



The Queensland Government Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$297 + GST

ISSN 0155-9362

Vol. 168

FRIDAY, 12 OCTOBER, 2001

No. 6

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
CA407/01	Bowen Coke Pty Ltd - Certified Agreement 2001	25/9/01	CA178/99
CA425/01	Abbot Point Bulkcoal - Certified Agreement 2001	26/9/01	CA5/98
CA431/01	Toowong Private Hospital - Nursing and Allied Health Employees- Certified Agreement 2001	26/9/01	CA320/99
CA424/01	Queensland Fire and Rescue Authority Commercial Activities – Certified Agreement 2001	28/9/01	CA447/97

The following Agreement has been amended by the Commission:–

	Date amended
CA409/99 Australian Building Services Association - Queensland Division – Certified Agreement 1999	27/9/01

E. EWALD
Industrial Registrar

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – unpaid wages

**Department of Industrial Relations (on behalf of Dianne Bartholomew) AND
Larbound Pty Ltd (No. W125 of 2001)**

COMMISSIONER BLOOMFIELD

27 September 2001

Unpaid Wages – Claim for payment of five weeks' notice – Applicant claimed she had been granted six months' leave of absence – Respondent claimed that Applicant's employment had ended prior to leave commencing – Arbitrated Matter – Witness evidence – Witness credibility – Certain aspects of Respondent's evidence not accepted – Applicant's evidence and version of events preferred – Applicant terminated when she attempted to resume work – Payment in lieu of notice not made – Respondent ordered to pay \$3,871.35 in lieu of notice.

DECISION

Mr Dru Elliott Powell, of the Department of Industrial Relations, seeks payment of \$3,871.35 – which represents five weeks of unpaid notice allegedly owed to Ms Dianne Bartholomew – from Larbound Pty Ltd. Larbound Pty Ltd is the service company for a patent/trademark attorney firm known as Ahearn Fox.

Ms Bartholomew is aged over 45 years of age and had been employed by the Respondent, Larbound Pty Ltd, from 1 July 1997. Prior to 1997 she had been employed by another service company – TGA Services Pty Ltd. She had worked on and off for Mr Ahearn since 1979. Her most recent engagement commenced in around March 1994 on a part-time or casual basis, and from June 1995 on a permanent basis. There is no dispute her employment was transmitted from TGA Services Pty Ltd to Larbound Pty Ltd when Mr Ahearn and Mr Fox established their partnership.

Ms Bartholomew said she had received verbal approval from both Mr Ahearn and Mr Fox in around September or October 1998 to take a period of extended leave from the end of March 2000 until the end of September 2000. Ms Bartholomew produced a letter, dated 15 March 2000 and signed by Mr Ahearn, which confirmed “our verbal advices” that her request for extended holiday leave from 31 March 2000 until 2 October 2000 had been approved.

Ms Bartholomew also said she discussed her planned leave with Mr Ahearn and Mr Fox on many occasions in the eighteen months which led up to her leaving on her overseas trip. She also said her period of leave was recorded in a leave roster calendar that was kept in the kitchen. This showed her departure and return dates. Her evidence on this latter point was confirmed by Ms Sherwood.

Ms Bartholomew said she had discussions with Mr Fox on Tuesday 28 March 2000 regarding the operation of a computer system which she had been installing over the months leading up to her departure and how she would be able to prepare end of financial year information after her return. She said he responded in positive terms that she would be the one who performed that task. She also said that Mr Fox gave her a list of European patent attorney firms she could visit during her trip. She left behind personal belongings including photographs and personal papers as well as photographic equipment.

The first six weeks of her absence was paid as annual leave, which exhausted her residue entitlement, and the period from 15 May until 28 September was unpaid.

Ms Bartholomew produced a copy of a letter to Mr Ahearn, dated 11 July 2000, in which she mentioned that she was looking forward to resuming their working relationship after her trip.

Ms Bartholomew said she returned to the office on 27 September 2000 in anticipation of her return to work on the following Monday 2 October 2000. She mentioned her impending return to work to Mr Ahearn and said that he responded in a positive way. During that conversation he produced Ms Bartholomew’s letter of 11 July and talked about various aspects of it.

Ms Bartholomew said that after speaking to Mr Ahearn she went and spoke to Mr Fox and they had a discussion regarding her trip. She mentioned she would be returning to work on Monday. There was no comment to the contrary from Mr Fox.

However, later that same evening, Mr Ahearn phoned her to advise her that Mr Fox had said there was no work for her. Mr Ahearn told her that Mr Fox was of the belief that she had finished her employment with the company when she left to go on her trip in March. She responded by saying that Mr Fox was well aware she had only taken extended leave and was returning to work after her overseas trip. She requested Mr Ahearn to ask Mr Fox to contact her. On the following day Mr Fox rang Ms Bartholomew and informed her that there was no work for her to return to. He explained that there were no searches coming in and the accounts were running reasonably. He said he would have to put off one or two girls to accommodate Ms Bartholomew’s return and that would not be fair on them.

After some further discussions Ms Bartholomew asked Mr Fox was she being terminated. He replied that there might be some part-time work for her in the future but he could not see that happening at present.

Payment of five weeks in lieu of notice was requested on behalf of Ms Bartholomew on the basis that her employment had been terminated, without notice, by Mr Fox in the discussion on 28 September 2000.

Each of Mr Ahearn and Mr Fox denied that they had agreed with Ms Bartholomew that she could take six months’ leave of absence. They insisted that as a small firm that type of arrangement was not possible.

Mr Fox, in particular, argued that he knew nothing about any arrangement whereby Ms Bartholomew was proceeding on six months’ leave of absence. He said that the firm would never have been able to accommodate it and that he would never have approved it. He said that he always understood that Ms Bartholomew was leaving the firm to go overseas and that she would take her chances on re-employment when she returned. Whether she could be re-employed would depend upon what work was available at the time.

Mr Ahearn attempted to downplay his role in the firm stating that all personnel matters had been taken over by Mr Fox. He said he was aware for some time that Ms Bartholomew was travelling overseas for a period of about six months. He claimed, however, that Ms Bartholomew did not tell him of any arrangements she had made with Mr Fox in that regard. He said he “found it convenient to assume that Fox and Bartholomew had conducted full and pertinent discussions”. Why he had found it “convenient” to do that was not explained.

Each of Mr Ahearn and Mr Fox suggested that the letter of 15 March may have been obtained by false pretences because Mr Ahearn was recovering from a serious knee operation at the time and he (allegedly) would not have been in a fit condition to have vetted any such letter. Mr Ahearn agreed that the letter bore his signature but said he had not approved its preparation and could not remember having read or signed it. He said he may have signed it if Ms Bartholomew had placed it in front of him because he was used to signing things that she had prepared.

Mr Ahearn also said that in late September Ms Bartholomew came to see him about her intention to recommence work on 2 October. In his witness statement he simply recorded that she had mentioned that she would see him on Monday. He recorded that he had spoken to Mr Fox later that day and asked him to confirm that Ms Bartholomew was expected on Monday. Mr Fox said that he was not.

However, in his verbal evidence he claims to have told Ms Bartholomew that there was “no room for her” when she said to him that she would see him on Monday. He also claimed that he expressed the view to her that she was not expected back and that he had asked her whether Dan (Fox) thought she was coming back.

I do not accept Mr Ahearn’s evidence on this latter issue. It was disingenuous.

I gained the clear impression from listening to, and observing, Mr Ahearn that he had clear knowledge of, and had approved, Ms Bartholomew's leave intentions from the time that they were first raised with him viz. September/October 1998. I am also satisfied that Mr Ahearn voluntarily signed the letter of 15 March 2000 and that he was in no way misled or deceived as to its contents. His later denial of any arrangement for six months' leave of absence seems to have been to avoid any conflict with Mr Fox who was clearly the dominant personality of the two. Mr Fox holds a very strong view that Ms Bartholomew left the firm to go on an overseas trip and her chances of re-employment upon her return depended upon whether work was available. Mr Ahearn adopted that view of the arrangement – contrary to reality – because it suited him to do so. His evidence was created in an attempt to reinforce the position that he had chosen to adopt.

I have no doubt from listening to the evidence of Ms Bartholomew, Mr Ahearn and Mr Fox that all three parties knew from around September/October 1998 that Ms Bartholomew was proceeding on leave in late March 2000 for six months and that it was her intention to return to work. Ms Bartholomew thought that she was proceeding on approved leave of absence and that she was returning to employment upon her return. I have no doubt that Mr Ahearn (at least) originally had a similar understanding.

Mr Fox, however, convinced himself at some point in time that Ms Bartholomew could only return to work if work was available. However, he did not share that view with anyone prior to Ms Bartholomew's departure (if, indeed, he had arrived at that position before her departure). When he did share his view with Mr Ahearn some time later, Mr Ahearn adopted it as representing the arrangement which the firm had with Ms Bartholomew. As I said above, I am satisfied that Mr Ahearn adopted that as the factual position because he was not prepared to argue with Mr Fox. To partially quote Mr Ahearn, it was the "convenient" thing to do.

I am satisfied that whatever view Mr Fox may have had about Ms Bartholomew's future with the company at the end of March 2000 it all firmed up in his mind during the next several months to be the one that he advocated during the hearing viz. that she could only return to work after her return from overseas if work was available.

In that regard Mr Fox gave evidence that he held a discussion with Ms Bartholomew at the end of March 2000 about her intentions upon her return to Australia. He said that she said that she was not sure what she would do and that she may like to do some part-time patent/trademark searching from home or at the offices of Ahearn Fox if there was any such work available. Ms Bartholomew denied that the discussion which they had held had run along those lines. If it had, I am certain that Mr Fox would have reminded Ms Bartholomew of it when they spoke on the telephone on 28 September when he informed her that there was no work available for her. There is no suggestion that he did. I simply do not accept his evidence on this point.

After considering all of the evidence I have reached the conclusion that Ms Bartholomew was given approval to go on leave of absence for six months by both Mr Ahearn and Mr Fox in September/October 1998. I am satisfied that after receiving that approval Ms Bartholomew proceeded to plan her trip in expectation of returning to employment upon her return.

I am also satisfied that Ms Bartholomew did not terminate her employment, and nor was it terminated, in (or before) March 2000 when she went overseas. There were none of the usual events and trappings that one would associate with the departure from employment of a long-standing employee such as Ms Bartholomew. There were no farewell speeches, farewell gifts or anything of that nature. She was paid annual leave as if she was taking it rather than it being paid in lieu upon termination of her employment. She was given a list of several European patent attorneys that she was encouraged to visit during her trip. Her personal effects were left at work. Everything suggests a return to work.

