

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

*Industrial Relations Act 1999 – s. 282 – case stated***Bettina O'Connor AND Electroboard Administration Pty Ltd (No. C60 of 2001)**

PRESIDENT HALL

20 September 2001

DECISION

Bettina O'Connor is an applicant under s. 74 of the *Industrial Relations Act 1999*. She seeks reinstatement to her former position as an account manager with Electroboard Administration Pty Ltd. Amongst other things Electroboard Administration Pty Ltd contends that Ms O'Connor is not entitled to bring such an application because she is excluded from Part 2 of Chapter 3 of the *Industrial Relations Act 1999* by each of paragraphs (a) and (e) of s. 72(1). The Commissioner to whom the matter had been allocated dealt with the issues relevant to s. 72(1)(a) and decided the matter adversely to Electroboard Administration Pty Ltd. The Commissioner did not determine whether Ms O'Connor was denied access to s. 74 by the operation of s. 72(1)(e). The Commissioner chose to exercise the power at s. 282 to state a case to the Court. The case stated was in the following terms:–

- “1. Should commission which is paid for sales made and paid pursuant to an employment agreement be included in the calculation of annual wages for the purpose of s. 72(1)(e)(iii) of the Act?
2. In the calculation of annual wages should commission which is paid for sales made and paid pursuant to an employment agreement be treated differently if irregular payments, such as a bonus or payments not paid pursuant to an employment agreement?
3. If the answer to Question 1 is ‘yes’, how should annual wages be calculated where an employee has worked for less than one year? Should projected commissions (ie commissions expected to be earned but not yet earned nor paid) be included in the calculation?
4. Should allowances which reimburse for expenses incurred in the course of employment such as a car allowance, and superannuation be included in the calculation of annual wages?
5. In s. 72(1)(e)(iii) of the Act, how does the phrase ‘immediately before the dismissal’ affect the meaning of the term ‘annual wages’?”.

Since the provision is brief, it is convenient to reproduce the terms of s. 72(1)(e). The provision reads:

“s. 72(1). Part 2 does not apply to –

(e) an employee –

- (i) who is not employed under an industrial instrument; and
- (ii) who is not a public service officer employed on tenure under the *Public Service Act 1996*; and
- (iii) whose annual wages immediately before the dismissal are more than \$68 000 or a greater amount stated, or worked out in a way prescribed under a regulation.”.

The ordinary meaning of the word “wages” was examined by Wilcox CJ in *Ardino v Count Financial Group Pty Ltd* (1994) 57 IR 89. At 95 His Honour observed:–

“The word ‘wages’ is not defined by the *Industrial Relations Act*, so in s. 170CD it bears its ordinary meaning. *The Shorter Oxford Dictionary* defines ‘wage’ as:

‘A payment to a person for service rendered; now esp the amount paid periodically for the labour or service of a workman or servant. Freq *pl.*’

The Macquarie Dictionary gives the primary meaning of ‘wage’, noting that it is often plural, as ‘that which is paid for work or services, as by the day or week; hire; pay’. I think these definitions’ emphasis on payment makes it difficult to argue that benefits that do not take the form of money payments are ‘wages’.”.

Sums earned by way of commission do not fit comfortably within either definition. I doubt that the *Shorter Oxford Dictionary* reference to “payment to a person for services rendered” and the *Macquarie Dictionary* reference to “that which is paid for work or services” was intended to embrace such payments. Rather, I understand those references to pick up a common understanding that where a worker is employed on wages or salary periodically payable, it is the service that earns the remuneration. That concept was more fully developed by Dixon J in *Automatic Fire Sprinklers Pty Ltd v Watson* (1946) 72 CLR 435 at 465:

“It is, of course, possible for the parties to make a contract for the payment of periodical sums by the master to the servant independently of his service. Indeed that is, in effect, what the Duke of Westminster persuaded the majority of the House of Lords he had done in *Inland Revenue Commissioners v. Duke of Westminster* (2). But, to say the least, it is not usual. The common understanding of a contract of employment at wages or salary periodically payable is that it is the service that earns the remuneration and even a wrongful discharge from the service means that wages or salary cannot be earned however ready and willing the employee may be to service and however much he stand by his contract and decline, to treat it as discharged by breach.”.

One may not, of course, safely assume that words used in a statute are used in their natural sense. Not uncommonly words are given an entirely unnatural meaning by express definition. On other occasions the context in which a word is used will require that it be construed in other than its natural sense. Here, there is a definition of wages at Schedule 5. Wages is defined as follows:–

“Wages means

- (a) an amount payable to an employee for
 - (i) work performed, or to be performed by the employee; or

- (ii) a public holiday; or
 - (iii) leave the employee is entitled to; or
 - (iv) termination of employment; or
- (b) a salary; or
- (c) an amount payable from wages for the employer, with the employee's written consent; or
- (d) a shortfall under s. 220."

Two observations may immediately be made. A definition such as the definition of wages at Schedule 5 is best regarded, not as giving wages a new meaning, but as an entirely mechanical device to allow the words at (a), (b), (c) and (d) to be supplied by a single word, viz "wages", whenever it is desired to legislate in the Act for anything which is included in that expression. In *Mutual Acceptance Co. Ltd v Federal Commissioner of Taxation* (1944) 69 CLR 389 at 398, Rich J observed:-

"A definition of this kind is not an exercise in philology. It is a mechanical device to save repetition. Its purpose is not to endow the word 'wages' with a new meaning, but to enable the expression 'wages, salary, commission, bonuses or allowances paid or payable,' &c., to be supplied by a single word whenever it is desired to legislate in this Act for anything which is included in that expression . . .".

The other observation to be made is that whilst in apparently peremptory terms the definition, like all statutory definitions, is subject to s. 32A of the *Acts Interpretation Act 1954* which provides:

"Definitions in or applicable to an act apply except so far as the context or subject matter otherwise indicates or requires."

There are sections in the *Industrial Relations Act 1999* into which the words of the definition of "wages" at Schedule 5 may comfortably be inserted. One such provision is s. 278(1)(a) which provides:

"278(1) An application may be made to the commission for an order for payment of –

(a) an employee's unpaid wages . . .".

The words at para (a)(i) of the definition of "wages" may be inserted without violence to language. A provision in the form,

"s. 278(1) An application may be made to the commission for an order for payment of –

(a) unpaid amounts payable to an employee for work performed, or to be performed by the employee.",

is neither inelegant nor ungrammatical.

Such a provision would sit easily with the history of industrial regulation in this state. The *Industrial Conciliation and Arbitration Act 1961* though using the word "wages" in the heading to the section about civil recovery referred to:

". . . money payable to that employee under an industrial award or an industrial agreement including money payable in respect of –

(a) work done by him; or

(b) any holiday, leave by way of annual holidays or sick leave.",

in the provision itself, see s. 97(2). That provision was plainly wide enough to allow for recovery of monies paid by results, including commission payments and tally payments.

The use of the word "wages" in the provision about civil recovery was an initiative of the *Industrial Relations Act 1990* subsequently adopted by each of the *Workplace Relations Act 1997* and the *Industrial Relations Act 1999*. There is nothing in the relevant Second Reading Speeches or Explanatory Notes to suggest that any narrowing of the remedy was intended. It would be startling if employees engaged under awards allowing for payment partly by way of minimum payments and partly by way of commission, see e.g. s. 16 if the *Commercial Travellers' Award – State*, were to be denied the opportunity to recover all that was owing in one proceeding, and required to pursue any unpaid minimum payment in the Industrial Magistrates Court or the Queensland Industrial Relations Commission whilst pursuing the unpaid commission in the Magistrates Court. It is to be noticed that the *Industrial Relations Act 1990* was very heavily influenced by the report of the inquiry into the *Industrial Conciliation and Arbitration Act 1961-1987* of Queensland chaired by Hon. R.I. Hanger, QC. At 417 to 425 of its Report, that Committed debated at length whether a specialist wage recovery tribunal should be established. It is likely that the language was changed in order to allow employees who are not engaged under industrial instruments the same remedies as the remedies available to employees within the industrial relations system. I note the observations of Boon JR in *Reinhard Wolfer v Computer Associates Pty Ltd* (12-4-1995) IRC\WI 538/94 that:

"The amount of commission an employee receives may have little bearing on the actual effort expended or "services rendered" by the employee."

That may be so. Indeed, the comment may be equally applicable to all systems of payment by result, except those where tallies have been set to ensure that a worker of ordinary ability and diligence would earn more than if paid by the time rate for the same number of hours actually worked. But such payments may still be described as "an amount payable to an employee for work performed".

The words which the definition of "wages" at Schedule 5 allows to be substituted for the word "wages" in a substantive provision may be slotted into s. 72(1)(e) just as readily as into s. 278. The case for finding a "contrary intention" in s. 72(1)(e) is to be found in the history and subject matter of the provision. It was the effect of s. 216(5) of the *Workplace Relations Act 1996* and s. 34(2)(b) of the *Workplace Relations Regulation 1997* that an employee "whose annual remuneration immediately before the dismissal [was] more than \$64,000" was denied entitlement under Chapter 5, Parts 2 and 3 of the *Workplace Relations Act 1997*. The change of language from "annual remuneration" to "annual wages" is *prime facie* suggestive of an intention to vary the scope of the denial of entitlement clause (now s. 72(1)). Materially, both the relevant Second Reading Speech and the Explanatory Notes are silent upon the point. However, the review industrial relations legislation in Queensland by the Industrial Relations Taskforce chaired by Professor Gardner which preceded the 1999 Act did deal with the topic. At pp 63-64 the Taskforce observed:

“... The Taskforce also believes that the level at which this ‘cap’ was set was appropriate when it referred to wages and salary. [As amended by Act No. 12 of 1994 the *Industrial Relations Act 1990* and the Regulation made thereunder about exclusions referred to wages and salary.] However, in 1997 the \$64,000 was changed to refer to remuneration, which has had the effect of complicating understanding of when the exemption applies and of restricting it further than the original intention. The majority of the Taskforce there recommends that the \$64,000 not only be indexed but be set as wages and salary rather than remuneration once more.”

If the words at para (a)(i) of the definition of “wages” are substituted for the word “wages” in s. 72(1)(e), it is difficult to identify a money payment which would fall within the concept of “remuneration” without also falling within s. 72(1)(e). (Though the change in language would put beyond doubt that non-pecuniary benefits might not be assigned their value in money and brought into account.) If the words at para (a)(i) may be substituted for “wages” at s. 72(1)(e) nothing has been made more certain. Whilst there is no greater conceptual difficulty in inquiring whether a reasonable person acquainted with all relevant circumstances would, on the day immediately before a dismissal, have concluded that an employee was in receipt of annual payments in excess of \$64,000 in respect of work performed than there was conceptual difficulty in inquiring whether a reasonable person acquainted with all relevant circumstances would, on the day immediately before a dismissal, have concluded that employee had an annual remuneration in excess of \$64,000, compare *Num v Linde Materials Handling Pty Ltd* (1999) 160 QGIG 212 at 213, the factual difficulties remain. Indeed, in many cases and certainly whereas in the present case the duration of the employment was less than six months, the matter might be resolved only by invoking the well-known passage in *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520, viz:

“... But in whatever form the enactment is cast, if it expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of a general or primary grounds from which the liability or right arises but denies the right or liability in a particular case by reason of additional or special facts, then it is evident that such an enactment supplies considerations of substance for placing the burden of proof on the party seeking to rely upon the additional or special matter...”

See also *Mann v State Rail Authority* [1999] FCA 273 where, speaking of the counterpart exclusion provisions in the *Workplace Relations Regulations (Cwth) 1996* the Court observed:

“Given the exclusionary effect of the Regulation, the party asserting that it operates to deny rights otherwise generally available bears the onus of establishing its application in the case in question. ...”

