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No. 10

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
CA251/02	Special Effects Shopfitting Certified Agreement	12/6/02	
CA252/02	Trident Construction Resources Pty Ltd t/a Trident Trades & Labour Hire Certified Agreement Queensland 2000	12/6/02	
CA259/02	Walkers Pty Ltd (Clerical) - Certified Agreement 2002	13/6/02	CA233/00
CA260/02	D & M Scaffolds Pty Ltd t/a M & J Scaffolding - Certified Agreement	13/6/02	CA561/97
CA261/02	Allsite Cranes & Rigging Pty Ltd - Certified Agreement	13/6/02	
CA262/02	Marble & Cement Work (WA) Pty Ltd - Certified Agreement	13/6/02	
CA263/02	PD Concrete Pty Ltd - Certified Agreement	13/6/02	
CA264/02	Sam Difrancesco Pty Ltd - Certified Agreement	13/6/02	

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

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

Carpentaria Gold Pty Ltd AND WorkCover Queensland (No. C16 of 2002)

Carpentaria Gold Pty Ltd AND WorkCover Queensland (No. C17 of 2002)

Copper Refineries Pty Ltd AND WorkCover Queensland (No. C18 of 2002)

Copper Refineries Pty Ltd AND WorkCover Queensland (No. C19 of 2002)

Oaky Creek Coal Pty Ltd AND WorkCover Queensland (No. C20 of 2002)

Oaky Creek Pty Ltd AND WorkCover Queensland (No. C21 of 2002)

Newlands Coal Pty Ltd AND WorkCover Queensland (No. C22 of 2002)

Newlands Coal Pty Ltd AND WorkCover Queensland (No. C23 of 2002)

PRESIDENT HALL

13 June 2002

DECISION

Each of the appellants brought an appeal to the Industrial Magistrates Court pursuant to s. 498 of the *WorkCover Queensland Act 1996*. The appeals were against a decision of the WorkCover Queensland Review Unit about the correctness of WorkCover's premium assessments for each of the appellants for accident insurance under the *WorkCover Queensland Act 1996* in respect of 1998/1999 and later years. Each appeal raised identical issues about the inclusion in the relevant premium calculation of amounts referable to industrial deafness claims made by employees of the appellants. Each appeal was dismissed by the Industrial Magistrate. It is the decision of the Industrial Magistrate which is now challenged pursuant to s. 509. Although the appeals were not joined, they were heard together.

Each of the appeals was argued on the assumption that the relevant version of the *WorkCover Queensland Act 1996* was that which included amendments up to Act No. 42 of 1999. Henceforth, I shall refer to sections without referring to the Act.

Section 5(i)(a) establishes a Workers' Compensation scheme for Queensland:

"Providing benefits for workers who sustain injury in their employment, for dependents if a worker's injury results in the worker's death, for persons other than workers, and for other benefits."

By s. 5(ii) the main provisions of the scheme established by the Act are said to include, amongst other things, provision for compensation for injuries sustained by workers in their employment, regulation of access to common law damages by workers for injuries sustained in their employment, the liability of employers for compensation for injuries sustained by workers in their employment and the obligation of employers to be covered against liability for compensation and damages either under a WorkCover insurance policy or under a licence as a self insurer.

"Injury" is defined at s. 34(i) as "personal injury arising out of, or in the course of, employment if the employment is a significant contributing factor to the injury." The definition of "injury" is both extended and reined in by the other subsections of s. 34. For present purposes it is necessary to mention only s. 34(iii)(c) by which "injury" is defined to include:

"Loss of hearing resulting in industrial deafness if the employment is a significant contributing factor to causing the loss of hearing."

Importantly, a worker who suffers an injury by way of loss of hearing resulting in industrial deafness is not entitled to compensation under the general provisions of the Act. By s. 152(1):

"The worker is entitled to compensation for the industrial deafness under part 9 and section 229(i)(a) and not under any other provision."

The part 9 referred to is part 9 of chapter 3 which deals with "entitlement to compensation for permanent impairment". Section 229(i)(a) is located within chapter 4 which deals with "injury management" and relates to the payment of medical costs by WorkCover. As well as limiting the entitlement of a worker suffering from a loss of hearing resulting in industrial deafness to an entitlement under part 9 and s. 229(i)(a), s. 152 specifies the circumstances in which a loss of hearing resulting in industrial deafness is to be treated as attributable to the worker's employment in the State of Queensland, specifies when the worker must claim for the injury and imposes a threshold "loss of hearing" test upon the worker's entitlement to a lump sum payment. Section 152(2), (3) and (4) provide as follows:

- "(2) The application for compensation for industrial deafness must be made –
- (a) while the claimant is a worker under this Act; or
 - (b) if the claimant would ordinarily be a worker under this Act but is temporarily unemployed; or
 - (c) within 12 months after the claimant's formal retirement from employment.
- (3) The worker is entitled to compensation for industrial deafness that is attributable to the worker's employment in the State as a worker if the worker –
- (a) has been employed in an industry in the State for a period of, or for periods totalling, at least 5 years; and
 - (b) the employment was at a location, or at locations, where the noise level was a significant contributing factor to the industrial deafness.
- (4) The worker is not entitled to lump sum compensation for the first 5% of the worker's diminution of hearing."