Taking everything into account I am satisfied, on the balance of probabilities, that Ms Bartholomew was first advised that there was no further position for her by Mr Fox on 28 September 2000. Until that time the agreed arrangement had been that she would return to work on 2 October 2000. Accordingly, Ms Bartholomew was entitled to five weeks' notice of termination or payment in lieu thereof.

It is the Commission's order that Larbound Pty Ltd pay the sum of \$3,871.35 to Ms Dianne Bartholomew within twenty-two days of the date of release of this decision.

A.L. BLOOMFIELD, Commissioner.

Appearances:-

Mr D. Powell, of the Department of Industrial Relations,
with Ms D. Bartholomew.

Mr D. Fox for Larbound Pty Ltd.

Released: 27 September 2001

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

The Australian Workers' Union of Employees, Queensland AND Grainco Australia Ltd (No. B854 of 2001)

GRAINCO AWARD – QUEENSLAND

COMMISSIONER FISHER

28 September 2001

Application for amendment – Statement of Policy – Afternoon and Night Shift Allowance – History Grainco Australia Ltd Shift Work – Industrial Agreement – Flexible Shift Work Arrangements – Parties to prepare new subclause (4) Two Shift Arrangements – Commission to determine in the absence of agreement – Parties to advise if further hearings required on drafts.

DECISION

This is an application by The Australian Workers' Union of Employees, Queensland (AWU) to amend the Grainco Award – Queensland (the Award) by inserting shift provisions consequent upon the decision of the Full Bench in *Re Percentage Shift Allowance* [(2000) 164 QGIG 54]. The application by the AWU seeks to vary the Award by inserting the percentage afternoon and night shift allowances determined as a Statement of Policy by the Full Bench. The application also seeks to insert definitions in the Award and to add a saving clause. The AWU's application is consistent with many others it has filed on the same subject matter.

The matter initially came on for hearing on 30 May 2001. At that time the representative of Grainco Australia Ltd (Grainco) advised that it had difficulties with aspects of the AWU's application and sought discussions with the applicant to try to resolve those matters. Grainco's representative foreshadowed it may seek to place an alternative amendment before the Commission for consideration. After raising the question of operative date with the parties, the Commission advised that the date of 30 May 2001 would be preserved unless Grainco put a particularly persuasive contrary argument at any future hearing.

For a range of reasons the matter did not return to the Commission until 5 September 2001. In the interim the parties held discussions and as a result had substantially narrowed the differences between them. Although the Commission still has the AWU's amended application before it, this has been superseded by Grainco's alternative proposition. Its proposal is more extensive than the original application. It provides for when shift work is to occur, the shift allowances payable, definitions, crib breaks, overtime and other conditions. The AWU advised it agrees to all of these clauses. It opposes the proposed subclause (4) – Two Shift Arrangements. This subclause purports to allow employees to agree to shift changeover times and where the changeover time is altered by employees at their request such that the shift would then be defined as a night shift, the afternoon shift penalty would apply. The subclause is in the following terms:–

“4. Two Shift Arrangements:

Where employees are engaged on shift where a day shift (or day work) and afternoon shift roster is to be used to cover extended hours, the employees involved and local management may choose to alter the finishing time of the day shift (or day work) and the starting time of the afternoon or second shift to suit local needs. The afternoon shift allowance will be paid for the second shift in these circumstances irrespective of the finish time.”

Evidence in the matter was given by Simon Warner, General Manager, Human Resources, Grainco Australia Ltd. Although the AWU did not oppose Mr Warner giving evidence, it complained of the late notice of this and the limited opportunity to peruse Mr Warner's affidavit. The AWU also complained that the late notice prevented it from also seeking evidence from employees. It did not however seek an adjournment of proceedings to allow its complaints to be remedied.

In order to understand Grainco's position in this matter, it is necessary to explain the history of shift work in Grainco. This can be done both by reference to Mr Warner's evidence and industrial instruments.

Mr Warner gave evidence that Grainco has operated shift arrangements for a range of operations over a long period. For short term irregular requirements a two shift roster has been used and for longer term continuous operations a three shift roster has been used. The two shift roster covers day and afternoon shifts with extra hours being worked as overtime if required. Three shift operations have been used in the past for seed grading operations and for a brief period in 1995 at port. Grainco has paid a 15% allowance for work performed on a night shift. Agreement to the 15% night shift allowance was initially recorded in an exchange of letters and later reflected in an Industrial Agreement entered into in 1992. The Grainco Shift Work Industrial Agreement contains provision for consultation between the employer, employees and the Union prior to the introduction of three shift arrangements at port. Mr Warner confirmed in evidence that Grainco was not taking issue with the Statement of Policy issued by the Full Bench including the 15% night shift allowance.

Mr Warner's affidavit deposed to the multiplicity of shift work operations throughout the organisation. He said:–

“19. Each port and country operation work different arrangements of shift hours and starting times to meet the shift requirement when it occurs. This has resulted from the employees and local management coming to an agreement that deals with local issues such as, the availability of public transport, daylight saving hours (where applicable), local social activities and local employees preference for example:

- (a) The operation of grain dryer in Capella in Queensland Central Highlands (approximately an hours drive outside of Emerald) may need to operate for extended periods of up to 24 hours a day during the peak sorghum receival period. This is usually a period between April to June, although it varies from year to year.
- (b) The peak demand may last a matter of days, or may have intermittent peaks associated with the receival pattern of grain. This pattern can be largely affected by the weather.
- (c) This operation would work in conjunction with normal grain receival functions carried out at the depot, which would normally be for daylight hours, from 6.00 am in the morning until 7.00 p.m. at night.
- (d) These hours of work reflect the hours of work under the Award.
- (e) However, the grain drying operation may need to operate on an extended basis for up to 24 hours, from time to time in peak periods.
- (f) The work is similar to a 'control room' and involves:
 - (i) supervising the operation of the automated machinery to ensure that the settings are within prescribed standards;
 - (ii) from time to time, changing the feed and flow path of grain;
 - (iii) in taking from new bins;
 - (iv) output to different storage; and
 - (v) ensuring fuel availability.
- (g) The two employees involved in this operation would be given the flexibility to determine amongst themselves the most appropriate changeover time between operators. Their decision would be influenced by:
 - (i) the location;
 - (ii) the living arrangements (living on site on Quarters or travelling from Emerald);
 - (iii) travel time to work;
 - (iv) transportation (which could include the working hours of other employees travelling to site, lifts from other employees); and
 - (v) custom and practice.

20. Grainco allows local management and employees to work such times as they choose to meet the shipping and harvest requirement. In Capella employees generally make the shift changeover time 7.00 p.m. Grainco does not require employees to work specific shift rosters as long as Grainco's operational requirements are met."

The difficulty for Grainco is that the proposed new definitions of afternoon and night shift differ from those contained in the Industrial Agreement and would consequently lead to a situation where employees would receive a higher shift penalty rate for work which previously attracted the afternoon shift rate. Grainco thus proposes inserting the two shift clause given earlier into the Award to ensure that employees retain the flexibility of determining shift changeover times and Grainco is not penalised by having to pay a higher allowance where the changeover time would, according to the definitions, result in the shift being determined as a night shift.

The AWU opposes the proposed clause on the grounds that it is disadvantageous to the employees. The AWU does not perceive the application to be about retaining flexibility for employees but about Grainco seeking to minimise or avoid the cost impost associated with the insertion of the Statement of Policy into the Award.

Having considered the evidence and submissions, the Commission shares the view of the representative of Grainco that the shift definitions contained in the Industrial Agreement are "eccentric". It is clear these definitions were developed to meet the particular requirements of Grainco. In light of the Statement of Policy, Grainco has agreed to more traditional definitions of shift work and is not opposing the shift allowances decided by the Full Bench. In fact, it has entered into an arrangement with the AWU outside of the Award to pay the final allowances determined at a date earlier than that set by the Full Bench. This is not evidence of an employer seeking to avoid its obligations.

The AWU is correct however when it states that Grainco is seeking to minimise the cost impost by the insertion of the subclause relating to the two shift arrangements. The Commission does not agree with the implication drawn by the AWU that this should be construed as untoward. Evidence is before the Commission that for a long period employees at local level have had the flexibility to determine shift changeover times to suit personal and other circumstances. The Commission is reluctant to interfere with such flexibilities particularly where they meet the needs of the employees and the employer. The Commission is also conscious that section 126(h)(i) of the *Industrial Relations Act 1999* requires facilitative provisions to be inserted into Awards whenever possible. In my view the circumstances described by Mr Warner would seem to be the types of arrangements which should be facilitated by Award provisions.

The Commission is not satisfied that Grainco's proposed subclause (4) does what the employer purports it to do. Provision should be made in the subclause for the majority of employees to voluntarily elect to alter shift changeover times to suit their own circumstances provided it does not interfere with the operations of Grainco's business. Where this election is made by the employees and approved by the management, the afternoon shift penalty will apply. A proviso should be inserted to indicate where Grainco does not approve of the shift changeover times or where it specifies the shift roster, the relevant shift allowances provided by the Statement of Policy and to be included in the Award will be paid.

While the Commission has been prepared to make provisions for this flexibility, it notes that employees may be less willing to seek flexible starting and finishing times if the allowance that will be paid is less than that which would be available where the employer specifies the shift roster. This may be an unintended consequence of inserting such a provision but is likely to be the result in the circumstances.

Given the changes to the shift arrangements and allowances granted by this decision and the impact on employees described above, the Commission requires Grainco and the Union to prepare advice to employees of this decision. Such advice should be jointly issued if possible.

Although the parties have reached an agreement about the date of operation of the shift allowances, the Commission requires the Award amendment to reflect the allowances and dates approved by the Full Bench in the Statement of Policy. The Commission expressed a view the first day of hearing about the date of operation of any amendments. This continues to apply to subclause (2) Shift Allowances though whether this date is appropriate for the balance of the clause is a matter to be discussed between the parties. If 30 May 2001 is considered inappropriate then the date of this decision will be the operative date.