Cases resolved on the basis of onus are not entirely satisfactory cases.

On balance a contrary intention is shown. “Wages” at s. 72(1)(e) should be given its natural meaning not the mean at the definition of “wages” at Schedule 5. The answer to Question 1 is “No”.

The answer to Question 1 makes it unnecessary to answer Question 3. Question 2 in the case stated goes beyond the issues raised in the litigation between Ms O’Connor and Electroboard Administration Pty Ltd. It should not have been included in the case stated and it should not be answered. Question 5 seems to me to arise only if “commissions” were to be taken into account. It should be answered “Not relevant”.

Question 4 raises questions about superannuation and motor vehicle allowances.

It may be accepted that superannuation payments for the benefit of an employee are “remuneration”, see *Mitchell v Australasian Correctional Management Pty Ltd* (1997) 157 QGIG 7 at 7-8; *May v Lillyvale Hotel Pty Ltd* (1995) 68 IR 112 at 116-117; *Rigby v Technisearch Limited* (1996) 67 IR 68 at 91-92. But such payments do not fall within the ordinary meaning of the word “wages”. In *Ardino v Count Financial Group Limited* (1994) 57 IR 89 at 94 Wilcox CJ observed:

“... I agree with counsel that definition of ‘relevant wages’ is concerned only with payments that are wages strictly so called. I do not think it includes payments made by an employer on behalf of an employee pursuant to a binding antecedent obligation, whether statutory or contractual. It is now common place for employers to make payments to a superannuation fund in respect of individual employees. This is usually because of a statutory obligation to that effect, sometimes because of a binding contractual obligation. If the situation is that the employer never had any option but to pay particular monies to a superannuation fund, as distinct from making it available to the employee, the payment cannot properly be described as ‘wages’.”

On the hearing of the case stated, Electroboard Administration Pty Ltd conceded that the car allowance was a “travelling allowance in the form of reimbursement of expenses incurred”, albeit subject to an agreed cap. Such a payment may not properly be characterised as “remuneration”. In *Re: Australian Liquor, Hospitality and Miscellaneous Workers Union*, Print Q1629, 3 July 1998, a Full Bench of the Australian Industrial Relations Commission concluded (at 15):

“We therefore construe paragraph 170 CC(3)(b) as meaning that the rate of remuneration applicable to the employee is an assessed annual rate of the cash payments made or liable to be made by the employer to or on behalf of the employee, or benefits in kind for the private use of the employee, exclusive of payments made as reimbursement, and identifiable as a reward or recompense for the work or service in the period of employment immediately prior to the termination of employment.” (Emphasis added)

Such a payment is certainly not within the ordinary concept of “wages”. If authority be needed for that it is to be found in *Wilfer v Computer Associates Pty Ltd* (12/4/1995) IRCtWI 538/94.

I remit the matter to the Queensland Industrial Relations Commission in order that the matter may be heard and determined according to law.

Dated this twentieth day of September, 2001.

D.R. HALL, President.

Released: 20 September 2001

Appearances:-

Mr A. Harding instructed by Gilshenan and Luton, Lawyers, for Bettina O’Connor.
Mr L. Moloney of Livingstones Australia for Electroboard Administration Pty Ltd.

INDUSTRIAL COURT OF QUEENSLAND

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

Sandra Lillian Venn-Brown AND Alexander Colquhuon & Son Pty Ltd (No. C42 of 2001)

PRESIDENT HALL

20 September 2001

DECISION

This is an appeal against sentence.

On 29 June 2001 Alexander Colquhuon & Son Pty Ltd, a company under the corporations law, pleaded guilty to a complaint by Sandra Lillian Venn-Brown, a public officer within the meaning of s. 142A of the *Justices Act 1986* and an inspector duly appointed under the provisions of the *Workplace Health and Safety Act 1995* that on 16 June 2000 at Toowoomba in the Magistrates Court District of Toowoomba, the company, being a person on whom a workplace health and safety obligation prescribed by s. 28(1) of the *Workplace Health and Safety Act 1995* was imposed, failed to discharge the obligation contrary to s. 24 of the *Workplace Health and Safety Act 1995*. A circumstance of aggravation was, I should add, raised by the complaint. It was averred that as a consequence of the failure to discharge the workplace health and safety obligation Natasha Elizabeth Stewart sustained bodily harm.

No conviction was recorded. The complainant did not press for a conviction. After hearing submissions, the Acting Industrial Magistrate imposed a penalty of \$4,500. In the case of a corporation the maximum penalty was \$187,500.

The appeal is brought pursuant to s. 164(3). It is common ground that the appeal is governed by the principal in *House v The King* (1936) 55 CLR 499 at 504 per Dixon, Evatt and McTeirnan JJ:

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

It is upon the second limb of the principle (relating to an error which has occurred without being discoverable) upon which the appellant relies in these proceedings.

The Acting Industrial Magistrate identified a number of mitigating factors. On the material before His Worship it was open to him to identify those mitigating factors. They were –

1. the respondent entered a timely plea of guilty;
2. the appellant had fully cooperated with the authorities;
3. the respondent has acted with alacrity to promptly remedy the defect immediately after the incident; and
4. the appellant displayed genuine (and not feigned) remorse.

By s. 9 of the *Penalties and Sentences Act 1992* His Worship was entitled, and indeed required, to take those matters into account.

The Acting Industrial Magistrate was not so fulsome in dealing with whether the incident was minor or grave. His Worship did observe that all offences under the *Workplace Health and Safety Act 1995* are serious matters. His Worship was right to do so. His Worship also observed that the seriousness of the injury was a material consideration. Once again, given the link established by s. 24 between seriousness of injury or potential injury and maximum penalty, His Worship was correct. Where His Worship is said to have fallen into error was in (an unknown way) failing to take into account certain matters of aggravation which had been raised by the complainant in the written statement of facts which had been handed up. It is submitted that once those matters are taken into account the offence was so objectively grave that giving full force and effect to the mitigating factors previously referred to, it could not properly be reduced to a penalty of \$4,500. The matters referred to were:

- Inadequate guarding on the 3 colour printing machine to prevent access to printing rollers and drums, as well as chains, cogs, wheels and gears;
- Workers had previously raised the issue of guarding of the 3 colour printing machine, with management;
- Quotes had been obtained for guarding the 3 colour printing machine but a decision was made to postpone modifications until administrative issues were resolved;
- Following an injury to another worker approximately 7 years ago, a sign was placed on the workplace wall stating: ‘under no circumstances must any cleaning or adjustment of any machinery take place whilst the machinery is in motion’
- In May 2000 Natasha STEWART’s jacket was caught in the unguarded gears and chains of the 3 colour printing.”.

The matter of the first dot point may be put aside. It is not a circumstance of aggravation. It is the offence to which the respondent pleaded guilty.

On first impression the matters appear serious. On closer examination, it emerges that the Acting Industrial Magistrate was not given any information in excess of the materials – which were really but headings – at the various dot points. His Worship was not, e.g., told –

- (a) whether the administrative issues which caused postponement of the modifications were the making of the respondent or the bureaucracy or that they had been confronted in a reasonable and responsible way;
- (b) His Worship was not told the circumstances surrounding the injury which had occurred seven years previously or whether it had led to conviction, and by a later assertion, told of 3 further incidents;
- (c) His Worship was not told whether when Miss Stewart caught her jacket in the unguarded gears and chains the gears and chains were moving or stationary; and
- (d) His Worship was not told if the workers had supported or opposed the guarding of the machine.

It may be that if the matter had descended into particularity information quite adverse to the respondent would have been flushed out. But that did not happen. The Acting Industrial Magistrate was left with ambiguous assertions and no detail. His Worship was engaged on a serious matter. His Worship was trying to determine an appropriate penalty in circumstances where the appropriate penalty lay between \$0 and \$187,500. (The size and financial capacity of the respondent was not before the Industrial Magistrate.) It was open to the Industrial Magistrate to put the matters aside on the ground that His Worship lacked confidence in the information with which His Worship was being provided. Indeed, with hindsight His Worship was (in part) plainly right to do so. It emerged that there were not 3 further incidents and that the incident of seven years ago involved a different machine. Given that the briefing notes handed up (relating to the conviction of TJM Products Pty Ltd and Oakey Holdings Pty Ltd) suggested a penalty range of \$7,000 - \$10,000 for very much more serious injuries, and given the substantial mitigating circumstances, it seems to me that a Industrial Magistrate properly instructed as to law might without error have come to the conclusion to which the Acting Industrial Magistrate ultimately came.

I dismiss the appeal.

Dated this twentieth day of September, 2001.

D.R. HALL, President.

Released: 20 September 2001

Appearances:-

Mr S. Smith, Solicitor, of Workplace Health and Safety for the appellant.
Mr A.K. Herbert instructed by Cleary & Lee for the respondent.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 – s. 21 – trading hours orders on non-exempt shops

**Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association
(Industrial Organisation of Employers) and Others (No. B1875 of 2000)**

TRADING HOURS ORDER – NON-EXEMPT SHOPS TRADING BY RETAIL – STATE

VICE PRESIDENT LINNANE
COMMISSIONER EDWARDS
COMMISSIONER SWAN

21 September 2001

Application to extend trading hours within defined tourist areas in Queensland – Extension of boundaries sought within some regions – Support for application by major organisations of employees – Employees to be engaged on a voluntary basis – Surveys conducted – Evidence on new developments, redevelopments and economic growth within the various regions – Standardisation of retail hours within defined tourist areas – Extension of boundaries within some regions granted – No substantive evidence to support an extension of boundaries within some regions – Consumer interests met – Business interests considered – Decision on some regions reserved until finalisation of other retail matters before the Commission – Application, in part, granted.

DECISION

Application B1875 of 2000 has been made by the Retailers' Association of Queensland Limited, Union of Employers (RAQ). This application seeks to amend the Order fixing *Trading Hours Order – Non-Exempt Shops Trading by Retail – State* by deleting clause 3.2(1)(a) of the abovementioned Order and replacing it by a range of amendments. The rationale for the application sought by the RAQ is as follows:-

“This application seeks an order from the Queensland Industrial Relations Commission to amend the Order to allow non-exempt shops in these tourist areas on Sundays, to open not earlier than 9.00 a.m., and to close not later than 6.00 p.m. (excluding hours set for Christmas trading) and to produce a uniform set of trading hours for Saturday and Public Holidays. This Order is sought pursuant to section 21 of the *Trading (Allowable Hours) Act 1990*, hereinafter referred to as ‘the Act’.

This application seeks to maintain the exclusion of the period of extended Sunday Trading on the four Sundays prior to Christmas (clause 3.3 of the Order – *Trading Hours Order – Non-Exempt Shops Trading by Retail – State*), granted by the Queensland Industrial Relations Commission in B579 of 2000 (Vol 165 QGIG No 9 @ folio 174 to 179).

The application also seeks an order relating to five (5) of the geographically defined areas (as set out in the Order) to reflect the expansion of these tourist areas. The areas are: –

- the Gold Coast area
- the Sunshine Coast area
- the area inner city of Brisbane
- the Cairns Tourist area
- the Douglas Shire Tourist area
- ...

The provision of a new set of tourist trading hours, operating uniformly, will provide consistency between the tourist areas, for customers, retailers and tourist industry operators and will not afford any one area an advantage over another.”

Preliminary points for determination were raised by the Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) (QRTSA). The QRTSA raised two preliminary matters. The issue of s. 27 of the Act and its impact upon those parts of the application by QRTSA which deal with the Douglas Shire Tourist Area, the Cairns Tourist Area and the Whitsunday Shire Tourist Area. The second matter raised was the need for inspections of those three areas. The decision by the Full Bench on those matters was issued on 9 February 2001 and the Commission dismissed the preliminary points.