[For completeness, I note that s. 152(v) operates with s. 197 to require WorkCover to have the degree of permanent impairment of the worker's hearing assessed by an audiologist].

Finally, by s. 50(1):

"An employer is legally liable for compensation for injuries sustained by a worker employed by the employer."

It is the (presently irreversible) policy adopted by the legislature in s. 152(1), (2) and (3) which lies behind the issues on the present appeal. One may put aside the case in which an employee making a claim in respect of a loss of hearing which is industrial deafness has had only one employer. One may put aside also the case in which, although the claimant has had a number of employers, it may be affirmatively established that the loss of hearing which is industrial deafness is attributable solely to the engagement with a particular employer. In the common case, where there is serial employment or "at a location or at locations where the noise level was a significant contributing factor to the industrial deafness", the liability to pay compensation will fasten upon the last employer in the chain. The whole liability will attach to that employer notwithstanding that is the scheme of s. 152(iii) that liability arises out of employment at noisy locations within the State of Queensland and notwithstanding that the contribution to the diminution of hearing made by the employment last in the chain may be minimal. Section 32(2) which provides,

“A reference to an employer of a worker who sustains an injury is a reference to the employer out of whose employment, or in the course of whose employment, the injury arose”;

is not effective to confine liability to employers in whose employment or in the course of whose employment, the injury solely arose.

An employer is not, of course, expected to discharge the liability cast upon the employer by s. 50(1). The scheme of the Act is that the employer is to provide for the liability either under a licence as a self insurer under part 5 of chapter 2 or under a WorkCover policy, s. 52(3). Materially, the appellants were covered by a WorkCover policy.

Understandably every policy is supported by a premium. The function of setting the premium under a WorkCover policy is allocated to WorkCover, s. 58(1). Section 58(2) directs WorkCover as to how the premium is to be set. By s. 58(2):

“The premium payable for the policy for a period of insurance must be assessed according to the method (the “method”) and at the rate (the “rate”) specified by WorkCover by Industrial Gazette notice.”.

Subject to an obligation to notify the Minister and to the right of the Minister to issue directions, the decision about the “method” to be specified by the Industrial Gazette notice and the decision about the “rate” to be specified by the Industrial Gazette notice is remitted to WorkCover. The relevant notice, “WorkCover Queensland Notice No. 1 of 1998”, was published in the Industrial Gazette for the 26th of June 1998, see 158 QGIG 231-299. It has (relevantly) been amended by “WorkCover Queensland Notice Amendment Notice (No. 3) of 1999” which was published in the Queensland Government Industrial Gazette of 29 June 1999, see 161 QGIG 177 to 184. It is not necessary, in order to dispose of the appeals, to deal with the Notice as amended in any detail. It is sufficient to say that in calculating the premium for a particular employer WorkCover is required to have regard to the Experience Factor of that employer calculated in accordance with schedule 6. The calculation at schedule 6 requires WorkCover, amongst other things, to have regard to the employer’s “statutory claims history” for each of the three financial years prior to the year for which the premium is being set and to have regard to the employer’s “common law claims history” for each of the two years prior to that. The issue in this case is the definition of the statutory claims which are to be taken into account and the definition of the common law claims which are to be taken into account. To reveal the nub of the matter to set forth the definitions relating to statutory claims the definitions are as follows:

“S₀” is the costs of statutory claims (to a maximum of \$250,000 per claim) to the conclusion of the preceding period of insurance under the Act incurred by WorkCover in respect to injuries to workers incurred on a date in the preceding period of insurance.

“S₁” is the costs of statutory (to a maximum of \$250,000 per claim) to the conclusion of the preceding period of insurance under the Act or former Act against the employer incurred by WorkCover in respect of injuries incurred on a date in the period of insurance immediately preceding the period of insurance referred to in S₀.

“S₂” is the costs of statutory claims (to a maximum of \$250,000 per claim) to the conclusion of the preceding period of insurance under the Act or the former Act against the employer in respect of injuries incurred on a date in the period of insurance immediately preceding the period of insurance referred to in S₁.”.

It is the submission of the appellant that in the case of each definition the phrase “incurred on a date in the preceding period of insurance” refers to “injuries”. (The presence of the words “to workers” in the definition of S₀ and their omission in the definitions of S₂ and S₃ is said to be immaterial). It is then contended that because an “injury” which is a loss of hearing which is industrial deafness occurs over a period of time rather than on “a date”, moneys paid in respect of successful claims about industrial deafness are not to be brought into account.