The parties are also directed to prepare a new subclause (4) Two Shift Arrangements to reflect this decision. A complete draft award amendment is to be submitted to the Commission within 14 days of the date of this decision. Where agreement cannot be reached, each party is required to submit its own draft and the Commission will then settle the terms. Should the parties wish to be heard on their own draft, the Registrar is to be advised at the time the draft is submitted and a date of hearing will then be set.

Order accordingly.

G.K. FISHER, Commissioner.

Appearances:-

Mr J. Sharpe for The Australian Workers' Union of Employees, Queensland.

Ms H. Meggorin, Mr D. Williams and Ms L. Dorricott (Minter Ellison) and with them Mr S. Warner on behalf of Grainco Australia Ltd.

Released: 28 September 2001

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 74(2)(b) – application for extension of time

Brian Daunt AND SKF Australia Pty Ltd (No. B1144 of 2001)

Herbert Donahue AND SKF Australia Pty Ltd (No. B1146 of 2001)

COMMISSIONER THOMPSON

1 October 2001

Application for extension of time – Long-term employment by both applicants – Redundancy – Key factors in considering extension of time – Limited prospects of success at a substantive hearing – Application rejected.

DECISION

Background

An application for an extension of time, pursuant to s. 74(2)(b) of the *Industrial Relations Act 1999* (the Act) was filed on behalf of Mr Brian Daunt (B1144/01) and Mr Herbert Donahue (B1146/01) which related to applications made by both persons for reinstatement following the termination of their employment by SKF Australia Pty Ltd (SKF).

Both the applicant(s), and the respondent, agreed through their legal representatives that the matters should be heard together, and reached further agreement that each of the parties would rely upon written outlines of submissions and filed statements of evidence, supportive of their positions, without the need for a hearing to be formally held.

The Commission accepted the position put forward by each of the parties, in respect of having the matter dealt with by written material, and determined that a decision would be made after the consideration of all the material filed by each of the parties.

Applicant(s)

In respect of Mr Daunt, it was submitted that his application was some twenty-two (22) days beyond the twenty-one (21) day time limit prescribed in the Act. This was due, in the main, to a claim that he was mentally affected by the termination, and during the period subsequent to his termination, he was unable to make decisions and to take appropriate action in relation to his rights to seek redress for unfair dismissal.

In an affidavit filed by Mr Daunt, he stated that he had commenced employment with the respondent on 1 March 1970, and remained in continuous employment until the termination of that employment on 18 May 2001.

At the time of the termination, he was employed as a Store Supervisor.

On 17 May 2001, the date prior to the termination, he received correspondence, dated 9 May 2001, from NSP Buck Pty Limited (NSP), the administrator of the SKF Superannuation Fund, advising that they had been notified that he had ceased employment and provided him with details as to his Superannuation entitlements.

On 18 May 2001, upon his arrival at work, he was met by the State Manager, Mr Peter Watkins and, at that time, was advised that his employment had been terminated forthwith on the basis that he was being made redundant.

The applicant alleged that no prior discussion had occurred in relation to the proposed redundancy, and the manner of his termination had placed him in a most stressful position.

It was only sometime after he had received his redundancy pay, and he was considering how he would need to reorganise his life, that he was made aware that he may have some legal recourse against the company. On 28 June 2001, he met with his legal adviser and subsequently filed an application seeking reinstatement.

Mr Sam Sciacca, of Sciacca's Lawyers & Consultants, on behalf of the applicants, submitted that Mr Daunt had good prospects of success if the extension of time was granted, based upon the factual situation regarding the termination.

The applicant was not in a position, due to the impact of the termination upon his life, to respond effectively to either make a decision or take the appropriate action relating to his unfair dismissal at the time of his termination.

According to Mr Sciacca, the position of the respondent would not be prejudiced by the late filing of the application for reinstatement.

In the case of Mr Donahue, it was submitted that his application was twenty-three (23) days beyond the twenty-one (21) day time limit prescribed in the Act, and that the reason for not meeting the requirements of the Act related to a medical condition and to the way in which he was mentally affected by the termination, and in the period subsequent to his termination, to make decisions.

In the affidavit filed by Mr Donahue, he stated that at the time of termination, he held the position of internal sales representative and his period of employment had been from 23 March 1969 until 17 May 2001.

In addition, his evidence, at paragraph 3, indicated that for a majority of the time in which he was employed by the company, he held the position as Branch Manager.

As was the case with Mr Daunt, the first knowledge the applicant had of his termination came by way of a letter received from NSP, dated 9 May 2001, and received on 17 May 2001, which advised that the applicant's employment had ceased and of the superannuation entitlements that were owing at the time.

Immediately upon receipt of the NSP correspondence, Mr Donahue phoned Mr Watkins, the State Manager, and was advised by him that he would return his phone call some time later that night.

Later that evening, the applicant was contacted by way of a conference phone facility involving the State Manager, the Human Resources Manager, and the Sales Manager. At that time, he was advised that he was to be made redundant, that his employment was terminated forthwith, and that he would not be required to present to work the next day.

On the impact of the termination of his employment upon him, the applicant, at paragraph 12 of his affidavit stated "I went into a slight depression that became severely stressed. I suffer from diabetes and the termination of employment did not help my diabetic condition."

He further stated that whilst waiting for his redundancy payment, he contacted the Queensland Industrial Registry, and had documentation forwarded to his home address which he claims that, after perusal, he was unable to fully comprehend the detail provided in that documentation.

He subsequently contacted his legal representative on 28 June 2001, and was advised then of the twenty-one (21) day time limitation provided for in the Act.

The submissions made by Mr Sciacca, supportive of the position of Mr Donahue's application for an extension of time, were identical to those made in respect of Mr Daunt.

Respondent

In opposing the application, the respondent relied upon an affidavit provided by Mr Ashok Kapoor, the Financial Controller of the respondent company, in addition to submissions provided in writing by Ms Kirsty Clarke, of Clarke and Kann, on behalf of the respondent.

The witnesses' affidavits contained similar core information relating to the type of business carried out by the respondent and detail of the restructure of the business that led to the decision to make redundant the positions held by both Mr Daunt and Mr Donahue.

In relation to the correspondence received by each of the applicants from NSP advising of their termination and superannuation entitlements, this was addressed in paragraphs 6 and 7 of the affidavit of Mr Kapoor, where he stated:—

“6. In or about early May 2001, SKF requested NSP Buck Pty Ltd (‘NSP’) a superannuation body, to prepare a Benefit Quotation Statement in relation to the Applicant’s superannuation entitlements, as the Applicant’s position was redundant as a result of the restructure at Bowen Hills.

7. Without SKF’s knowledge or consent, NSP sent the Applicant the letter dated 9 May 2001 (attached to the Applicant’s application dated 28 June 2001 and filed in this proceeding) notifying the Applicant of his termination of employment.”.

An explanation was sought from NSP as to their conduct in the matter, and a written response was provided, advising that the request from the company was processed incorrectly and NSP’s sincere regret for what had occurred.

In the case of Mr Daunt, the respondent made available five (5) weeks’ pay in lieu of notice, in addition to six (6) months’ severance pay which was paid shortly after the termination.

Attention was also drawn to the failure of the applicant to provide any medical evidence relating to an alleged medical condition that had been relied upon as a reason for his failure to lodge an application within the required time period.

The evidence of Mr Kapoor, as it related to Mr Donahue, provided information of the notice and severance payment made by the respondent, which was identical in terms of five (5) weeks’ and six (6) months’ payment respectively.

Contained within the affidavit was a question in relation to the failure of the applicant to provide medical evidence to support the claim that he was suffering conditions that prevented the application being made within the prescribed time.

Finally, at paragraph 15 of the affidavit, it was stated that Mr Donahue had secured alternative full-time employment within one (1) or two (2) weeks of being terminated.

Mr Kapoor maintained that the redundancies were of a genuine nature, and having regard for the benefits paid to the applicants, that the claim should be considered by the Commission as lacking merit.

Ms Clarke submitted that the period of time in both applications was some twenty (20) days after the twenty-one (21) day period, and both applications had prejudiced the respondent, in that it had caused an expenditure of legal costs as well as the loss of time and resources in responding to the application.

The position of the respondent was that the company had completed a restructure of its business. As a result of that restructure, there were no longer jobs available to which both applicants could be placed.

In relation to both Mr Daunt and Mr Donahue, the termination of employment was for a valid reason, namely due to redundancies.

It was further submitted that the applicants were more than adequately compensated following the termination of their employment, and that the termination benefits were in excess of those prescribed in the Act, and the severance rates of pay, as prescribed by the *Termination, Change and Redundancy* case (1984) 9 IR 115.

Finally, that in the circumstances, the respondent’s submission was that the claims by the applicants were unlikely to succeed having regards to the merit of the applications, and of the payments already made by the respondent.

Conclusion

When lodging an application for reinstatement, an employee must do so in accordance with s. 74(2)(a) and (b) of the Act:—

“(2) The application must be made within—
(a) 21 days after the dismissal takes effect; or
(b) a further period the commission allows on application made at any time.”.

The applications filed in this matter fall outside of the twenty-one (21) day period as provided for in s. 74(2)(a) of the Act. The Commission is therefore required to consider whether an extension of time is appropriate under s. 74(2)(b) of the Act.

In the case of both applicants, they had been employed by the respondent for what would be considered a lengthy period of time, with Mr Daunt and Mr Donahue having some thirty-one (31) and thirty-two (32) years of service respectively.

Their terminations were by way of redundancy due to the restructure of the respondent’s business, and each of the applicants was paid five (5) weeks’ in lieu of notice and received a further severance payment of some six (6) months’ pay.

As long-term employees, for the applicants the experience in finding out that their services were to be terminated through correspondence received from a third party (NSP) would have been, by any reasonable standard, most discerning. Whilst the blame for such actions cannot be sheeted home to the respondent, it is nevertheless conceivable that the circumstances would have had a significant impact on each of the applicants.

This aside, however, in consideration of the extension of time applications, the Commission has, in previous matters, relied upon a set of key factors as set out in the decision of Linnane VP in *Tracey Colfax v Jupiters Limited* (B1547 of 2000):—

“In ordinary circumstances the key factors to be considered in the construction and operations of provisions such as s. 74(2)(b) of the Act are to be found in the decision of the then Chief Industrial Commissioner in *Breust v Qantas Airways Limited* (1995) 149 QGIG 777. These factors will be:—

- (i) the length of the delay;
- (ii) the explanation for the delay;
- (iii) the prejudice to the Applicant if the extension of time is not granted;
- (iv) the prejudice to the Respondent if the extension of time is granted; and
- (v) any relevant conduct of the Respondent.