The Minister for Industrial Relations determined to intervene in this matter pursuant to s. 43 of the *Industrial Relations Act 1999* and did so for the purpose of clarifying the Government's position in respect of the Government's National Competition Policy obligations regarding trading hours. The Minister's intervention was not based on support or otherwise for the claim before the Commission. The Act was one of the pieces of legislation that was listed for review in accordance with clause 5 of the Competition Principles Agreement. That clause states that legislative regulation should not restrict competition unless it can be demonstrated that –

- the benefits of the restriction to the community as a whole outweigh the costs;
- the objectives of the legislation can only be achieved by restricting competition.

Clause 5 must satisfy the "Public Benefits Test Guidelines" which assist Government agencies undertaking a public benefit test as part of a legislative review process. We have given due consideration to the Government's submissions in this regard in making this decision.

The Australian Workers' Union of Employees, Queensland (AWU) expressed its support for the application after consulting with its membership within the retail industry. There was substantial agreement amongst the Union's membership for the extension of hours sought and the Union had given its support on the basis that work for all relevant employees would be on a voluntary basis only. The Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (SDA) adopted a position similar to that of the AWU.

The QRTSA opposed the application as did the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers. That last mentioned organisation stated that it did not wish to call any witness evidence during the hearing.

Overview of the RAQ's position

The RAQ stated that it did not wish to revisit the Commission's previous decisions which had defined specific tourist areas throughout the State. Rather, it sought the application generally for the following reasons:–

That the current hours were restrictive and did not meet the needs of the expanding tourism industry.

That the retail industry is the largest employer in Queensland. The tourism industry was also in this category and this application would facilitate stronger employment opportunities in those tourist areas.

Consistency between tourist areas would ensure that one area was not advantaged over another.

Since the granting of Sunday trading in tourism areas, other non-exempt stores have been granted Sunday trading hours e.g. non-exempt hardware stores, the New Farm and Coles Express CBD stores in Brisbane.

"The Queensland Industrial Relations Commission in previous matters has deemed it desirable to have consistency between the hours of Sunday trading in all of the Tourist precincts within the State. In line with this, the RAQ in this Application is seeking to have the Sunday trading hours for non-exempt stores in each of these precincts extended on the same basis..."

RAQ WITNESS EVIDENCE (Brief Summary Only)

All relevant evidence, while not necessarily cited in this decision, has been considered.

Mr Anthony Dimasi

Mr Dimasi is a Director of Jebb Holland Dimasi Pty Ltd. This Company was commissioned by the RAQ to prepare a report examining the tourist trading areas, and in particular the various changes that have occurred or are occurring in those areas.

In terms of the Gold Coast area, Mr Dimasi stated that what was sought by the RAQ in this application differed somewhat from the currently designated Gold Coast tourist area. The proposed area now included the suburb of Helensvale. The rationale for including this area was that: –

"The Helensvale area is, and in the foreseeable future will continue to be, the fastest growing residential area on the Gold Coast; and The area around Helensvale and Oxenford to its north now contains a number of the major tourist attractions on the Gold Coast, in particular Movie World, Dream World and Wet 'n Wild."

The Gold Coast, in terms of trading hours considerations, was last reviewed by the Commission in 1992. Since that time, it was claimed that considerable changes had occurred which now required revisiting by the Commission. The Gold Coast population increased by an average of 12,330 persons each year making it one of the fastest growing regions within Australia. There had been a marked increase in the number of housing developments established within that area, together with the aforementioned tourist attractions.

Specifically, within the Gold Coast region, Mr Dimasi stated that shopping centres on the Gold Coast occupy some 409,500 sq.m. of floorspace and generate annual turnover of \$1.8 billion. The capital value of the Gold Coast shopping centres is \$1.6 billion and shopping centres on the Gold Coast employ approximately 18,300 people and pay \$290 million annually in wages and salaries to these employees.

In terms of the City Heart of Inner City of Brisbane, Mr Dimasi stated that, since the area was last considered by the Commission in terms of trading hours in 1989, significant changes had occurred. There has been considerable residential development in that region over the last two years.

A profile was given of shopping habits of residents within this area and it was claimed that:–

- approximately one-third of residents undertake their food and grocery shopping after 5.00 p.m.;
- most residents found the availability of appropriate shopping facilities in this region "poor";
- the use of convenience stores was often seen to be inconvenient and over-priced; and
- many residents had to travel well outside of their region to find appropriate shopping.

An analysis was then given of general retail expenditure within Brisbane, visitor nights, tourist accommodation, shopping facilities and proposed development within this area. All, it was claimed, showed marked increases since the previous survey had been conducted.

In summary, Mr Dimasi stated:-

“The Inner Brisbane area has been strongly promoted for residential development by various Government bodies, including in particular the Urban Renewal Taskforce. The growth in the provision of new dwellings, as well as in the provision of retail and commercial facilities, throughout Inner Brisbane is likely to continue at high rates, given the natural attractions of the area.

The residents of the area however have indicated quite strongly that they require appropriate services and in particular appropriate retailing, which is an essential part of the inner city lifestyle. Visitors to Brisbane similarly require greater flexibility in shop trading hours.”.

In terms of the Sunshine Coast, which was last considered by the Commission in relation to trading hours in 1996, Mr Dimasi stated that the new area sought for inclusion within the tourist area included the areas of Buderim and Chancellor Park and the hinterland village of Maleny.

The rationale for inclusion of these areas was that:-

- The very rapid population growth, and the consequent additions of retail facilities, that have either occurred or are in the process of occurring in Chancellor Park and Buderim in particular.
- The development of the Sunshine Coast University (at Chancellor Park).
- The importance of the Maleny/Montville area as a growing hinterland tourist attraction on the Sunshine Coast.”.

Mr Dimasi claimed that visitation levels to the Sunshine Coast had grown very strongly over recent years, particularly from domestic day visitors. The region had averaged approximately 10% in annual growth since 1996. Retail facilities within the area had also grown considerably over the period.

The Whitsunday Tourist Area (Cannonvale/Airlie Beach) was last considered by the Commission in terms of shopping hours during 1999. The population growth within the area has ranged between 3%-5% annually and is currently performing at more than three times the national average.

Additional facilities constructed within this region were listed by Mr Dimasi e.g. the new lagoon at Airlie Beach, a new luxury hotel at Airlie Beach, major refurbishment of three of the Whitsunday Islands and the proposed development of the Whitsunday Sailing Club, the Queensland Tourism Industry \$10 million cable way linking Airlie Beach to Hinterland National Parks, and a \$180 million unit complex to be developed.

In terms of shopping facilities within this region, Mr Dimasi stated that most were confined to convenience and tourist shopping, however, tourism demanded greater flexibility within retail shopping hours.

Reference was made to the Douglas Tourist Area where the population growth was around 4% annually. Tourism growth within the region was around 10% annually. New development projects were mentioned and the major retail centres were located in Macrossan Street with a new supermarket, Franklins, opening for business at the entrance to Port Douglas.

Within the Cairns tourism area, the RAQ application sought to expand the defined tourist area. Reference was made to the general economic growth within the city and specifically to the shopping facilities. Those particulars included the following:-

“Shopping centres in Cairns occupy 140,000 sq.m of retail space, and generate annual turnover of \$550 million. The capital value of Cairns shopping centres is \$410 million. Shopping centres in Cairns employ 6,000 people, and pay approximately \$100 million annually in wages and salaries to those employees.”.

An area of specific concern related to the new Mt Sheridan Plaza due to open on 19 March 2001. This Plaza, anchored by a Coles supermarket, was designed to service the growth area of White Rock.

In summary, Mr Dimasi stated:-

“The Australian Bureau of Tourism Research (BTR) undertakes annual surveys of international visitors to Australia. These surveys are extensive, and cover all aspects of the visitor’s trip to Australia, including the level of visitor satisfaction with tourism and retail facilities in Australia.

These surveys conducted by the Australian BTR over the past decade highlight the following key findings with respect to shop trading hours:

- 1 The degree of visitor satisfaction with most of the tourist facilities in Australia is in excess of 90%, and in many instances in excess of 95%.
- 2 Over the past decade, the issue about which international visitors to Australia have expressed the greatest degree of dissatisfaction is shop trading hours.
- 3 Over the past decade, the degree of dissatisfaction with shop trading hours in Australia expressed by international visitors has increased significantly...

The proportion of overseas visitors now expressing dissatisfaction with shop trading hours in Australia is 30%. In 1993, that proportion was 20%. Clearly, over time, visitors to Australia are becoming less tolerant of the relatively inflexible shop trading hours which they encounter in many of the most popular tourist destinations.

Shop trading hours are very flexible in Sydney (which attracts more visitors than any other city in Australia) and also generally throughout New South Wales and Victoria. On the other hand, shop trading hours are much less flexible in Queensland which is Australia’s number one holiday state.”.

Mr Trevor Reddacliff

Mr Reddacliff is the Chairman of the Urban Renewal Taskforce and also Chairman of the Townsville CBD Taskforce.

The Urban Renewal Program commenced in 1991. The four local Urban Renewal Plans relate to the planning framework for future development in New Farm, Fortitude Valley, Bowen Hills and along the Teneriffe and Newstead Waterfront. It was stated that approximately 300 residential, commercial and mixed-use developments, worth over \$1 billion, were committed in the program’s first seven years, with further significant project investment under negotiation.

Detailed statistics were provided relating to population growth in the areas cited, an age profile of residents in the various areas, the type of accommodation required, general, and socioeconomic particulars of residents in those areas etc.

It was claimed that "The introduction of seven (7) day trading for this area is integral in the Urban Renewal Taskforce's plans for improving the viability of these areas for commercial use and the lifestyle and demands of the increasing residential community in these areas require a seven (7) day retail service."

Similarly, in Townsville, the Townsville CBD Taskforce supports the introduction of extended trading in the inner-city area. The strategy of the Taskforce is to encourage Townsville residents to adopt inner-city living and reference was made to a wide range of developments/redevelopments being undertaken or planned for around this inner-city area (e.g. Townsville Railway Station, Ocean Wharf and Terminal, General Hospital).

Mr Ian Kean

Mr Kean is the Chief Executive Officer of Tourism Tropical North Queensland and Chairman of the Regional Tourism Organisations. Tourism Tropical North Queensland is the official visitor and convention bureau for the North Queensland region including Cairns and Port Douglas.

The evidence of Mr Kean on behalf of the abovementioned organisations is to support the application, however, he specifically wanted to note the support for the Cairns region (and the inclusion of Mt Sheridan in the boundary and that of Port Douglas).

Particularly, Mr Kean detailed the key principles relating to tourism in those two regions as being: –

- Visitors don't distinguish between the seven (7) days of the week when on holiday; Shopping is a holiday priority for visitors, particularly international visitors travelling to Port Douglas and Cairns;
- One of our aims is to increase the spend of visitors in each of these destinations;
- An objective is also to increase the length of stay for visitors. In order to do this, we must ensure visitor satisfaction levels of a destination are met. Appropriate shopping hours assist in increasing visitor satisfaction and therefore visitation numbers, length of stay and expenditure levels."

Within the region in question, the annual visitor expenditure was in excess of \$1.2 billion making that region one of the fastest growing within Australia. Mr Kean believed that it was essential that the continued growth be accompanied by extended trading hours.

Mr Tony Hogan

Mr Hogan is the Townsville CBD Promotions Manager and provided evidence on behalf of Townsville Enterprise Limited and Townsville CBD promotions.

Mr Hogan's evidence upon the question of development of the inner-city area of Townsville was in part similar to that given by Mr Reddacliff with the addition of further information as it related to development/redevelopment of many other areas e.g. CBD redevelopment, Museum of Tropical Queensland, ReefHQ, Palmer Street, Inner City Apartments, Breakwater Development, Nelly Bay Harbour Project.

Mr Hogan stated that:–

"To make the area work, as well as changing the physical infrastructure, it is necessary to ensure the facilities attract residents to this area on a weekend and to make it a popular tourist destination. Townsville Enterprises Limited see the need to allow the range of retailers in the CBD the ability to trade together for longer hours on Sunday to match the new attractions in the area."

Mr Daniel Gschwind

Mr Gschwind is the Chief Executive Officer of Queensland Tourism Industry Corporation.

Mr Gschwind stated that the tourism industry had a major impact upon the State's economy in the following manner:–

- Tourism provides 130,000 full-time jobs for Queenslanders – up to 200,000 all up. Many of these jobs are in regional Queensland and in areas with high unemployment.
- In Queensland, more people are employed in tourism than in agriculture, forestry, fishing and mining combined.
- Queensland Treasury estimates that it is close to 10% of the workforce.
- Tourism directly represents about 10% of the Gross State Product.
- Tourism is an important industry to this State and Nation."

Mr Gschwind proceeded to expand upon the positive affect that extended trading hours would have within tourist areas for example:–

Multiplier Effect;
Employment Opportunities;
Diversification;
Improved Facilities for Residents;
Opportunities for Business;
Queensland Overseas Arrivals;
Accommodation Trends in Queensland;
Short Breaks becoming more Popular;
Where do Brisbanites go on Short Breaks, etc.

Also stated were the number of international events scheduled for Queensland within the near future e.g. Commonwealth Heads of Government Conference and the Goodwill Games.

Overall, it was claimed that:–

"Allowing more flexible Sunday hours from 9.00 a.m. to 6.00 p.m. and as per the RAQ's application allows all of the tourist regions to market a seven (7) day retail service which adds to the tourist satisfaction of a destination, and importantly as pleasure shopping is a tourist attraction in itself, it is important to improve the access."

Mr Bruce Dier

Mr Bruce Dier is the Chief Project Officer for UMR. UMR was commissioned by the RAQ to conduct a study of resident attitudes towards extended trading hours for non-exempt shops in the seven identified tourist areas. A telephone survey was conducted by UMR with residents who live in the areas to which RAQ sought to extend the tourist trading boundaries.

The particulars of the findings are as follows:-

66% of those surveyed in the seven areas supported the RAQ proposal if non-exempt shops are permitted to open on Sundays.

Within the specific areas in question, the following results emerged:-

Port Douglas	-	81% of residents supported the RAQ proposal
Brisbane City Heart	-	75 %
Cairns	-	69%
Whitsunday	-	67%
Gold Coast	-	56%
Townsville CBD	-	56%
Sunshine Coast	-	55%

The survey showed that the main reasons for supporting RAQ proposals related to added convenience, flexibility, freedom of choice for store owners, that the economy would benefit overall, that there would be increased employment, and that Sunday trading would be good for other local businesses.

For those opposed to the RAQ proposal the main reasons related to customers believing that there were sufficient trading hours, that smaller retail outlets would be disadvantaged by the extension of such hours and that Sunday was a family day and retail employees would appreciate non-working time.

The Survey results were quite detailed and considered the demographic detail of all areas to be considered. There were responses given in the survey where residents stated their opposition to an extension of hours, but in general the responses were favourable to the claim as sought by the RAQ.

Mr William Cummings

Mr William Cummings established Cummings Research in 1982 and this organisation was commissioned by the RAQ to conduct a study of attitudes towards extended trading hours for non-exempt shops in the Cairns area. Cummings Research was asked to "carry out a survey of residents in the Edmonton/Whiterock area on the southern side of Cairns City to ascertain attitudes to an extension of trading hours for non-exempt shops south of the current boundary including those in the new Mt Sheridan Shopping Centre."

The survey showed that residents within the Mt Sheridan catchment area cited the following reasons as to why that area should be permitted to shop in the same manner as shops within the tourism boundary:-

"Closer/Convenient/Accessibility
Fair/Equal/Same across city/No boundaries
Fit my work hours better/Better for shiftworkers
More time to shop."

For those who did not believe that the RAQ application should succeed, the reasons proffered included:-

"Bad for small traders/Other shops/Too many shops
Not enough business/Family life/quality of life
Not good for shop assistants/Entitled to a break."

The survey showed strong support for the RAQ application.

Mr John Dean

Mr Dean is the Chief Executive Officer of Tourism Whitsunday.

The evidence of Mr Dean was that the Airlie Beach region was changing "dramatically". Airlie Beach had become a significant tourist attraction in its own right. Reference was made to the new Lagoon (previously cited) and further developments within the region.

An estimated 600,000 tourists visited the Whitsundays during 2000 and the prediction was that that figure would increase by 10% during 2001.

Mr Robert Brett

Mr Brett is the General Manager of the Gold Coast Tourism Bureau.

Of the range of persons who visit the Gold Coast region, 57% claimed their primary interest was in visiting the beach, 45% of persons go to restaurants and 37% visit the Gold Coast for the shopping. Within this context, a high percentage of international visitors listed shopping for pleasure as one of the great attractions of the Gold Coast.

Amongst a range of tours offered to visitors on the Gold Coast, a high percentage of tourists undertake what are known as Retail Tours. These incorporate visits to Harbour Town. The Asian market remains focussed upon buying gifts to take home to friends and relatives and extended hours are required to cater for these needs. A number of developments/events were mentioned by Mr Brett to indicate the growth experienced in the Gold Coast region. These included:-

Gold Coast Convention Centre;
Goodwill Games;
Coolangatta Airport Upgrade;
Harbour Town;
Further development of the Meeting, Incentives, Conventions and Exhibitions market;

The plan for the development for Coolangatta Airport and an upgrade of facilities for full international air services Virgin Airlines establishment in Queensland;
The Boeing/Powerte joint venture for the Pacific Innovation Corridor (specifically the International Tourism and Business node);
The continuation and growth of many major events held on the Gold Coast; and
The expansion of existing theme parks and proposed new theme parks.

In summary, Mr Brett stated:–

“The retail and tourist industries work very closely on the Gold Coast and are the two largest employers for the area. The wider Sunday trading hours between 9a.m. and 6p.m. would provide a greater opportunity for retail and tourist business to grow their businesses and provide a better service to visitors. This supports the local economy which in turn allows the Gold Coast to reinvest and develop better services for the local community and visitors.”

Mr Peter Rigney

Mr Rigney, at the time of giving evidence, was about to open the Newsagency at Mount Sheridan Plaza in Cairns.

Mr Rigney states:–

“I see the Mount Sheridan News as having a totally different market, drawing from the people within this rapidly expanding surrounding area and the drive-by tourist market and further from the store. Our other two newsagencies are very much convenience strip centres and that has been their drawing feature in those areas.”

Mr Rigney claimed that some nine years earlier he had serviced the Mount Sheridan area with newspapers and that the area had grown dramatically since that time. He states that there are now more than 300 homes which have been built within that area. Mr Rigney believed that the RAQ’s application, if granted, would facilitate the needs of the community in a relaxed environment. Reference was also made to the question of contractual obligations with News Limited to trade on a Sunday given that Sunday was a major trading day for newspapers.

Ms Kerry Jamieson

Ms Jamieson is the Manager of the Mirage Country Club and Marina Mirage Shopping Centre. Mr Jamieson is also the Retail representative on the Port Douglas and Daintree Tourism Association Committee.

Ms Jamieson spoke of the developments taking place within the Port Douglas region and stated that the Coles store situated in Macrossan Street required extended hours to service the number of tourists who often chose to stay in self serviced accommodation.

Most of the residents of Port Douglas were involved within the tourist or retail industries. Tourists did not distinguish between the days of the week and wanted to shop when it was convenient for them. It was claimed that because so many tourists engage in day trips, shops needed to be open longer to facilitate their needs.

ORTSA WITNESS EVIDENCE (Brief Summary Only)

Mr John Hockings

Mr John Hockings is the proprietor of two IGA Express Convenience Stores in Brisbane. One is situated in Spring Hill and the other at Brunswick Street. Mr Hockings stated that his evidence related to that part of the application that seeks to extend trading hours on Sundays and Public Holidays in the Brisbane City Heart on Sundays between 9 a.m. and 6 p.m. and on Public Holidays between 8.30 a.m. and 5.30 p.m..

Mr Hockings stated that the hours sought around his immediate catchment area were unnecessary as residents were already well catered for in terms of independent convenience stores in the New Farm/Teneriffe, Fortitude Valley, Spring Hill and Brisbane CBD areas.

Mr Hockings stated that when extended hours for Sunday commenced in the respective areas, his stores suffered a significant downturn in trade of approximately \$3,000.00 per Sunday at each store. Some staff have been retrenched and rosters have to be readjusted to deal with these changed circumstances. For independent retailers, Sundays remained a significant trading day and any alteration to the current situation would see their businesses decline further.

Mr Bernie Low

Mr Low owns two Five-Star Convenience Supermarkets located in West End and at Oxenford. These stores currently trade between 7 a.m. and 8 p.m. Monday to Sunday. The current Gold Coast tourist boundary was some ten kilometres to the south-east of his store but if the application as sought was successful, Mr Low believed it would adversely affect his business. Mr Low had witnessed such an effect in his West End store when Coles opened for business.

Mr Low states:–

“My store was built knowing that the legislation allows Sunday trade for non-exempt stores to a certain area. I have invested over \$600,000 in this store, employed 20 local people, and abided by the rules in doing so.”

Mr Low challenged the assertion made that the Helensvale area may appropriately fit within the Gold Coast tourist region. He stated that the area was primarily residential. This witness has not seen tourists at the nearby facilities (e.g. Dream World, Warner Bros Movie World, etc.), purchasing foodstuffs on their visits to these facilities.

Mr Darcy McKeown

Mr McKeown is the owner of a Foodstore located at Burleigh Heads. His store is an independent convenience supermarket trading from 7 a.m. to 7 p.m. seven days per week.

The witness' evidence went to issues such as the level of trade and income which was experienced in November 1991 and his current situation. There had been a gradual lessening of income and staff levels.

Mr McKeown's evidence was that he had visited the Burleigh Town Marketplace on Sunday 11 March 2001 to see how many stores were actually trading on that Sunday between the hours of 10.30 a.m. and 4.00 p.m.. Of the 38 stores, only 10 stores traded on that Sunday, one was closed at 12 noon and the remainder closed between 2 p.m. and 3 p.m.. No store traded after 3 p.m..

Mr Ian McLauchlan

Mr McLauchlan is the joint proprietor of Nightowl Convenience Store located in Brunswick Street, New Farm. The business is an independently owned convenience supermarket trading 24 hours, 7 days per week.

Evidence was provided to show how this business had declined since the granting of extended Sunday trading hours to Coles Express in the City and Coles at New Farm.

Similar to the evidence provided by Mr McKeown, there had been marked decreases in income and staffing levels.

Mr Peter Muller

Mr Muller is the joint proprietor of the 5 Star Supermarket at Cannonvale. His store trades from 6.30 a.m. to 9 p.m. seven days per week.

This witness' evidence is that as late as July 2000, the Queensland Industrial Relations Commission granted extended trading hours on Sundays for the Whitsunday Shire Tourist Area. Only a small number of local independent stores extended their opening hours to match those of the non-exempt stores. The majority of independent stores which had opened to match the hours of the non-exempt stores had since reverted back to their former hours as they believed that there was insufficient local support for longer hours.

Mr Muller's evidence was that approximately 41% of the store's total income had been derived from hours worked outside of those worked by the non-exempt stores. Reference was also made to the fact that the saleability of the business was in question especially when a major non-exempt store began its business within the area.

Mr David Westmore

Mr Westmore is the owner of Spar Buderim Supermarket. Mr Westmore stated that he believed that within some weeks of his giving evidence, Woolworths would be opening a store opposite his store. Sunday was one of Mr Westmore's better trading days, averaging 15.4% of his overall trade on that day.