The three caveats to be added to the approach in *Breust v Qantas Airways Limited* are:-

- (i) that s. 74(2)(b) of the Act vests an unlimited statutory discretion in the Commission which must always be exercised;
- (ii) that the time limit of twenty-one (21) days provided for in s. 74(2)(b) must be respected;
- (iii) that the Applicant's prospects of success at the substantive hearing is always a relevant matter i.e. that where it appears that an applicant has no, or very limited, prospects of success the Commission should not grant an extension of time."

In applying the key factor approach, as in the *Breust v Qantas Airways Limited*:-

- (i) length of delay – Daunt twenty-two (22) days, Donahue twenty-three (23) days;
- (ii) the explanation for the delay –
 - Daunt – only after receiving his redundancy pay did he become aware that he may have some legal recourse, and further that he was mentally affected by the termination which inhibited him from taking the appropriate course of action;
 - Donahue – he stated that he suffered from diabetes and following his termination went into "a slight depression that became severely stressed". Whilst waiting for his redundancy payment, he contacted the Queensland Industrial Registry and was forwarded documentation relating to the lodgement of an application, but had difficulty in comprehending the detail contained within that advice.

In respect of both the applicants, I have discarded their claims in respect of either medical or mental conditions simply because of their failure to provide any form of medical evidence supportive of that particular claim.

I further find that the position of Mr Donahue, that he could not fully comprehend the material obtained from the Queensland Industrial Registry, as being difficult to accept on the basis of his evidence that for a majority of his employment, he had held the position of Branch Manager within the respondent company which, in the view of the Commission, is a position that one would reasonably expect the person to have the capacity to decipher the type of information that would have been provided by the Registry.

- (iii) the prejudice to the Applicant if the extension of time is not granted –

The prejudice to the Applicants in not being granted an extension of time would be to deny them the opportunity to seek redress for what they allege was an unfair dismissal through the way in which the redundancies were processed.

- (iv) the prejudice to the Respondent if the extension of time is granted –

In the granting of an extension of time in these matters, it is reasonable to assume that the respondent would incur legal costs in defending their position after having voluntarily paid amounts of monies to each of the applicants in excess of what would be their legal entitlements.

- (v) any relevant conduct of the Respondent –

The Commission is most critical of the way in which both applicants became aware that their employment was to cease, however accepts the evidence of the respondent that the actions of NSP were not as a direct result of any instruction given by the respondent.

The Commission is also critical of the failure to provide adequate consultation with each of the applicants prior to effecting the redundancies.

In addressing the previously mentioned caveats (i) and (ii), I have taken into account the unlimited statutory discretion available to the Commission, and duly noted that the time limit of twenty-one (21) days must, in all circumstances, be respected.

In relation to caveat (iii), I have looked at this in respect of the prospects of success at a substantive hearing, in particular, the remedies available to be considered by the Commission at ss. 78 and 79 of the Act. The evidence that a restructure of the respondent company had taken place, and that the jobs of Mr Daunt and Mr Donahue were no longer available, was unchallenged by the applicants. Therefore, in the view of the Commission, if the applicants were to be successful at a substantive hearing, it would not be practicable to order reinstatement.

The other option then available to the Commission would be at s. 79(2)(a) and (3) of the Act:-

- "(2) The commission must not award an amount of compensation that is more than-
 - (a) if the employee was employed under an industrial instrument – the wages the employer would have been liable to pay the employee for the 6 months immediately after the dismissal, paid at the rate the employee received immediately before the dismissal; or . . .
- (3) The commission must take into account any amount paid to the employee by the employer on the dismissal."

It would appear then that if the applicants were successful, the ability of the Commission to award an amount of compensation over and above the monies that had already been paid to the applicants, would be severely limited.

Having considered all of the evidence, submissions, and applied the key factors and caveats as in *Tracey Colfax v Jupiters Limited*, I am not convinced that an extension of time as sought under s. 74(2)(b) of the Act is warranted. The applications from both Mr Daunt and Mr Donahue in this matter are rejected.

I order accordingly.

J.M. THOMPSON, Commissioner.

Released: 2 October 2001

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 276 – application to amend or void contract***Clipmont Pty Ltd and Others AND Boral Resources (Qld) Pty Ltd (Nos. B635 – B643 of 2001)**

COMMISSIONER FISHER

3 October 2001

Applications to amend or void contract – *Industrial Relations Act 1999* – Case Law – Employees defined – s. 276(6) exclusions – Corporations and/or partnerships below earnings threshold not precluded from making application – Trust not legal person nor entity – Technical error in application – Commission rejects jurisdictional arguments – Applicants to advise Registry when ready to proceed with substantive matters.

DECISION

The Commission has before it nine applications seeking to amend or void contracts for services under s. 276 of the *Industrial Relations Act 1999*. The applicants are variously a corporation, partnership or trust. The applications have been listed together at this stage as the respondent is the same in all, viz, Boral Resources (Qld) Pty Ltd, and the respondent has raised a number of jurisdictional issues, which, if successful, would have the effect of excluding each of the applicants from the jurisdiction of the Commission.

The respondent relies on three grounds to support its argument that the applicants have no standing to bring the applications. These are:–

- (i) section 276 of the Act should be read as excluding a corporation or partnership from bringing an application;
- (ii) the applicants are not parties to the contracts; and
- (iii) the applicants' gross earnings exceeded the threshold prescribed by s. 276 (6) of the Act.

It is convenient to deal with grounds (i) and (iii) together.

The respondent argues that the applicants are not eligible to bring the applications by reason of s. 276(6) of the Act which provides:–

- (6) A person cannot make an application under this section if –
 - (a) an application has been made under section 74 for the same matter; or
 - (b) the person –
 - (i) is not a public service officer employed on tenure under the *Public Service Act 1996*; and
 - (ii) has an annual wage of more than \$68 000 or a greater amount stated in, or worked out in a way prescribed under a regulation.”.

The respondent notes that the term “person” is not defined in the Act but is defined in s. 36 of the *Acts Interpretation Act 1954* as –

“‘person’ includes an individual and a corporation”

and at s. 32 D –

- “(1) In an Act, a reference to a person generally includes a reference to a corporation as well as an individual.
- (2) Subsection (1) is not displaced merely because there is an express reference to either an individual or corporation elsewhere in the Act.”.

Reference was also made by the respondent to s. 276(3) of the Act with prescribes who may make an application.

- “(3) An application may be made by –
 - (a) a party to the contract; or
 - (b) an inspector, for the party required under the contract to provide services; or
 - (c) an organisation of employees or employers of which a party is, or has applied to become, a member, if it is acting with the party’s written consent.”.

Again the term “party” is not defined in the Act but is defined in s. 36 of the *Acts Interpretation Act 1954* as.

“‘party’ includes an individual and a corporation”;
 “‘individual’ means a natural person.”.

The respondent submits that the term “party” in s. 276(3) of the Act must mean an individual natural person. A corporation, partnership or a trust could never make an application under s. 74 of the Act.

The respondent then argues –

“Bearing in mind the restrictions in s. 276(6) of the IR Act:

- a. in the case of corporations, partnerships and/or trusts:
 - i. a corporation, partnership and/or a trust cannot be a member of an organisation of employees permitted to bring an application under s. 276(3)(c); and
 - ii. it would be repugnant to the objects of the IR Act for the monetary limit under s. 276(6) to exclude a natural person or a partnership consisting of natural persons from relief under s. 276 whilst leaving unchecked corporations, partnerships consisting of a corporation and/or trusts whose contract earnings exceed the money limit;

- iii. properly construed, ss. 276(3) and 276(4) preclude a corporation and/or partnership consisting of a corporation making an application under s. 276.
- b. in the case of partnerships:
 - i. a partnership, not being a 'person', cannot bring an application under s. 276 or,
 - ii. in the alternative, a partnership not being a corporation or a legal entity and having no independent legal existence cannot bring an application under s. 276.
- c. further in the case of partnerships, if it is held that a partnership consisting of natural persons can bring a s. 276 application, then:
 - i. a partnership consisting of corporations cannot bring a s. 276 application; and
 - ii. s. 276(6) applies, in an event, to prohibit a s. 276 application by a partnership where the earnings of the partnership exceed the prescribed amount.
- d. in the case of trusts:
 - i. a trust, not being a "person", cannot bring an application under s. 276 or,
 - ii. in the alternative, a trust not being a corporation or a legal entity and having no independent legal existence cannot bring an application under s. 276;".

The applicants reject the submissions of the respondent and essentially rely on the decision of Blades, C. in *Braunack & Anon v Couriers Please Ltd* (2000) 165 QGIG 225 to support its decision. In that decision, the applicants say the Commission held that a partnership (as distinct from individual persons) could make an application under s. 276 of the Act.

The applicants point out that although the Commission did not finally decide the question of the standing of a corporate applicant as it was outside the scope of the application, a view was expressed that corporations may not be captured by s. 276(6). Reference was made to the decision of Hall, P on the same matter where the conclusions and reasoning of Blades, C was adopted. *Couriers Please Pty Ltd v Graham Braunack and Anor* (2001) 166 QGIG 141. In the appeal decision, Hall, P commented that the approach of the Commission could result in big corporations bringing applications under s. 276. The applicants submit that the decision acknowledges that corporations could indeed bring applications.

The respondent's approach is that the determination of who can make an application should commence from an interpretation of s. 276(6). The Act in s. 276(3) provides who may make an application and includes at (a) a party to the contract. "Party" is defined in the *Acts Interpretation Act 1954* as "includes an individual and a corporation". Section 276(6) specifies who may not make an application and refers to a "person" in certain circumstances. I agree with the view of Blades, C expressed in *Earner v Queensland Investment Corporation* (2001) 167 QGIG 267 that s. 276(6)(b) should be read as "a person can not make an application if the person is other than a public servant on tenure and has an annual wage of more than \$68 000.". Section 276 gives the Commission the power to amend or declare void both a contract of services that is not dealt with by an industrial instrument and a contract for services. Section 276(6)(b) would seem to have relevance only to a contract of service because it refers to the annual wage of the excluded person.

"Wages" is defined in Schedule 5 – Dictionary of the Act to mean:–

"(a) an amount payable to an *employee* for –

- (i) work performed, or to be performed, by the *employee*; or . . ." (emphasis added).

Wages are thus payable only to employees.

"Employee" is defined in s. 5 of the Act and although members of a partnership in specified circumstances might be employees, the partnership itself cannot be an employee. Neither can a corporation be an employee. Employees are engaged under a contract of service. Considering all this, the term "person" where it appears in s. 276(6) of the Act must be interpreted as an individual and not a corporation.

This may prevent employees who are not engaged under an industrial instrument and who earn in excess of \$71 200 from making an application under s. 276 but permit corporations and partnerships to do so. This may be an unintended consequence of the legislation but the prospect of corporations making applications was discussed by Hall, P in *Couriers Please Pty Ltd v Graham Braunack and Anor* (supra).

Section 276(6) provides for two types of exclusions. Paragraph (a) excludes cases where an application for reinstatement has been made. Clearly it is only an individual who is an employee who can make such an application. Paragraph (b) has already been dealt with. This confirms the view that the exclusions are directed only at natural persons who are employees.

In view of the construction given of s. 276(6), those applicants in these matters who are either a corporation or partnership, whose earnings exceed \$71 200 are not precluded by this provision from making an application.

Who may make an application is provided for in s. 276(3) and includes a party to a contract. In *Braunack* (supra) Blades, C decided that "party" as used in s. 276(3) included natural persons in a partnership. Detailed reasons were given for that decision. They were confirmed on appeal. The Commission is bound by a decision of a superior court. Accordingly, a partnership consisting of natural persons, is able to be a party to a contract and make an application.

In the appeal decision *Couriers Please* (supra), the prospect of corporation making an application was clearly contemplated by Hall, P. The Commission finds that corporations are not excluded by s. 276(3) from making an application to vary a contract for service.

One of the applications, B638 of 2001, is brought by Bonnell Transport (a partnership). The respondent argues that a partnership consisting of a corporation as well as a natural person or persons is excluded. The Commission has already dealt with the argument about whether a corporation or partnership can make an application. Given the affirmative findings on these matters, the Commission can see no impediment to a partnership consisting of a partnership (comprised of natural persons) and a corporation from being an applicant. Further, as Blades, C said in *Braunack* (supra):–

"It must be understood that a partnership is not a corporation, is not a legal entity and has not independent legal existence. It is *constituted* by legal entities whether they be by natural persons or corporations or a mixture of both."

There is however a deficiency in the application in that the persons constituting the partnership are not named. The applicant acknowledges this and foreshadows seeking leave to amend the name of the applicant to "Jack Pearce Haulage Pty Ltd and E.A. and H.M. Bonnell, a partnership, trading as Bonnell Transport.". This matter should be raised when the application next comes on for hearing.

I have dealt with the capacity of a corporation or partnership to make an application. One of the applications (B641 of 2001) has been made by a trust, the Brinckman Business Trust. A partnership though not a legal entity, can be distinguished from a trust on many grounds including being constituted by natural persons and hence being able to make an application under s. 276(3) of the Act. In contrast, a trust is not a separate legal entity (being no more than a collection of duties, disabilities, rights and powers) and is not a legal person which can sue and be sued in its own name. (Latimer, P. "Australian Business Law" CCH, 1990 p. 690). Accordingly, the respondent effectively seeks Case No. B641 of 2001 be struck out.

In its response submissions, this applicant belatedly realised its error and has advised that "leave will be sought to amend the proceedings to make the applicant Peter Brinckman as trustee for the Brinckman Business Trust.". A trustee, being a natural person, would be able to make an application.

The application contains an error which is capable of rectification. The Commission is not prepared to dismiss Case No. B641 of 2001 at this point for what would appear to be a significant but nonetheless technical error. Further will be heard from the parties on this matter when the case is next relisted.

This leaves the issue of whether certain applicants are parties to the contracts. The applications in question are B635, B637, B639, B640, B642 and B643 of 2001. The submission on this matter by the respondent is that the corporation that has made an application is not the party as it was not the original contracting party. The respondent contends it is a specified individual who is the party to the contract. The named corporation is subcontracting to the original contractor with any cause of action being against the principal. Because the contracts as they were originally construed did not include the applicants, then the applicants are unable to bring the applications.

The applicants submit that:

"It is a matter for evidence at the hearing of the matter as to whether, at the time the contracts were terminated by the Respondent, each of the Applicants was a party to a contract with the Respondent. It is the Applicant's case that each of the Applicants was a party to a contract with the Respondent at the time the contracts were terminated. Simply because the original contracting parties may have been different, does not mean that the Applicants were not parties to the contract at the time of the Respondent's termination of the contracts. Evidence will be led at hearing in relation to how the changes in contracting parties occurred and how the Respondent acquiesced and indeed consented (expressly or by implication) in those changes. Those are matters for evidence however and it is not appropriate for the Commission to determine on a summary basis that the Applicants have no standing on this basis without hearing evidence on these matters."

The Commission agrees with the applicants that these matters are for evidence and that it is inappropriate for the Commission to determine at this point that the applicants have no standing on the grounds advanced.

In summary, the Commission rejects each of the jurisdictional challenges raised by the respondent. The applicants are to advise the Registry in writing when they are ready to proceed with the substantive matters.

Order accordingly.

G.K. FISHER, Commissioner.

Appearances:-

Mr M. Brady (Barrister) instructed by Mr J. O'Dwyer (Reidy and Tonkin) for the applicants.

Mr J. Murdoch SC instructed by Mr H. Lepahe (Corrs Chambers Westgarth) for the respondent.

Released: 3 October 2001

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 276 – power to amend or void contracts

**Peter Geoffrey Grayson and Gail Margaret Grayson AND Family Four (99) Pty Ltd
T/a Fine Pastry Factory and Peter Thomas (No. B710 of 2001)**

COMMISSIONER BLADES

4 October 2001

Unfair contract – Delivery of pastry products – Contract for sale of motor vehicle and delivery run – Whether contract for services – Misrepresentations of fact – Conduct of respondent allegedly rendering contract unfair – Issues of fact – Application dismissed.

DECISION

This is an application brought by Mr and Mrs Grayson for orders under section 276 of the *Industrial Relations Act 1999* (the Act) that a contract for services entered into with the first respondent be declared void. That application also seeks an order for payment of money by both the first respondent and the second respondent who was the sole director, secretary and shareholder of the first respondent.

On 12 January 2001, the applicants and the first respondent entered into a written contract whereby the applicants purchased a business, being "the business and goodwill of Food Wholesaler – Brisbane run", including a Toyota Town-Ace Van for the sum of \$31,000 apportioned as \$19,000 to the business and goodwill and \$12,000 to plant and equipment, (the Van).

The first respondent also carried on business as "Fine Pastry Factory". The "Brisbane run" referred to was the delivery of product manufactured by the first respondent to outlets in the Brisbane area. It was alleged that the terms of the delivery contract were never reduced to writing but were contained in the "Pastry Product Delivery Contract", a draft document. According to representations made by the second respondent, the applicants allege that the average income of between \$1,969 and \$2,126 per month, represented by commissions calculated at 15% upon gross monthly sales of between \$13,129 and \$14,178 could be expected. The applicants allege that these figures never eventuated, that in their first week of operation they earned \$453.19, in the week ending 9 March 2001 they earned \$252.32 and that in the week of 23 April, 2001, they earned \$25.

This application to the Queensland Industrial Relations Commission was filed 17 April 2001.

The draft "Pastry Product Delivery Contract" was not sighted by the applicants until after 12 January, in fact about 6 March 2001, but it was agreed that it recorded to a substantial degree how the business operated.

The applicants allege that the contract for the sale of the business and the contract to provide services to the first respondent was an unfair arrangement for the following reasons:-

- . It was unfair at the time it was entered into because of misrepresentations made by the second respondent.
- . It became unfair after it was entered into because of the conduct of the first and second respondents, more particularly the second respondent.
- . It was unfair for other reasons, in particular, because of matters not disclosed to the applicants at the time they entered into the arrangement.

As to the allegation that the arrangement was unfair when it was entered into, the applicants allege that it was because of misrepresentations of fact made by Mr Thomas on behalf of the first respondent and because of some misrepresentations made by employees of the first respondent. These were that the applicants could expect to earn 15% of everything sold on the Brisbane delivery run; that the average sales of that run were between \$13,000 and \$14,000 per month; that by way of documents handed to Mr Grayson by Mr Thomas that set out the customers of the first respondent those customers were current and ongoing customers; that an employee of the first respondent represented to the applicant during the exposure period that the sales during that time were much slower than normal; that another employee of the first respondent represented to Mr Grayson that any discount given by the first respondent to customers would not affect the amount of money the applicants would receive; that there was a misrepresentation made by Mr Thomas that the vehicle that was sold as part of the contract was suitable for the delivery of food.

As to the allegation that the arrangement became an unfair arrangement after it was entered into, it is alleged that as part of the contract of sale, the first respondent would supply Mr Grayson at completion date with a list of customers on the Brisbane run and that was not done; that Ms Pieper an employee, or Mr Thomas did not disclose to Mr Grayson that an administration fee would be charged by the first respondent to the applicant as part of the delivery services; that the first respondent's employees or agents, as required under the contract, failed to assist the applicants develop customers for the first respondent and for the applicants; that the first respondent failed to assist the applicants in maintaining customers, particularly after being requested to do so by Mr Grayson.

As to the allegation that the arrangement was unfair because there were matters that the first respondent or its agents failed to disclose to the applicant prior to the contract being entered into, these included that any credit terms that some of the first respondent's customers enjoyed would affect the earnings made by the applicants; that some significant customers on the Brisbane run had prior complaints about the service and quality of the product supplied by the first respondent.

The applicants allege that the arrangement is an unfair arrangement and seek an order that the contract for the sale of the business be declared void from its beginning save and except to the extent of the title to the van that the applicants acquired and to the moneys that the applicants have received pursuant to the arrangement. The applicants seek an order for the payment of money by way of restitution to the extent of the purchase price of the business less the true value of the van which is alleged to be \$7,000, leaving an amount sought of \$24,000. In exercising its discretion to void the contract, the applicants contend that the Commission should have regard to the poor bargaining power of the applicants compared to the respondents and because of the unfair tactics of the first respondent and its employees and agents in making misrepresentations and failing to disclose information before and after the contract was made.