Mr Westmore's view was that Buderim serves only as a "gate-way" to the tourist areas of Maroochydore and Mooloolabah, rather than a tourist destination itself. He claims that the only real changes in the area have been the growth of residential occupancy.

Mr Mark Brown

Mr Brown is the owner of the IGA Convenience Supermarket in Port Douglas. His store trades 7 a.m. to 8 p.m. seven days per week. Mr Brown states that there is no real demand beyond 7.30 p.m..

Mr Brown states that his store stocks products which adequately meet the needs of tourists. It was claimed that Saturday and Sunday trade accounted for more than 35% of his turnover. It was claimed that since the opening of the Coles Port Douglas store on Sundays in 1999, the Spar Supermarket in the town had closed down. After the opening of the Coles store at Port Douglas on Sundays, the turnover in Mr Brown's store was 23% less in comparison to the previous year's figures.

Mr Mick Churchill

Mr Churchill is the proprietor of four Independent Grocers of Australia Supermarkets in the Townsville district.

Mr Churchill's evidence is that he only recently invested in IGA Express shortly after the Queensland Industrial Relations Commission released its previous Trading Hours decision in what was termed the "Southeast Queensland Corridor" case.

Mr Churchill stated that none of the independent stores he was aware of relied primarily upon tourists for Sunday sales. His belief was that tourists were content to experience the Sunday markets and the retail facilities of the CBD of Townsville. He also stated that Townsville did not have an international airport as did Cairns and Brisbane where the CBD's had additional hours on Sundays and Public Holidays.

Consideration of the Evidence

At the outset, it must be stated that this Commission has previously expressed concern about creating what was described as "a complex web of trading hours for non-exempt stores" (B123 of 1999 163 QGIG 16 at p.554). We have responded to that concern, with provisos later stated, and have determined to accede to that element of the claim i.e. that standardisation of trading hours within already defined tourist areas, occur.

Against that background, consideration must be given to the legislative requirements of the Act. That Legislation has at its core the appropriate regulation of trading hours within this State. Certain criteria must be considered by the Commission in making decisions pertaining to trading hours.

Relevantly, the Legislation states:-

- "26. In relation to making an order under section 21 the Industrial Commission must have regard to -
- (a) the locality, or part thereof, in which the non-exempt shop or class of non-exempt shop is situated;
 - (b) the needs of the tourist industry or other industry in such locality or part;
 - (c) the needs of an expanding tourist industry;
 - (d) the needs of an expanding population;
 - (e) the public interest, consumers' interest, and business interest (whether small, medium, or large);
 - (f) the alleviation of traffic congestion;
 - (g) such other matters as the Industrial Commission considers relevant."

The evidence put forward by RAQ has been both substantial and diverse. It is fair to state that detailed and compelling material has been put before the Commission relating to the state of the tourist economy within the areas addressed in this decision.

From the inspections conducted by the Commission – which included visits to Port Douglas, Cairns, Townsville, Airlie Beach, the Gold Coast, the Sunshine Coast, the Sunshine Coast hinterland, and the Brisbane area – it was clearly evident that specific areas had altered considerably in terms of development and redevelopment since the Commission had last considered those areas.

We accept generally the evidence of RAQ witnesses as it goes to matters regarding new developments, redevelopments and proposed developments within regions under consideration. This material has been detailed throughout this decision. We also accept the general statistics put by RAQ witnesses as they go to questions of tourist visitor nights, tourist retail expenditure, numbers of international tourists, etc. These are primarily factual matters and were not challenged in any serious manner by the respondents.

We are always conscious, however, that there is considerable debate around the question of the reliability of surveys upon consumer opinion as it goes to questions of trading hours. It is often claimed that the outcome is dependent upon the manner in which the questions are framed. At best, these surveys give a general overview as to the perceptions and attitudes of consumers approached by those conducting such surveys. In themselves, the surveys, do not determine the issue of extended trading hours but represent one factor, amongst many, to be considered by the Bench. Certainly, we accept that generally there is a discernible desire on the part of the public for extended hours within these areas, but we also accept that there is real and detailed opposition to the claims for reasons cited earlier in this decision. There was a challenge to the manner in which these surveys were conducted by the QRTSA, but we feel that the issues raised in themselves did not detract from the overall outcomes conveyed to the Bench by RAQ witnesses. We have taken into account those challenges, e.g. the non-use of an interpreter with Taiwanese tourists, the failure to ask some tourists to participate in the surveys, levels of dissatisfaction, differentiation of shopping for pleasure as opposed to shopping for necessity, etc. In making its decision, the Bench has taken into account all of those considerations.

The evidence submitted by the QRTSA focuses upon the following considerations:–

- that the claim if granted would only benefit the major retailers;
- the accuracy of the surveys conducted by Retailers' Association of Queensland Limited, Union of Employers;
- that the Commission has wider considerations imposed upon it by s.26(e) of the Act to consider other parties within the industry;
- that small business is the largest employer in this State and retail is the biggest industry within the State;
- that there is evidence of damage caused to small business retailers as a consequence of the Coles New Farm and Coles CBD Express extensions to trading hours and particularly on a Sunday;
- that many small business retailers have made financial commitments based on the outcome of earlier Commission findings restricting the trade by non-exempt shops on a Sunday; and
- that an appropriate case has not been made out by RAQ which would satisfy the requirements of the Legislation.

In terms of satisfying the criterion of "locality", it is the QRTSA's claim that the extensions to the tourism boundaries sought in the Helensvale, Fortitude Valley, Bowen Hills, Spring Hill, Newstead, Mount Sheridan and Franklins (Port Douglas) are areas primarily sought on the basis of the placement of new/near Coles and Woolworths developments. Examples provided relate to the areas of Buderim, Maleny, Oxenford, Mount Sheridan, Newstead, Spring Hill and Franklins (Port Douglas).

The QRTSA claim is that it was never the intention of the Legislature "to create a tourist locality that encompassed additional sites with the sole purpose of covering specific Coles or Woolworths developments."

Regarding the criterion of "Tourist Industry", the QRTSA did not believe that the RAQ could satisfy the Commission that the areas under consideration were significant tourist areas deserving of Sunday trading. Added to this submission was the view that, in any event, each area was adequately catered for in terms of tourists' needs by existing non-exempt, independent and exempt shops over the seven days. The QRTSA states that the needs of the tourism bodies do not necessarily represent the needs of tourists or an expanding tourist industry.

A challenge was mounted by the QRTSA against the RAQ's assertions (in some instances) that shopping is "entertainment", a "priority" for tourists, and a "pleasure" for consumers rather than a "necessity".

On the question of an "expanding tourist industry", as cited earlier, no real challenge was made against the assertions made by RAQ save for the view that those tourism bodies (which had given evidence) "simply represent their own commercial needs and those of their clients and nothing more."

Regarding the element of "an expanding population" QRTSA believed that no evidence had been produced to show that there had been significant growth of population in the tourist areas, but rather that the growth was no more than "normal growth".

On the question of s. 26(e) of the Act, the QRTSA raised the following matters which should be considered within the following context: –

- employment;
- sufficient hours already exist;
- consumer interests; and
- business interests.

Regarding "employment", the QRTSA believed that were there to be employment growth as a consequence of extended trading hours, then it would be in the area of part-time and casual employment. Further, that the loss of jobs in the independent retail sector would outweigh any gains by the major retailers. The retail industry is one which is predominantly staffed by part-time and casual employees. There is no precise indicator as to what may occur within the business sector were the application to be granted. We would accept, however, that there may exist within many areas a growth in employment as a consequence of this decision.

On the question of "sufficiency" of current hours, the claim was made that with the exception of some major retailers, stores simply do not trade the full allowable hours. Beyond the accepted core hours, there was little to no demand for extended trading hours.

On the question of "consumer interest", we have already stated that we generally accept that consumers would prefer extended hours as a consequence of our considerations around the various surveys presented. There are acknowledged pitfalls associated with those surveys and the QRTSA highlighted to the Bench various instances where they believed the stated survey outcomes did not match, were not supported by, or were not addressed in the survey results (e.g. the evidence of Mr Bruce Dier (UMR Research)).

In terms of "business interests", the QRTSA stated that comparisons could not be made between trading over the four Sundays prior to Christmas 2000 with other times of the year. The submission was, amongst other things, that larger retailers invest in various sites knowing the existing trading hours and they make a commercial decision as to the anticipated profitability of their stores on that basis. We concur with the views expressed regarding pre-Christmas trading hours and also those concerning the commercial decisions that all businesses make concerning the locations in which they trade.

With regard to the possible effect upon small business, we would state that we acknowledge that there will always be an effect, to some degree, on a range of businesses when trading hours are altered. The variations sought in this application, in the main, simply extend trading hours on days where those stores are currently entitled to trade within defined tourist areas. The effect of this decision is to make those hours consistent throughout the tourist industry. The advantages to be gained, within this context, and on balance outweigh the detriment which may be experienced by the small business sector of the industry. We believe that consumers' interests have been adequately catered for in this decision.

A further criterion to be considered was "alleviation of traffic". The evidence of the QRTSA witnesses had been that in both the New Farm area and the Spring Hill/Fortitude Valley area more traffic congestion had occurred as a consequence of extended trading hours. At this point in time, our decision on this point is reserved.

The QRTSA contended that there was considerable lack of local council support for the RAQ application, with the exception of local councils in the City Heart of Brisbane, Cairns and Townsville. Criticism of the evidence centred upon the QRTSA's assertions that both the Mayors of Cairns and Townsville offered no authorisation by a vote in council for their views in support of the application. This challenge may be technically correct, however, we viewed the evidence of these persons as generally reflecting the views of the Councils of those cities. We have fairly drawn the conclusion, we believe, that the position of Mayor of these two significant cities carries with it a sufficient degree of authority and status for the Bench to accept their views as reflective of the bodies which they represent.

Against these assertions, the RAQ believed that there was considerable support for the application, not only from their membership, but also from the Queensland Tourism Industry Corporation (and Tourism Task Force), the major unions within the retail industry (the AWU and SDA) and the Property Council of Australia (Queensland Branch).

We have already made reference with regard to the evidence tendered by the RAQ witnesses concerning surveys and statistics concerning general growth trends within Queensland. In this context, we accept that ss. 26 (a), (b), (c) and (d) of the Act are adequately addressed by RAQ submissions, sufficient to warrant the claims made by that organisation. More detail on these points will be provided in the body of this decision.

Re s. 26 of the Act

Section 26(a) of the Act reads as follows:-

"the locality; or part thereof, in which the non-exempt shop or class of non-exempt shop is situated."

The primary areas to be considered in this application have been cited earlier. With the exception of some elements of the RAQ claim, those areas have already been deemed to satisfy the criteria established by the Commission in a range of cases as tourist areas. It is the extension to those areas and extended hours made in the RAQ application which need consideration. In considering that point, all relevant requirements of the legislation need to be considered.

We have determined to grant that part of the application as it relates to standardising the trading hours in already defined tourist areas. Those areas have been clearly defined by the Commission as meeting the requirements of the Legislation. Given that those issues have been subject to Commission decisions in the past, we see no need to revisit the rationale for the making of such decisions. It is, amongst other important considerations, a matter of common sense to standardise the hours for trading in these defined areas. It is not in any party's interest to have a proliferation of differing trading hours within the tourist industry in this State. The other "considerations" are those detailed later in this decision as supporting the granting of an extension to already existing tourism boundaries.

In all areas of the application where existing defined tourist boundaries have already been established we determine to grant the application as sought by the RAQ with the exception of the Mt Sheridan, Franklins Port Douglas and the Chancellor Park area. Where extensions to the boundaries already in existence are sought, the Full Bench proposes to reserve our determination on these areas (with the exception of the Maleny, Buderim and Caloundra areas on the Sunshine Coast where the extension as sought will be granted) until the finalisation of matter No. B810 of 2001.