The respondents deny that the contract is a contract for services, deny all claims made by the applicants, allege that if the contract is a contract for services, then it is a fair contract. The respondents also sought to make a "cross-claim" for the price of goods sold and delivered by the first respondent to the applicants, payment for which had not been forthcoming. The claim consisted of product sold to the applicants by the first respondent during the last weeks of the relationship and which was unpaid for. Because the claim was in contract for the price of goods sold and delivered, a claim justiciable only in a court exercising civil jurisdiction, it was struck out on application made on the first day of the hearing.

Evidence in the proceeding was given by Mr Grayson on behalf of the applicants and by Mr Thomas and Ms Pieper on behalf of the respondents. A letter written by the owner of one of the customers, Helen's European Cuisine, was admitted into evidence on behalf of the applicants by consent. The onus is upon the applicants to prove on the balance of probabilities that the arrangement was unfair.

It is appropriate to make some general observations on credit but the decision has been made upon the whole of the evidence although not everything taken into consideration has been mentioned. The contract of sale was entered into on 12 January 2001. During the days prior to that, Mr Grayson operated the run, both with two employees and then on his own. This has been termed the "exposure period" and was in fact a trial period. Mr Grayson alleges that the two employees told him that sales during that period were very quiet and much slower than normal. During his cross-examination he also alleged that he had been told by Mr Thomas in January that sales were slower than normal, yet that latter important information, which was denied, was not included in any documentation and his claim that it was the Solicitor's error was not particularly attractive. Mr Grayson also claimed that he had complained to Mr Thomas that the customer list was inaccurate, yet again, that information was missing from his written affidavit. Mr Grayson made an allegation in his affidavit that he had been purposefully misled by an omission of figures from the summer months. He had been supplied figures for sales from April to November 2000. The business had only been purchased by Mr Thomas in April 2000, a fact which should have been known to Mr Grayson because it was disclosed on the Reconciliation document containing those figures. Mr Thomas did not have figures for the summer months and Mr Grayson's explanation that, again, it was his Solicitor's fault is not accepted. There was also an allegation in Mr Grayson's statement that the representation was that he would be able to make \$500 per week but the figures supplied to him indicated a range from \$450 to \$484 per week. He again blamed his Solicitors. On 6 March 2001, Mr Thomas held a meeting of all vendors which Mr Grayson did not attend. He readily initially agreed that he did not attend because he was at his Solicitor's office but later recanted and was rather vague as why he did not attend. Yet the first correspondence from the Solicitor was written on 16 March. There also appeared to be an inconsistency when Mr Grayson first denied that by the end of March or beginning of April he had given up on the business, yet later conceded that because of that letter of 16 March, the contract was not worth persisting with. In his written statement, he alleged that Mr Thomas had attempted to hamper his sales rather than provide support. Under cross-examination, he agreed that Mr Thomas was not hampering sales.

Although Ms Pieper was an employee of Mr Thomas, I accept her testimony as accurate and honest. She claimed that the document identified as "PG3", a Customer Report was given to Mr Grayson on 19 January when she had a meeting with him. Mr Grayson was insistent that it was given to him by Mr Thomas on 21 December as a list of current customers. Mr Thomas gave evidence that the first he knew of "PG3" was on 17 September 2001. It was common ground that the "Run 61 List", another list of customers, being part of Exhibit "PG2" was provided on 21 December. It is noted that the lists of customers do not coincide in that "Time Out Coffee Lounge" does not appear on the "Run 61 List". I would have expected the discrepancy to have been brought up with Mr Thomas before the contract was signed if both documents were provided simultaneously but there is no evidence that occurred. The evidence of Ms Pieper and Mr Thomas is preferred.

In contract law, a misrepresentation is a statement made by one party, or agent, to the other, before or at the time of contracting, about some existing state of affairs or some past event, which is one of the factors which induced the representee to enter the contract. It must be a representation that is not true or leads the other party into error. The test is what would have been understood by a reasonable observer, not what was intended – see paras 11.9–11.10 *Cheshire & Fifoot's Law of Contract 7th Australian Edition*.

The alleged misrepresentations that the applicant could expect to earn 15% of everything sold and that the average sales were between \$13,000 and \$14,000 per month can be dealt with together. When Mr Thomas met with Mr Grayson on 21 December, he handed to him a series of documents containing the “Brisbane Run Reconciliation” which listed gross sales for the period April, 2000 to November 2000. April figures were for part of the month only. The monthly average including April was \$13,129.57, excluding April was \$14,167.54. Mr Grayson claimed that he asked the question “What are the average sales at the moment?”. While Mr Thomas denied he told Mr Grayson “Between \$13,000 and \$14,000 per month” but gave him the documents, the variance would not appear to have much relevance because the representation that was made was as to an existing fact which was not disputed in evidence. In other words, it was not disputed that the figures provided were accurate and were the “average sales at the moment”. Mr Grayson also alleged that Mr Thomas told him that they were the monthly earnings he could expect to receive. This was denied by Mr Thomas and I accept that denial on the probabilities. Mr Thomas had not owned the business for a full twelve months and only had figures from April. I consider that it was unlikely that he made such a representation.

Mr Grayson conceded that a customer might go out of business or go to the opposition, might go out of stocking product, might reduce stocks of product or might decide not to like the applicant or his service. He also conceded that there might be a downturn in the economy. He agreed that there were no guarantees that he would have the same customers in the future or that there would always be sales of \$13,000 to \$14,000 per month or that sales would continue at the same rate. He also admitted he took a risk.

I am satisfied that there was no misrepresentation as to the earnings. I am satisfied that the figures were provided to Mr Grayson as an accurate account of the daily performance of the Brisbane run since the respondents purchased that run in April.

It was submitted that I should accept Mr Grayson's evidence in preference to Mr Thomas' evidence because Mr Thomas wanted to sell his business and it was cheaper for him to do so. However, it is equally relevant that because there had to be an ongoing relationship of trust and confidence between the two that Mr Thomas might not be likely to provide inaccurate information and thereby establish a bad relationship with a person on whom his business depended.

It was conceded that the agreement was that Mr Grayson was to get 15% of the gross sales. Nothing was said about expenses, for example, petrol, but it must have been obvious to Mr Grayson that he would have some expenses associated with his 15%. Liability for the payment of Goods and Services Tax should also have been obvious to him as he had previously conducted a business. I remain unsatisfied that the statement that he was to get 15% of gross sales amounted to a misrepresentation.

There was an allegation that because of the documents handed to Mr Grayson by Mr Thomas on 21 December that set out the current customers, there was a misrepresentation because three of those on that list were not current customers at all. Mr Thomas alleges that three customers on that list were potential customers, evidence corroborated by Ms Pieper who actually printed the list, and that Mr Grayson was told that three were potential customers. Moreover, there was a dispute about what Docket Reports were provided, Mr Grayson alleging that only the final days Report in each month were handed over. I am satisfied on the probabilities that what Mr Thomas provided to Mr Grayson on 21 December was the Brisbane Run Reconciliation, the Run 61 List and the Docket Reports for the whole of the period from 10 April 2000 to 30 November 2000. I saw no reason why he would hand over only part of the documents and I would have expected Mr Grayson to insist on seeing the other pages if some were missing. Had Mr Grayson studied the Reports provided to him for that purpose, he would have seen that two of the names were not current customers and he could have challenged the apparent divergence there and then. He had ample opportunity during the times he was an observer on the run and when he operated the run himself prior to contract to check out the representations. What is of most significance is that there were two other names on the Docket Reports, namely Time Out Coffee Lounge and Sugar and Spice Capalaba, neither of which were included on the list of current customers at all, yet both had purchased product, the former in November 2000 and the latter in September and October 2000. In other words, Mr Thomas could have included those two businesses as current customers and their omission indicates to me an attempt at accuracy of the list. Furthermore, one of the “potential” customers, Wellington Country Chicken, had in fact purchased product in September, making it unnecessary for that business to be classified as a “potential” customer. While I acknowledge that Mr Thomas' intention is not relevant to whether there has been a misrepresentation, I am unable to accept on the probabilities that there was a misrepresentation in relation to the current customer list. I am satisfied that there was an attempt at accuracy by defining three on the list as “potential” customers.

In any event, I am satisfied that the representation as to the number of customers on the customer list did not induce Mr Grayson to enter into the contract. Mr Grayson did not make any enquiries as to the volume of sales to each customer and was probably more interested in the gross sales figures provided as opposed to the number of customers. The number of customers would appear on the probabilities to have little relevance.

There was a complaint that employees represented to Mr Grayson during the exposure period in early January and just prior to him signing the contract that sales were much slower than normal. This allegation was not denied and Mr Grayson alleged it was a misrepresentation because sales could only be slower in cases where schools were closed because of the school holidays. There were no schools in Mr Grayson's run, hence the misrepresentation. No basis was suggested for these two employees to mislead Mr Grayson. They knew he had no schools on his run. In a letter dated 28 February 2001, marked “PG21”, to all vendors, Mr Thomas spoke of times being quiet and that everyone spoken to had said they were experiencing quiet times. This letter appears to have been written before Mr Grayson commenced any sort of legal dialogue and in my view is some corroboration that times were quiet and that the statements of the employees were accurate. Mr Thomas also spoke about “very slow times” in his letter to the vendors dated 6 March, exhibited as “PG22” and Mr Grayson's Solicitor's letter was not written until 16 March although it would appear that he visited the Solicitor on 6 March. Mr Grayson presumed in cross-examination that the winter months would be more profitable than the summer months. I am unable to find on the balance of probabilities that there was a misrepresentation by the two employees.

There was an allegation that there was a representation made which was false, that any discount given by the first respondent to the customer would not affect the amount of money the applicants would receive. This was a most confusing allegation because Mr Grayson himself in cross-examination admitted that the allegation was irrelevant and said that he was not concerned with the fact that if the factory gave a discount, then he would get 15% of the discounted price. This is what seems to have been encompassed in the representation alleged to have been made. Mr Grayson was told, according to his evidence, that if he gave a discount then it would reduce the amount he would receive but if the factory gave a discount, it would not interfere with the amount he would receive. It was common ground that Mr Grayson was entitled to give his own discount from his 15% but if the factory gave the discount, he still received the full 15% of the discounted amount. I am unable to find any misrepresentation.