In terms of an extension to the Cairns defined tourism boundaries, we determine as follows:-

In the Case of the Franklins store at Port Douglas, we would state as follows:-

We are unable to see any justification for the granting of the extended tourism boundary in that region and the trading hours which would follow. We have accepted the evidence submitted as it related to the defined tourism area under consideration. However, it is difficult to accept the proposition that in some way the area surrounding Franklins in Port Douglas fits into the same category as that of Macrossan Street, Port Douglas. Our inspections of the area failed to highlight any noted changes which had occurred within the particular area in question and specifically so since that matter was last considered by the Commission. We did acknowledge, however, real changes in the defined tourist areas of that region. The area surrounding the Franklins store in Port Douglas is primarily residential, notwithstanding the fact that the centre is situated in the vicinity of the entrance to Port Douglas. We adopt the comments of the Full Bench in B570 of 1999 (QGIG 162 p. 384) where it was stated:-

"The Queensland Industrial Relations Commission has always been reluctant to anoint a particular site. Though each case has to be decided on its even facts, the tradition has been to permit extended trading within a significant market ...with numerous non-exempt stores.";

"The claim that those residents 'need' access to the Franklins supermarkets on a Sunday strains credulity."; and

"The Franklins supermarket was constructed adjacent but outside a Sunday trading precinct. Shopkeepers cannot expect that the boundaries of Sunday trading precincts, set for good reason will be abandoned or modified where such locations are chosen."

There have been no discernible changes in this specific area sufficient to warrant consideration by this Bench of incorporating this area into the defined tourist boundaries.

When considering the Mount Sheridan shopping complex in Cairns, we would comment as follows:-

We are also unable to extend the tourism trading hours boundaries in Cairns to accommodate the Mount Sheridan Shopping complex.

The area in question does not qualify to be included on the following grounds:-

The area does not, from the evidence before us, attract a tourist population sufficient to justify the extension of boundaries as sought. The requirements of the legislation would not be met in granting that component of the application.

The fact that there exists within the vicinity of the shopping complex a large and popular accommodation facility, does not of itself assist the claim. To accede to this claim would be to introduce a new criterion which is not envisioned by the legislation.

There was little substantive evidence produced by RAQ witnesses to warrant the granting of the claim as sought. The evidence of Mr Kean (Tourism Tropical North Queensland) as it related to the Mount Sheridan centre was limited to the extent that there would be increased traffic on the highway upon which the centre was located and that there was tourist accommodation of some sort near to the Centre. These factors are not sufficient to warrant the granting of the claim.

Further evidence was put to the effect that many persons living within the Mount Sheridan area worked within the tourism industry and would need access to seven day trading. There was no statistical evidence produced to support that contention.

Those retailers who had chosen to locate at this new centre did so with the knowledge of current trading hours, but one retailer, Mr Rigney (Newsagent in Mount Sheridan Plaza), stated that he had done so on the "reasonable expectation" that this centre would be granted extended trading hours. We are unable to understand how this "expectation" may have arisen. Certainly it could not have been derived from any prior Commission decision.

In terms of the Chancellor Park (Sunshine Coast Region) part of the application, we are unable to see any justification for this component of the claim. The developments within this area are not tourist developments. At best, the evidence showed that this area was a popular residential location and also the location for the new Sunshine Coast University. This area simply does not fit into any of the categories as outlined in the Legislation. We acknowledge that, over time, this situation may change but, at present, the claim is rejected.

In relation to the Maleny and Buderim townships, we propose to permit the tourist boundaries already established in the Sunshine Coast region to be expanded to the areas defined in the application to include Maleny and Buderim.

We see both of those areas as satisfying the legislative criteria of the Act sufficient to be included within the Sunshine Coast tourist trading hours boundaries. Both are tourist oriented areas in their own right.

The evidence of Mr David Westmore (Spar Buderim Supermarket) was that, amongst other things, Buderim was no more than a "gateway" for tourists travelling to coastal beaches on the Sunshine Coast.

This area is quite different from that described in the Franklins, Port Douglas and Mt Sheridan areas. Maleny and Buderim are defined areas (rather than discrete site locations) where tourist facilities exist. Maleny is a township within the Sunshine Coast region, but it stands alone geographically from the coastal region to the extent that it is not a "drive-through" town or area *en route* to the Sunshine Coast. Similarly, Buderim township is analogous to Maleny. Both of these areas represent an extension of the tourism region of the Sunshine Coast.

The evidence of Mr Dimasi is that the "population growth throughout the Sunshine Coast is only slightly less rapid than the growth recorded throughout the Gold Coast."

The level of tourist visitation to the sunshine Coast has grown rapidly during recent years with an average annual growth in the category of "Estimated International and Domestic Visitors 1992 - 1999" of 8.4%. The evidence also showed that the domestic day visitors to the Sunshine Coast had averaged almost 10% annual growth since 1996.

Conclusion

For all previously defined tourist areas (prior to the hearing of this case), we grant the application to expand trading hours to those sought in the application.

We reject claims made for the areas of Mt Sheridan (Cairns), Franklins (Port Douglas) and Chancellor Park (Sunshine Coast).

We grant an extension of defined tourism boundaries in the Sunshine Coast region to include the townships of Buderim and Maleny.

We reserve our decision on all other components of the claim until after the finalisation of matter No. B810 of 2001. With regard to this reservation, we would state generally as follows:-

"We are mindful of the fact that the case as presented to us relates to an extension of trading hours/boundaries within the tourist areas. Matter No. B810 of 2001 is a different case, dependent upon its own facts and particular Legislative provisions.

We would not be seeking further submissions or evidence from the parties relating to this case in matter No. B810 of 2001."

We note the concurrence of the relevant parties as it goes to the question of employees and the voluntary nature of such employment as it goes to work performed on a Sunday.

The operative date of this decision will be 15 October 2001. The RAQ is to provide the Registry of the Commission and other relevant parties to this matter with a draft order within fourteen days from the release of this decision. If any party objects to any component of such order, they should notify the Registry of the Commission and all relevant parties within seven days from that date.

We order accordingly,

D.M. LINNANE, Vice President.
K.L. EDWARDS, Commissioner.
D.A. SWAN, Commissioner.

Released: 24 September 2001

Appearances: -

Ms P. Spencer, with her Ms S. Lindsay for the Retailers' Association of Queensland Limited, Union of Employers.
Mr D. Matley, for the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers).

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 335 – application for costs***Annette Jane Ross AND Silvalake Financial Services Pty Ltd (No. B759 of 2001)**

COMMISSIONER BLADES

21 September 2001

Unfair dismissal – Costs – Conciliation conferences – Issues not determined – Claim for commission in an amount outside jurisdiction of Commission – Decision made to commence proceedings in Magistrates Court to encompass all claims – Discontinuance of application – Not necessarily evidence that application made without foundation – Costs application dismissed.

DECISION

On 24 April 2001, the applicant Ms Ross, filed an application for an order for reinstatement or alternatively for compensation, arising from the termination of her employment with the respondent Silvalake Financial Services Pty Ltd. Two conciliation conferences were conducted without success. Following upon the last conciliation conference on 30 May 2001, the Solicitor for the applicant wrote to the Solicitor for the respondent on 20 August 2001 proposing that the matter be dealt with in the Magistrates Court and –

- “1. That my client file a Notice of Discontinuance in the Queensland Industrial Relations Commission;
2. That there be no order as to costs.”.

That proposal has met with an application by the respondent for an order for costs, notified to the applicant on 23 August 2001 in the following terms:

- “1. The application dated 24 April 2001 bears no resemblance whatsoever to the amended Application contained in your letter dated 24 May 2001. The application in its current state is not and has never been within the jurisdiction of the Industrial Relations Commission and therefore should never have been brought in the first place in this jurisdiction.
2. Our client suffered additional costs being incurred by reason of unnecessary conferences between the parties. At both conferences your client raised new issues that had not been raised at any time prior to the conference. Therefore, our client threw away costs by reason of your client’s poor case management.”.

The letter of 24 May 2001 claimed the balance of unpaid notice and holiday pay amounting to \$4,406 together with an amount for commissions earned. There was no reference to compensation for unfair dismissal.

The trigger for an award of costs in an unfair dismissal case under s. 335(1)(b) of the *Industrial Relations Act 1999* (the Act) is that a party caused costs to be incurred by the other party because of an unreasonable act or omission connected with the conduct of the application. The respondent alleges that the actions of the applicant were unreasonable in that:

- the initial application has been abandoned and the applicant has commenced a claim not encompassed by her original application;
- as the original application was not properly prepared, the respondent has retained legal representation, attended two conciliation conferences, prepared a response to the original application, prepared a response to the amended application, all of which has been completely wasted;
- had the applicant prepared her application sufficiently, such conferences and responses would not have been required as the matter would have been commenced in the correct jurisdiction;
- it was unreasonable for the applicant to commence the application as there was insufficient grounds, that it was without foundation and the applicant has since abandoned her claim and conceded at a conciliation conference that there was no unfair dismissal;
- it was unreasonable for the applicant to commence the amended application with respect to seeking two weeks’ unpaid notice and unpaid holiday pay as this is without foundation; and
- the third element of the amended application with respect to unpaid commissions has not been substantiated by the applicant.

It may have been as the result of a suggestion by the Commission that the claims by the applicant, that is, for wrongful dismissal, unpaid notice and commissions, be dealt with in the one trial in the one jurisdiction. That was the commonsense course of action. There are limitations on the jurisdiction of the Commission where claims for unpaid wages are limited in amount and there was an indication that commissions in excess of \$20,000 were in dispute.

The respondent has approached this matter on the basis that its assertions are fact. The claim for unfair dismissal remains a live issue. It was based on a claim that there was a dismissal without reason and that there was no genuine redundancy. The claim for unpaid notice remains a live issue. Failure to pay proper notice may in some circumstances render a dismissal harsh, unjust or unreasonable for that reason alone. There is no consensus as to whether the applicant worked under an award or not. If the applicant did not work under an award but in a managerial capacity, then two weeks’ notice may well be found to have been insufficient, if in fact two weeks’ notice had been paid at all. There has been no adjudication on any of these issues.

The application contains grounds for a finding that the dismissal was harsh, unjust or unreasonable. Merely because it is now sought to withdraw it does not mean that it was commenced without foundation. The suggestion to move the proceedings to the Magistrates Court jurisdiction seems to have been first adopted by the *respondent* in correspondence dated 25 June to the applicant wherein the respondent stated that it seemed appropriate that the applicant withdraw her claim in the Commission and recommence the action in the Magistrates Court. The applicant claims that the letter of 20 August was simply a response to that correspondence.

The applicant may have elected to proceed with unfair dismissal proceedings to recover compensation should reinstatement prove inappropriate. The applicant may have proceeded to recover compensation under s. 85 of the Act for unpaid notice. The applicant may then have proceeded in an alternative jurisdiction with the claim for commission. Discontinuing the action in the Commission and proceeding with all claims in the Magistrates Court seems to me to have been an eminently sensible course of conduct.

The respondent complains that at the first conciliation conference on 17 May 2001, the applicant advised that she was no longer seeking reinstatement and that she agreed there was no unfair dismissal save and except for an unpaid notice period.

There is no evidence before the Commission that the applicant conceded at a conciliation conference that there was no unfair dismissal and there is no admission in the submissions. The Commission’s notes of the proceedings at the 17 May conference indicate that the claim for commission was raised then in addition to the other matters and the conference was adjourned to enable the parties to seek further information and to negotiate privately to resolve all issues. Other live issues at that time were whether there had been a genuine redundancy and whether the applicant had been paid appropriate notice. There was also an issue about whether she had properly mitigated her loss.