The final misrepresentation alleged was that the vehicle that was sold as part of the contract was suitable for the delivery of food when it was not. An insulated unrefrigerated Mitsubishi van was originally included as part of the contract. While Mr Grayson alleged that it was fibreglassed and not insulated, I accept on the probabilities the evidence of Mr Thomas that the fibreglass covered foam insulation on the same principle as an Esky. This was the vehicle that was normally used in the delivery of product. It was marked “Food Delivery Vehicle” and was the vehicle used by Mr Grayson

during the exposure period on the trial runs. Mr Grayson did not wish to purchase it because he believed it unroadworthy. Mr Thomas had another vehicle for sale, a Toyota Town-Ace, a stock standard vehicle, which was not insulated but which was newer than the Mitsubishi and of more value. After negotiation, the original asking price for the business was negotiated upwards and the Toyota was included instead of the Mitsubishi. Health Regulations requiring product of this nature to be kept at 5 degrees C during transportation did not come into force until 1 July 2001 but they were mooted. I accept Mr Thomas' evidence that insulation was generally sufficient to keep the product under that temperature if it commenced its journey at 0 degrees C. There was at least one other delivery driver whose vehicle was neither insulated nor refrigerated. Only two drivers had refrigerated vans. Mr Thomas gave evidence that he told Mr Grayson the Mitsubishi was insulated and that insulated vans might be required and that Mr Grayson accepted that changes to the Toyota would be necessary. I accept that evidence on the probabilities. Mr Grayson's own observations of the Mitsubishi Van's insulation should have made him aware that alterations to the Toyota were necessary. It is probable that his observations of other drivers lessened the urgency and the importance for the changes to be made to the Toyota in the immediate future.

The proprietor of Helen's European Cuisine had raised with Mr Thomas some time in November or December 2000 that product should be delivered at 5 degrees C or below. Helen's European Cuisine was an important customer of the arrangement and I consider it probable that Mr Thomas told Mr Grayson prior to contract that insulation of the vehicle would be a requirement in the not too distant future.

I am not satisfied that there was any misrepresentation either by way of a positive assertion or by implication from conduct.

It was then alleged that the arrangement became an unfair arrangement after it was entered into. It was alleged that as part of the contract of sale, the first respondent would supply Mr Grayson at the completion date with a list of customers on the Brisbane run and that was not done. There is no issue taken with the fact that it was not done on completion date. The reason was that the list had been supplied to Mr Grayson on 21 December. I would see no reason why another list should be provided. In any event, it would hardly render the contract unfair.

It was alleged that Ms Pieper did not disclose to Mr Grayson that an administration fee would be charged by the first respondent as part of the delivery services. Neither Ms Pieper nor Mr Thomas alleged to the contrary and it was accepted that there had been no discussion prior to contract of an administration fee. This fee was charged because invoices were prepared on behalf of Mr Grayson for his customers by the respondent. It saved him the paper work. The first he heard of the administration fee was during the first week of his contract when a drivers' meeting was held where the fee was increased from \$25 to \$30 or \$33. Mr Grayson accepted that if the fee had been discussed at the start, he most probably would not have had any problems with it and would have agreed to it.

It was alleged that the respondents failed to assist the applicants to develop customers and failed to assist the applicants in maintaining customers. The first customer identified was Night Owl, Beenleigh which did not purchase product from Mr Grayson at all. However, Mr Grayson was advised prior to contract that other drivers were having trouble with the lady concerned. Mr Thomas said that when he became aware that Night Owl, Beenleigh was not buying, he telephoned the proprietor who advised him that while there had been a problem with one of the drivers, she was looking at other suppliers in the Brisbane area. She also owned the Night Owl, Auchenflower which continued to purchase product until 9 February 2001. I am unable to come to a conclusion that Mr Thomas did nothing at all.

The second complaint was in relation to Quick Snax which Mr Grayson had attempted to obtain as a customer. He gave evidence that he approached the Manager of Quick Snax about 1 March who agreed to meet with Mr Thomas. Mr Grayson alleges that Mr Thomas did not provide Quick Snax with a price list until 8 March and even then it was only a full priced price list. It was not until 22 March that a complete price list was sent. It was alleged that Mr Thomas did not attend upon the Manager at all but wrote to him on 18 April by which time Quick Snax had lost interest. Documents produced by Mr Thomas show that he faxed price lists on 8 March after having had at least one previous discussion with the Manager, that he sent another complete copy of price lists on 22 March and that on 18 April, he sought estimates of the quantity of product to afford him an opportunity to consider a discounted wholesale price. That fax indicates a concern about an appearance of being too "pushy". Mr Thomas was never supplied with an estimate of the quantity of product likely to be purchased to enable him to consider a discount. I am satisfied that there was little else Mr Thomas could have done.

Mr Grayson also complained that he had attempted to obtain Griffith University as a customer on or about 5 February 2001 but that Mr Thomas did not supply a price list for two weeks and when he did, it was a full price list. A copy of a fax exhibited as "PG14" indicates that a discounted price list was sent on 19 February and that Mr Thomas had spoken by telephone to the University the Friday before. Although there was initially a complaint that the University had not done business with Mr Grayson because his vehicle was not refrigerated (later changed in oral evidence to "not insulated"), a letter from the University dated 20 February to Mr Thomas indicated that the decision was made on price and range of product.

Another matter referred to in the complaints was that the respondent failed to disclose credit terms for some of the customers. Helen's European Cuisine was a major customer and enjoyed credit. This of course meant that Mr Grayson was out of pocket for the amount of the credit during the period that credit was extended. However, he admitted that he was made aware before contract that some customers enjoyed a credit arrangement and he made no enquiries. He also said he realised that he would have to wait a week or two for payment in some cases. There was no evidence that there were any "bad payers" at the time the representation about "bad payers" were made.

The allegation that it was not disclosed to Mr Grayson prior to contract that some significant customers had prior complaints about the service and quality can only relate to Night Owl, Beenleigh and Helen's European Cuisine. The letter from Helen's European Cuisine, admitted into evidence, corroborates complaints about quality of product and standard of service but does not provide evidence that the concerns and complaints existed prior to contract. As Mr Grayson's association with Helen's extended over about 5 weeks, the complaints may in some way have related to him. Mr Grayson admitted he was aware of problems associated with Night Owl, Beenleigh prior to contract.

An unfair contract, for the purposes of this case, is a contract which is harsh, unconscionable or unfair – s.276(7). The determination of fairness is according to the common sense approach of a jurymen by applying standards which appear to provide a proper balance or division of advantage or disadvantage between the parties who have made the contract or arrangement. Their conduct, their capability to appreciate the bargain they had made and their comparative bargaining positions when entering into the contract will always have to be borne in mind – see *Hungerford J in McNaught v Micador Australia Pty Limited* (1996) 83 IR 111. It is a plain matter of morals not law. The section's massive power makes it imperative that it should be exercised with proper restraint. It should not permit itself to become a refuge for those who are merely disgruntled with a bargain entered into on even terms. The discretion should be exercised to protect victims of wrong dealing not to prescribe anodynes – *Baker v National Distribution Services Limited* (1993) 50 IR 254. Any conduct of the parties may cause a contract to be unfair – *Reich v Client Server Professionals of Australia Pty Ltd* (2000) 49 NSWLR 551. The unfairness may arise either from the terms of the contract itself, the surrounding circumstances or from the manner of performance or operation of the contract. It may arise simply in the special circumstances of and surrounding the particular contract – *Barry v Incitec Ltd* (1991) 45 IR 143.

It was alleged that Mr Grayson had poor bargaining power compared to the respondents. Mr Grayson owned a courier run prior to this arrangement and which he had sold because of the hours he was required to work. It was a somewhat similar operation. The allegation that the respondents enjoyed a very superior bargaining power was not developed further other than that the respondent had control over the information. No operative inequality in the bargaining positions of the parties was pointed to and there was no reason to believe that Mr Grayson lacked the moral strength of an ordinary person – see *Buchmueller v Allied Express Transport Pty Ltd* (1999) 88 IR 465.

Barwick CJ in *Stevenson v Barham* (1977) 136 CLR 190 said that the legislature had apparently left it to the good sense of the Industrial Commission not to use its extensive discretion to interfere with bargains freely made by a person who was under no constraint or inequality, or whose labour was not being oppressively exploited. In *Mozzoni v Dean* (1970) AR 1 McKeon J commented that the section was plainly designed to protect citizens from unfair and harsh dealing but it could not be used to avoid a contract merely because the applicant was sorry that it had been made.

The records indicate that Mr Grayson's earnings dropped off very rapidly from early March 2001. He lost Helen's European Cuisine as a customer from 21 February. Helen's was by far his biggest customer. He lost Marina Foods and Convenience from 2 March and although that account was smaller, it was a daily delivery. During the whole of the period of his relationship he failed to introduce any new customers to the run. He knew that there was no guarantee he would keep a customer or that the customer would remain loyal. It was his business and had he introduced new customers to the run, he would have increased his income. That would have taken some time which he may not have been prepared to give, having sold the previous courier business because of the hours involved. He stopped pursuing new customers after about 6 weeks. The loss of Helen's combined with the loss of Marina Foods must have been sufficiently disappointing to have caused him to make an appointment with his Solicitor on 6 March and his income generally declined from there. It is probable that upon learning of Helen's cancellation and knowing that Helen's was his most significant customer, Mr Grayson found it uneconomical to insulate his vehicle (cost of \$2,500) or to install refrigeration (cost of \$4,000). All Mr Grayson had to do was to recruit one new customer of the size of Helen's and his problems most likely were over. The only evidence of attempts to locate new customers was that he approached Griffith University, Quick Snax and wrote to some schools.

There was a complaint that on the first day of the run, 15 January, Mr Thomas cancelled the discount that the respondent had organised for Helen's European Cuisine. Mr Thomas wrote to Helen's advising them that Mr Grayson had taken over the run and advising them to renegotiate the discount with Mr Grayson. Unfortunately, Mr Thomas did not tell Mr Grayson who was confronted by the owner of Helen's about the loss of the discount. When Mr Thomas was informed there was a problem, the first respondent reinstated the discount about two weeks later.

I am unable to find that there were any misrepresentations. While there was a failure to advise the applicants of the existence of the administration fee and while it may have been possible for the respondents to have been more efficient in attending to customer relations, I am not satisfied that on the whole of the evidence, the arrangement was harsh, unconscionable or unfair and I am not satisfied that the arrangement was an unfair contract.

There was also a submission that the contract was not a contract for services. The respondents allege that there were two distinct contracts, one for the sale of a business and the second for the supply of pastry products. The submission was that the applicants did not provide services to the first respondent but that Mr Grayson purchased the product from the first respondent and then sold and delivered the product to his own customers.