The Commission’s notes of the result of the conference on 30 May reveal that the issue to be determined was whether there had been a genuine redundancy, whether the applicant mitigated her loss, that the parties were informed that it was unlikely that the objection to an extension of time of one day would succeed and that claims for commission would need to be dealt with elsewhere. That conference was adjourned to a date to be fixed for further negotiation.

As previously indicated, there has been no adjudication on any of the issues and the applicant’s claims remain live issues. There existed no barrier, except good sense, to the applicant continuing with separate claims in each jurisdiction. That the application in the Commission has made way for a more substantial claim elsewhere does not mean that it was made without foundation.

I am unable to find that the applicant has caused costs to be incurred by the other party because of an unreasonable act or omission connected with the conduct of the application.

The applicant seeks leave to discontinue the action and that there be no order as to costs. I grant that leave. The application for costs is dismissed.

I order accordingly.

B.J. BLADES, Commissioner.

Released: 21 September 2001

Appearances:-
Mr N. Barbi, N.R. Barbi Solicitor, for the applicant.
Ms T. Skellern-Smith, Short Punch Greaterix, for the respondent.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Training and Employment Act 2000 – s. 230 – appeal to industrial commission against council

Darren Ronald Moore AND Training Recognition Council AND W&S Autocraft (AT5 of 2001)

COMMISSIONER ASBURY

20 September 2001

Appeal from decision of Training Recognition Council – Requirement for fair procedures to be followed by decision maker – Finding that fair procedures were not followed in decision to cancel appellants’ training contract – No exercise of discretionary powers at this stage – Liberty for any party to apply for exercise of discretionary powers.

DECISION

This is an appeal by Darren Ronald Moore (the appellant) pursuant to s. 230 of the *Training and Employment Act 2000* (the Act), against a decision of the Training Recognition Council (the first respondent hereinafter the Council) to cancel the registration of his training contract with W&S Autocraft Pty Ltd (the second respondent hereinafter the employer).

The facts in relation to this application are as follows:-

- the appellant entered into a training contract with the employer on 4 January 1999;
- the appellant has a learning disability, which was disclosed to the Council and the employer at the time the training contract was entered into;
- the appellant successfully completed the “off-the-job component” of the first and second stage of his apprenticeship;
- after experiencing difficulty with the appellant’s work performance, the employer contacted the appellant’s training provider (Brisbane Institute of Technical and Further Education) and then the Council, to discuss these concerns;
- the appellant was assessed and identified as having an intellectual learning disability;
- as a result of this assessment, the appellant was provided with additional support and assistance from the training provider and an arm of the Council known as the Specialised Employment Group;
- while some improvement was noted, the employer’s supervisors and managers believed that the appellant continued to demonstrate difficulties with the quality and performance of his work;
- the employer contacted the Council to advise of the lack of overall improvement on the part of the appellant, and a workplace assessment was conducted on 19 April 2001, by the training provider, which concluded that the appellant had not progressed to the level of a third year apprentice;
- the Council forwarded a letter to the appellant and the employer dated 2 May 2001, under the hand of Mr Rolf Bierman, advising of a proposal to cancel the appellant’s training contract because of failure on his part to make reasonable progress in training;
- the letter invited the appellant to show cause why this action should not be taken by 18 May 2001, by telephone, in writing or by way of personal representation at Mr Bierman’s office;

- the appellant opted to respond to the show cause notice in writing, and delivered his response to the Council on 16 May 2001;
- by letter dated 17 May 2001, Mr Scott Wiseman on behalf of the employer, confirmed to the Council a desire to proceed with the cancellation of the appellant's training agreement; and
- on 18 May 2001, Mr Bierman acting as agent for the Council, advised the appellant by telephone that a decision to cancel his training contract had been taken, and a letter confirming this was forwarded to the appellant on 21 May 2001.

The contract was cancelled pursuant to s. 71 of the Act, the relevant provisions of which are as follows:–

“SECTION 71 DISCIPLINE

71(1) [Application of section] This section applies if the council reasonably believes a party to a registered training contract –

- (a) has contravened this Act or the contract; or
- (b) has engaged in misconduct.

71(2) [Council orders] The council may make any of the following orders –

- (a) an order reprimanding the party;
- (b) an order directing the party –
 - (i) to pay the chief executive an amount of not more than 4 penalty units; or
 - (ii) to comply with the contract;
- (c) if the party contravening the contract or engaging in the misconduct is the apprentice or trainee – an order suspending the contract for a period no longer than 30 days;
- (d) if an order has not been made under paragraph (b)(ii) or (c) – an order cancelling the contract.

71(3) [Procedure] The council –

- (a) may make an order under subsection (2) only by fair procedures prescribed under a regulation; and
- (b) must give the parties an information notice of its decision on the order . . .”.

The Council contended that the appellant had engaged in misconduct, defined in s. 70(b)(iv) to include failure by an apprentice or trainee to make reasonable progress.

The appellant was invited to show cause why his training contract should not be cancelled, pursuant to Regulation 25 of the *Training and Employment Regulation 2000*. That Regulation appears in Part 4 of the *Training and Employment Regulation 2000*, which provides as follows:–

“PART 4 – FAIR PROCEDURES

REGULATION 23 APPLICATION

23(1) [Application of Part] This part applies if, under a relevant section of the Act, an administrator is required to exercise a power or perform a function by fair procedures.

23(2) [Exercising power and performing functions] The administrator must exercise the power or perform the function in accordance with this part.

23(3) [Further to subsec (2)] Subsection (2) does not limit the way the administrator exercises the power or performs the function if the way is not inconsistent with this part.

REGULATION 24 TIMELINESS

24 The administrator must exercise the power or perform the function as quickly as possible.

REGULATION 25 SHOW CAUSE NOTICE

25(1) [Issue of ‘show cause notice’] The administrator must give the affected person for the relevant section a signed notice (‘**show cause notice**’).

25(2) [Show cause notice must state] The show cause notice must state the following –

- (a) the action (‘**proposed action**’) the administrator proposes taking under the relevant section;
- (b) the grounds for the proposed action;
- (c) an outline of the facts and circumstances that are the basis of the grounds;
- (d) if the proposed action is suspension of a registered training contract – the proposed maximum suspension period;
- (e) an invitation to the affected person to show within a stated reasonable time (not less than 14 days after the notice is given to the affected person) why the proposed action should not be taken.

REGULATION 26 REPRESENTATIONS ABOUT SHOW CAUSE NOTICES

26(1) [Response of affected person] The affected person for the relevant section may, in relation to the show cause notice –

- (a) make oral or written representations to the administrator; or
- (b) give the administrator any document or thing (‘**material**’).

26(2) [Time limit] The representations must be made, or the material given, to the administrator within the time stated in the notice.

26(3) [Representations by telephone, television etc] The administrator may permit the affected person to make oral representations by telephone, closed circuit television or another form of communication allowing reasonably contemporaneous and continuous communication between the affected person and the administrator.

REGULATION 27 ADMINISTRATOR MAY INFORM ITSELF

1 The administrator may inform itself of any matter relevant to the exercise of the power or the performance of the function in the way it considers appropriate.

REGULATION 28 ADMINISTRATOR MAY ASK FOR ADDITIONAL INFORMATION

28(1) [Additional documents or information] The administrator may ask the affected person for the relevant section to give the administrator the additional documents or information it considers necessary to exercise the power or perform the function.

28(2) [Time limit] The administrator must give the affected person a reasonable time to give the administrator the additional documents or information.

REGULATION 29 ALL REPRESENTATIONS AND MATERIAL TO BE CONSIDERED

29 The administrator must, in exercising the power or performing the function, consider all representations made, or material given, to it by or on behalf of the affected person for the relevant section.”.

The provisions of s. 71 of the Act, under which the Council may act to cancel a training contract, are triggered by reasonable belief that a party to a training contract has engaged in misconduct. Misconduct is defined in s. 70 to include failure to make reasonable progress.

On the evidence before me, I am unable to be satisfied that the Council acted upon a reasonable belief that the appellant had engaged in misconduct. The evidence clearly establishes that when the employer sought the cancellation of the training contract, the Council organised for an on-the-job assessment to be conducted of the appellant’s work performance.

The assessors, who gave evidence in the hearing into this application, stated that they were not advised by the Council that an unfavourable outcome to the assessment would result in the cancellation of the appellant’s training contract. Of greater concern is the evidence of one assessor, Mr Allison who stated that he would have had to observe the appellant over a longer time frame, such as the three week block release period which he was due to attend shortly after assessment was conducted, before he could be certain about that assessment. Mr Allison also said that he had expressed his concerns about the assessment of the appellant to a representative of the Council, whom he identified in his evidence as Rosemary. (I take this reference to be to Ms Rosemary McGuire a representative of the Council involved in the process of cancelling the appellant’s training contract).

Further, it was clear from the evidence of both assessors that their report on the appellant was largely based on the views of the foreman and other representatives of the employer, rather than on their own direct observations. Mr Bierman’s evidence was that the assessment conducted on the appellant by the training provider was fair and was done to the best of the assessor’s abilities. Clearly, that contention is not supported by the evidence of those who conducted the assessment.

Mr Bierman’s evidence also indicates that he relied on that assessment, in addition to other evidence available to him in deciding to cancel the appellant’s training contract. In my view, to the extent that Mr Bierman relied on the assessment conducted on 19 April 2001, the decision to cancel the appellant’s training contract was unfair.

I am also satisfied that there was unfairness in the manner in which the show cause process was conducted by the Council. In my view, the show cause notice which was forwarded to the appellant does not meet the requirements of Regulation 25 in that it lacks sufficient detail of the facts and circumstances that are the basis of the grounds upon which the termination of the training contract is proposed. The notice simply lists a number of areas which were based on advice from the employer, and identified in evidence by Mr Wiseman to equate to modules of training which the appellant was supposed to have undertaken during the off-the-job training component of his apprenticeship. The notice simply indicates that these are “practical areas of concern where the apprentice has shown a performance based inability in the workplace” rather than providing any detail of the alleged inability.

Further, it was reasonably known by the first respondent that the appellant had learning difficulties. Despite this knowledge the show cause letter was framed in a manner which did not take those difficulties into account. In my view, a young person who did not suffer from a learning disability would have had difficulty in understanding the facts and circumstances that were the basis of the grounds for cancellation of the training contract.

The appellant, with the assistance of his parents, prepared a written response to the show cause notice, and delivered it to the Council on 16 May 2001. The appellant’s response was detailed and raised a number of issues which *prima facie* warranted further consideration and investigation by the Council. In my view, even if the Council formed the view that the response was inadequate, Regulation 29 in the context of fair procedures, would require that proper consideration be given to the matters raised and some opportunity be given to the appellant to support the response verbally, before a final decision was made. This is particularly relevant in this case given the appellant’s learning difficulties and his obviously sincere desire to finish his apprenticeship. Regulation 28 certainly enables further information to be requested, subsequent to the response being made to the show cause letter.

I have formed the view that proper consideration was not given to the appellant’s response to the show cause letter based on Mr Bierman’s evidence that he had been admitted to hospital on the evening of 17 May, and had taken the appellant’s file with him. Mr Bierman had contacted the appellant on the morning of 18 May, from his hospital bed. Fairness in my view would require that a reasonable person would believe that in all the circumstances, proper consideration was given to matters raised by the appellant. While Mr Bierman undoubtedly displayed a dedication to duty, I am unable to be satisfied that a reasonable person could conclude that he properly considered the matters the appellant had raised in response to the show cause notice, given the time frame and his hospitalisation. Mr Bierman contends that he had not finally decided to cancel the appellant’s training contract at that point, but concedes that he did tell the appellant that on the material he had before him, that cancellation would be the likely outcome.

I am satisfied that the appellant formed the view that the telephone call from Mr Bierman on 18 May advised him of the decision to cancel his training contract, and that in the circumstances, that view was a reasonable one. I am also satisfied that the sequence of events prior to the decision to cancel the training contract lead to a situation where fair procedures were not followed. I am unable to be satisfied that there was sufficient consideration of the matters raised by the appellant in his response to the show cause notice, to enable a finding that fair procedures were followed, or to fulfil the requirements of Part 4 – Fair Procedures of the *Training and Employment Regulation 2000*.

On balance, the appellant has satisfied me that fair procedures were not followed by the Council, in the decision to cancel his training contract. The issue is whether the powers under s. 233(2) of the Act should be exercised as a result of that finding.

The exercise of powers under the *Training and Employment Act 2000* on an appeal is discretionary. Section 233(2) provides that:-

“The Commission may –

- (a) dismiss the appeal; or
- (b) allow the appeal, set aside the decision being appealed and substitute another decision; or
- (c) allow the appeal and amend the decision;
- (d) allow the appeal, suspend the operation of the decision and remit the matter, with or without directions to the person who made the decision to act according to law.”.

The Commission does not have power to award compensation for the cancellation of a training contract other than as provided in Division 2, Part 2 of Chapter 8 of the *Training and Employment Act 2000* which limits such an award to cases where the Commission decides the employer or the apprentice has purported to cancel the training contract in a way other than that allowed under the Act. This is not such a case. However, I am concerned that the appellant has been deprived of an income as a result of his unfair treatment, since the cancellation of his training contract. I also accept that the appellant has a concern about the cancellation of his training contract for “misconduct”. It is unfortunate that failure on the part of an apprentice to make progress is defined in the Act as “misconduct”.

There is no capacity under the *Training and Employment Act 2000*, for the Commission to balance unfairness in the decision making process against a consideration that the substantive grounds upon which the decision was made, were valid. Put another way, I am reasonably satisfied that that there are real and serious concerns about the appellant’s capacity to complete his apprenticeship with the employer, and if fair procedures had been followed by the first respondent the outcome of this appeal may well have been very different.

In my view, the employer held (and will undoubtedly continue to hold) serious concerns about the appellant’s work performance and his capacity to satisfactorily complete his training contract. I am also satisfied that the employer acted in good faith to raise its concerns with both the appellant and the Council and did not contribute in any way to the unfair treatment of the appellant.

I accept that the employer has been caught in the situation which has arisen around the attempt to cancel the appellant’s training contract, which is beyond the employer’s control. The specific provisions of the *Training and Employment Act 2000*, dealing with cancellation of a training contract, focus on the actions of the decision maker, which is invariably the Council. It is the decision of the Council which is appealed and which must be considered. However, I am also of the view that the Objects of the *Training and Employment Act 2000*, need to be considered, and that the needs of industry are an important consideration in any decision made under that Act.

Further the nature of a training contract is such that an apprentice must be competent both on and off-the-job. The employer plays a major role in deciding whether or not an apprentice is competent, by assessing the on-the-job training component, thereby enabling the apprentice progress to the next stage of training. Even if the appellant were to successfully complete the off-the-job component of the third stage of his training, it would be open for the employer to conclude that the appellant was not competent in the on-the-job component, and to prevent the appellant progressing to the next level of his training.

Although the appellant has established that the decision to cancel his training contract was not based on fair procedures, if in future, he did not satisfactorily complete the off-the-job component of his training, or was properly assessed as not being competent on-the-job, his training contract could be cancelled, consistent with the provisions of the *Training and Employment Act 2000*.

The appellant has said that he is to attend his third block release training period commencing on 10 September 2001, and that his attendance has been facilitated by a program operated by the Council. This means that a proper assessment of his competencies will be conducted in the manner in which the assessors who gave evidence in this case believed it would be appropriate. I have also given consideration to the fact that the appellant indicated in his response to the show cause notice, that he believed that the employer was determined to get rid of him, and requested his transfer to another workshop to complete his apprenticeship.

On balance, I am not satisfied at this point in time, that I should exercise any of the powers under s. 233(2) of the *Training and Employment Act 2000*. Instead, I intend to defer determination of the appropriate remedy for the unfairness the appellant has suffered, until the outcome of his third period of block release training is known. When the appellant has completed that training, upon request of any party to this proceeding, I will re-list the matter for the purpose of determining an appropriate remedy.

I.C. ASBURY, Commissioner.

Appearances:-

Mr D. Moore, the Appellant on his own behalf.

Ms S. Parsons, of the Department of Employment and Training, for the first Respondent.

Ms K. Evans of Motor Trades Association of Queensland Industrial Organisation of

Employers on behalf of the second Respondent.

Released: 21 September 2001

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 319 – representation of parties

Suzanne Lang AND Queensland Ambulance Service (Case No. B888 of 2001)

COMMISSIONER ASBURY

20 September 2001

Representation of parties – Application for legal representation – Considerations in granting leave for party to be represented by a lawyer – Whether party being represented by a lawyer will increase costs of proceeding – Consideration of relevance of concerns of applicant about adequacy of representation – Consideration of whether additional restrictions should be placed on public sector entities – Case law – Leave for respondent to be represented by a lawyer granted.

DECISION

Background

This is an application by the Queensland Ambulance Service, the respondent in an unfair dismissal application by Ms Suzanne Lang, to be legally represented at the hearing into that application. The respondent seeks leave pursuant to s. 319(b)(iii) and (iv) of the Industrial Relations Act 1999. Those subsections provide that leave may be granted for a party to an application to be represented by a lawyer, if the Commission is satisfied that:-

- having regard to the matter that the proceedings relate to, there are special circumstances that make it desirable for the respondent to be legally represented - s. 319(2)(b)(iii); or
- that the party can be adequately represented only by a lawyer - s. 319(2)(b)(iv).

For leave to be granted the Commission need only be satisfied that one of those subsections applies (Fraser v Teys Feedlots Pty Ltd (2001) 166 QGIG 233). The respondent submits that the proceedings involve significant factual and legal complexity and will require the Commission to consider evidence of a technical nature including medical evidence and evidence relating to Queensland Ambulance Service operational and clinical procedures. Further, the proceeding involves a summary dismissal which will raise matters of law. It was also stated by the applicant's representative that the issue of whether the applicant was dismissed for an invalid reason, may also be pursued.

The applicant, who is represented by the Australian Liquor, Hospitality and Miscellaneous Workers Union, opposes the granting of leave for the respondent to be legally represented. Many of the issues raised by Ms Semple for the applicant, have been dealt with in decisions of this Commission, where leave for parties to be legally represented has been granted.

The respondent in my view has met the requirements of s. 319(b)(iii) necessary for leave to be legally represented to be granted. I am satisfied that the nature and complexity of the matter; the nature of the evidence to be adduced; the cross examination which will be required and the questions of law which are likely to arise make this a case where there are special circumstances which make it desirable for a party or person to be legally represented.

However, there are a number of additional matters which were raised by Ms Semple, which it is necessary for me to address. Ms Semple submitted that if leave was granted for the respondent to be legally represented, that the applicant could have concerns that her representation was not adequate. I am unable to accept that this is a matter which should be considered in deciding whether legal representation should be allowed, particularly where the applicant is represented by a Union which has considerable experience and expertise in conducting unfair dismissal cases before the Commission.

Ms Semple also argued that the applicant would be exposed to costs if leave for the respondent to be legally represented was granted and that this should be a basis for refusing such representation. I am also unable to accept that a party in an unfair dismissal application can oppose legal representation for the other party or to limit the first party's exposure to costs (see Grant Nicholas Raby v AEC Electricians (2001) 166 QGIG 209 at 210). A further consideration in this regard is that costs in relation to proceedings under the Industrial Relations Act 1999 are limited to applications which the Commission is satisfied were made vexatiously or without reasonable cause, or in applications for reinstatement, cases where a party causes costs to be incurred by the other party because of an unreasonable act or omission.

Further, Ms Semple submitted that the Queensland Ambulance Service is a large public sector organisation which employed staff who would be capable of conducting the case. Ms Semple also contended that the Commission should consider whether it is in the public interest for Queensland Ambulance Service funds to be used to pay for legal representation in an unfair dismissal case.

I am unable to accept that a public sector organisation should be treated differently to a private sector organisation when the Commission is considering the matters in s. 319(4) including whether a party being legally represented would increase or decrease the cost of the proceedings.

Leave is granted pursuant to s. 319(2)(b)(iii) for the respondent to be legally represented in Case Number B888 of 2001.

I.C. ASBURY, Commissioner.

Appearances:-
Ms V. Semple of the Australian Liquor, Hospitality and Miscellaneous Workers Union,
Queensland Branch, Union of Employees for the Applicant.
Mr C Murdoch of Counsel, instructed by Ms R. Nicholson of Crown Law for the Respondent.

Released: 21 September 2001

#####

QUEENSLAND INDUSTRIAL REGISTRAR

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

Queensland Teachers Union of Employees (No. Q36 of 2001)

REGISTRAR EWALD

21 September 2001

Request for Conduct of Elections - Prescribed Information - Casual Vacancies - Unfilled Positions - Expired Terms - Composition of Branches and Area Councils - Methods of Elections - Electoral Commission to Conduct Elections.

DECISION

On 20 September 2001 the Queensland Teachers Union of Employees lodged in the Registry under s. 481 of the Industrial Relations Act 1999, the information prescribed in s.36 of the Industrial Relations Regulation 2000, in relation to the conduct of elections by the Electoral Commission of Queensland for the following positions of office:-

Office	Number of Positions	Method of Election
<i>State Council Representative of a Branch -</i>		
Pine Rivers South	1	Direct vote by members of the Branch
Browns Plains	1	Direct vote by members of the Branch

Office	Number of Positions	Method of Election	
Metropolitan East Area Council Treasurer	1	Collegiate vote by members of Area Council	
SunshineCoast Area Council Vice President	1		
SunshineCoast Area Council Treasurer	1		
Wide Bay Area Council Vice President	1		
<i>Area Council Representative of a Branch –</i>			
Office	Number of Positions	Office	Direct vote by members of the Branch Number of Positions
Central Queensland Area Council			
Blackwater	1	South Coast Area Council	
Metropolitan East Area Council			
Brisbane Central	2	Gold Coast South	1
Capalaba	1	Gold Coast North	1
East Moreton	2	Merrimac	2
The Gap	1	Nerang	1
Windsor	1	Woodridge	1
Wynnum	1	South Queensland Area Council	
Metropolitan West Area Council			
Brisbane Valley	1	Darling Downs Central	1
Browns Plains	1	Darling Downs North	1
Ipswich Central	1	Lockyer	1
Macgregor/Rochedale	2	Stanthorpe	1
Sherwood	1	Western Downs	1
North Queensland Area Council			
Hinchinbrook	1	Sunshine Coast Area Council	
Peninsula Area Council			
Barron	1	Caloundra	1
Wide Bay Area Council			
		Maleny	1
		Redcliffe	1
		Hervey Bay	1

Composition of Branches and Area Councils

The number, formation and geographical boundaries of Branches and Area Councils are approved by the State Council through its general powers under relevant Rules. Evidence has been produced regarding the State Council determinations of previous and newly formed Branches and Area Councils as they currently are and relevant to the above positions of office.

Reason For Election

The Industrial Organisation advised that the above positions were unfilled after calling for nominations in a previous decision and some casual vacancies have arisen.

Methods of Election

I am satisfied that the methods of election are as specified above.

Conduct of Elections

I have considered the request, the Act and Rules and I find that the elections being sought are for positions of office within the meaning of the Act and are required to be held under the Rules of the Industrial Organisation.

Therefore, under s. 482 of the Industrial Relations Act 1999, I am making arrangements for the elections of the above named positions to be conducted by the Electoral Commission of Queensland.

Dated this twenty-first day of September, 2001.

E. EWALD,
Industrial Registrar.

Released: 21 September 2001