This matter has lost its relevance in view of my findings on the substantive issues. However, I will make some brief comments. The advertisement for the sale of the business was for a "Food Delivery Run" and the contract of sale included the business and goodwill of Food Wholesaler – Brisbane Run. A letter dated 15 January exhibited as "PG10" to Helen's European Cuisine (referred to earlier) informed Helen's that Mr Grayson "had taken over deliveries of Fine Pastry Factory product to the Brisbane area". No matter under what guise the arrangement was, the effect of the arrangement was that Mr Grayson delivered the respondent's product to various outlets. Unlike the contract in *Jordan v Aerial Taxi Cabs Co-operative Society Ltd* (2001) FCA 972, the gist of the contract between Mr Grayson and the respondent was the provision of the delivery services. In *Brown & Others v Rezitis & Others* (1970-71) 127 C.L.R. 157 Barwick C.J. said at 164 that one of the purposes of the section was to deal with subterfuges. This legislation is remedial in nature and should be construed beneficially so as to give the fullest relief which the fair meaning of its language will allow – *Beahan v Bush Boake Allen Australia Ltd* (1999) 47 NSWLR 648 at 664. In my view, it was a contract for services.

The application is dismissed.

I order accordingly.

B.J. BLADES, Commissioner.

Released: 4 October 2001

Appearances:-

Mr J. Merrill, Counsel, instructed by Primrose Couper Cronin & Rudkin, for the Applicants.

Mr D.C. Rangiah, Counsel, instructed by Nicol Robinson Halletts, for the Respondents.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Shop, Distributive and Allied Employees Association (Queensland Branch)
Union of Employees AND Rulebrook Pty Ltd (formally Mixea Pty Ltd)
t/as Addable (No. W94 and W95 of 2001)**

COMMISSIONER THOMPSON

3 October 2001

Unpaid wages – Award coverage – *Retail Industry Interim Award – State* – Arbitrated Matter – Witness evidence – Application granted – Order made.

DECISION

These matters came before the Commission, filed separately, in respect of Ms Kym Hind-Jordon (W94 of 2001) and Ms Narelle Wilson (W95 of 2001), seeking that Rulebrook Pty Ltd (formally Mixea Pty Ltd) t/as Addable (Addable) pay outstanding wages owed to both the applicants.

It was agreed by the parties that the applications be joined on the basis that both applicants are former employees of the respondent company.

Applicant(s)

Evidence was provided by Mr Darryn Gaffy, Ms Wilson and Ms Hind-Jordon in support of the applications.

Mr Gaffy is the Workcover Claims and Information Officer employed by Industrial and Workcover Services which is the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees' (SDA) approved agent for Workcover and Industrial Services.

His evidence was that, at the request of the SDA, he prepared back pay claims arising out of the employment of both Ms Wilson and Ms Hind-Jordon.

The details of the claim, and the associated workings, were tendered as a Schedule (marked "DG 1") to his affidavit of evidence.

The assessments for both applicants were based upon the *Retail Industry Interim Award – State* and covered such areas as: classification of employment, wages, allowances, hours of work, rest pauses, meal breaks, statutory holidays and annual leave.

In respect of Ms Hind-Jordon, the calculations provided to the Commission claimed for a net amount of \$2,243.42, and for Ms Wilson, a net amount of \$2,863.41.

The evidence of Ms Wilson was that her employment commenced with the respondent company in May 1999 and ceased employment on 25 January 2001. A period of maternity leave was taken between 20 April and 9 October 2000.

She provided, to the SDA, copies of time and wages records, pay slips and bank statements indicative of deposits made to her credit on account of wages (copies of the information was attached to her affidavit of evidence marked “NW1”).

Ms Hind-Jordon commenced employment on 18 March 2000 and ceased on 8 March 2001. The employment was on a casual basis with the engagements generally on the basis of five (5) days per week.

For the assessment of her claim by the SDA, she provided copies of the roster book and entries from her own book which showed the hours worked during the period of her employment (copies of the information was attached to her affidavit of evidence marked “KH-J 1”).

Respondent

The respondent relied upon the evidence of Ms Maria Pham, the Managing Director of Addable.

The company operates a number of retail clothing outlets located at Carindale Shopping Centre, Chermside Shopping Centre, Morayfield Shopping Town and Garden City Shopping Centre.

The applicants were primarily employed at the Carindale store.

The conditions of employment for the applicants, according to information received from Wageline, were governed by the *Retail Industry Interim Award – State* and the *Trading Hours Act 1990*, in which the stores were classified as an Independent Retail Shop.

The witness confirmed the employment periods for both applicants as being those evidenced by Ms Hind-Jordon and Ms Wilson, and stated that the mode of employment was that of a casual nature in each case.

Ms Pham stated that the applicants’ hours were those as displayed on a roster, with a practice in place that all alterations to the roster would be recorded on the roster.

In an attachment to her affidavit of evidence (marked “MP 1”), copies of roster sheets completed by the applicants, a summary of hours worked, a summary of wages paid and an amount identified as “short pay”, were provided to the Commission.

Final Submissions

Applicant

Mr Laurie Gillespie, of the SDA, in the first instance, questioned the accuracy of the attachment to the affidavit of Ms Pham and, in particular, raised issue in respect of the rosters and the hours worked by Ms Hind-Jordon.

He also alleged that there were discrepancies in the material relating to the hours worked and those recorded where they related to Ms Wilson’s employment.

In respect of the treatment afforded the applicants by the respondent, at page 60, line 58 of transcript, Mr Gillespie said:–

“It merely went to – illustrates that the respondent was less than scrupulous in the way she had dealt with her employees as far as fair dealing and time were concerned and compensating them for their own private time into which the employer had incurred.”.

In terms of the employees receiving the correct rates of pay, Mr Gillespie contended that never, at any stage during the tenure of the applicants’ employment, did they ever receive their correct entitlements.

According to Mr Gillespie, Ms Pham demonstrated a knowledge of the Award when it provided some form of appreciated benefit for her business, yet seemingly when it applied benefits to the applicants, she was less than scrupulous.

Finally, it was submitted that the respondent had acted improperly by short paying the applicants, and their claim should substantially be approved.

Respondent

Mr Michael Crimmins, of the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI), delivered the final submissions on behalf of the respondent.

He acknowledged that a liability, in respect of wages and superannuation, existed and at page 66, line 56 of transcript, he stated:–

“We acknowledge a liability in respect of wages as are contained in that table and the accompanying superannuation liability. That was acknowledged by us yesterday, our position is the same and payment of that can be made at any time.”.

However, the quantum of the under payment, in the view of the respondent, was vastly different to the applicants’ claim.

In respect of Ms Hind-Jordon, the amount owing was \$549.25 and for Ms Wilson, it was \$641.74.

It was argued that the applicants had not produced sufficient evidence to justify the alleged under payments, and to merely produce evidence of a differentiation between a projected roster and actual hours worked, did little to help their cause.

This case, according to Mr Crimmins, rests on whether the applicants have established that an under payment other than what the respondent has admitted exists and it was strongly argued that they had failed to do so.

Finally, in terms of the quantum, Mr Gaffy, in his evidence, said in one instance that one claim was based on estimates, and that a portion of the other claim was also based on estimates.

Conduct of this matter

The Commission, at page 70, line 23, of transcript, had these comments:-

“Commissioner: Well, what I was going to say is that having had the opportunity over the last two days to hear evidence and the submissions of the parties, the Commission is less than happy with the material provided by both parties in respect of the employment conditions of both the applicants and – employment conditions in terms of remuneration.

It is my view that before I – and I pick up on the remarks that Mr Crimmins made that it would be very difficult to determine any amount really on what’s before me at the moment and in determining this matter fully and in a proper way, I’m going to indicate that I would expect firstly from Mr Gillespie to provide information in terms of a gross amount that he believes ought to have been paid as I’ve said earlier to him. From the position of the respondent, I would indicate that I would expect information to be provided as to the gross – all of the relevant pay details for both of the applicants for the periods of their employment.

Now, I would need that provided to me by close of business a week from today which I think would be 19 – 20 July.”.

Conclusion

On 17 July 2001, immediately following the completion of the hearing in this matter, the Commission received correspondence from Mr Gillespie advising that, subject to the execution of suitable deeds of release, both matters had been settled and that a withdrawal of the applications would follow in due course.

Further correspondence was received from Mr Gillespie (dated 21 August 2001) advising that the respondent had failed to execute the deeds of settlement and that the SDA now had serious concerns as to the security of the settlement.

A request was made to the Commission to convene a conference of the parties with the view to conciliating a finalisation of the matters.

A conference was held on 2 October 2001, and whilst attended by Mr Gillespie and Ms Hind-Jordon, the respondent failed to appear.

My Associate made numerous phone calls to two different numbers in an effort to contact the respondent, however was unsuccessful with no contact being made.

After a perusal of the Registry file, and in particular the facsimile “transmission slip”, I am convinced that a notification of the proceedings by way of facsimile had been duly forwarded to the respondent.

At that conference, Mr Gillespie tendered information that had been previously requested by the Commission in respect of the gross wages that had been paid to each of the applicants whilst they were employed by the respondent.

Arising from the evidence before the Commission, the period of employment for both applicants was undisputed, and it was acknowledged by the respondent that monies were owing in respect of both applicants, albeit, a different amount than claimed.

The Commission studied, at length, the material relating to hours worked, classifications, and payments received by each of the applicants.

It is the view of the Commission that some discrepancies exist in each of the affidavit attachments submitted in evidence by both Mr Gaffy and Ms Pham, and on this basis, the Commission was required to scrutinise, most closely, all of the information provided in making a judgment in this matter.

I find that, in the case of both Ms Hind-Jordon and Ms Wilson, they were not paid their full entitlements as prescribed by the Award, however I am unable to conclude that the net amounts claimed of \$2,243.42 and \$2,863.41, respectively, are able to be justified.

On consideration of all of the evidence and material before the Commission, I find that the respondent should pay Ms Hind-Jordan a gross amount of \$2,082.75, and Ms Wilson a gross amount of \$1,888.09, being for monies owed and not paid during the course of their employment.

I order accordingly.

J.M. THOMPSON, Commissioner.

Appearances:-

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

Mr M. Crimmins, of the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers, for the Respondent (in the first instance).

Released: 4 October 2001