The first contention of the respondent is that the words “incurred on a date in the preceding period of insurance” refers back to “costs”. On that submission there is nothing in the appellants’ first point as each expenditure made in any particular period of insurance will be incurred on a “date”. In support of the submission the respondent has conducted an electronic search of the reprint of the Act in the form which it took after Act No. 42 of 1999. That shows that the expression “injury incurred” does not appear in any provision, that the expression “injury sustained” appears on 52 occasions and that “incurred” appears in reference to “costs” or “expense” on 14 occasions. Whilst one must respect the ingenuity and effort involved in the submission, the plain answer is to be found in s. 3A of schedule 6 which provides:

“Date of injury

3A. Where for the purpose of calculating S and C Factors in section 3, there is no doubt as to the date an injury was incurred, the injury is deemed to have been incurred by a worker on the date upon which the worker was assessed as having the injury by a doctor or a dentist.”.

Section 3A, which was added by WorkCover Queensland Notice Amendment Notice (No. 3) of 1999, must be taken into account in determining the scope of the definitions at s. 2 prior to the amendment at least to avoid a result which would render the amendment unnecessary or futile, *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85 to 86 per Dixon J and *Hunter Resources Limited v Melville* (1988) 164 CLR 234 at 254 to 5 per Dawson J. In the light of s. 3A it seems to me that the words “incurred on a date in the preceding period of insurance” must be read as referring to “injuries”.

The respondent’s second argument is more persuasive. Whilst it may be factually true that a loss of hearing which is industrial deafness develops over a period of time, the Act proceeds on the view that it becomes a compensable injury when the threshold of s. 152(4) is crossed. In terms of the definitions at S₀, S₁, and S₂, that is the date at which the injury is “incurred”. The date of the injury in that sense will be a matter of some doubt. For the purposes of working out a statutory claims history s. 3A removes the doubt by “deeming” the injury to have been incurred “on the date upon which the worker was assessed as having the injury by a doctor”.

The appellants’ alternative submission commences with s. 32(2) which provides:

“A reference to an employer of a worker who sustains an injury is a reference to the employer out of whose employment, or in the course of whose employment, the injury arose.”.

The submission is that in assessing the C and S factors in the course of calculating an employer’s premium reference may be made only to the costs of claims relating to injuries arising out of, or in the course of, employment with the employer whose premium is being assessed. With respect, neither the definition of S₀, S₁, S₂, C₄ or C₅ refers to the notion of a worker sustaining an injury. The expression “injury sustained”, which as pointed out above is used time and again in the Act, has been eschewed in favour of an expression nowhere to be found in the Act, *viz*, “injury incurred”. There seems to be no reason to deny “worker” its meaning at s. 12.1, *viz* (roughly) a person employed under a contract of service, and to refrain from acknowledging the actual employer of the worker as the employer for the purposes of definitions of S₀, S₁, S₂, C₃ and C₄. On that (neutral) interpretation one would, for example, in calculating S₀ bring into account moneys paid to workers or former workers of the employer in respect of injuries “incurred on a date in the

preceding period of insurance” in response to claims made pursuant to s. 152(2). I note that in support of its submission the appellants develop the argument that the purpose of referring to the previous claims experience is to reward employers with a good claims history and penalise employers who do not have a good claims history, and develops the argument that there is some funding of the costs of a loss of hearing which is industrial deafness by the rates at schedule 1 of the WorkCover Queensland Notice No. 1 of 1988. The appellant relies also on s. 5(vi) which provides:

“Because it is in the State’s interests that industry remain locally, nationally and internationally competitive, it is intended that compulsory insurance against injury in employment should not impose too heavy a burden on employers and the community.”.

All of that must be weighed against s. 5(v) which provides:

“The scheme is taken to be fully funded if WorkCover is able to meet its liabilities for compensation and damages payable from its funds and accounts and maintains:

- (a) the minimum solvency or capital adequacy standards under the *Insurance Act 1973* (C’wth), section 29; and
- (b) solvency required under a regulation.”.

Whilst it may be conceded that the objects are an aid to the interpretation of the Act, see s. 4(ii), it seems to me that this is one of those cases in which a Court of construction should step back, acknowledge that each of the Legislature and the body charged with the function of setting the “method” and the “rate”, viz WorkCover, has made a policy decision, and respect those decisions.

I dismiss the appeals.

Dated 13 June 2002.

D.R. HALL, President.

Appearances:

Mr R. Hanson SC, with him Mr G. Rhead (instructed by MIM Care) for the appellants.

Released: 13 June 2002

Mr J. Logan SC, with him Mr A. Horneman-Wren (instructed by WorkCover) for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

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

Gary Eric Newman AND David Knox Holdings Pty Ltd (No. 2)
(No. C31 of 2002)

PRESIDENT HALL

17 June 2002

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 13 June 2002, the President stated:

“On 31 May 2002 I published a decision in the matter of Newman and David Knox Holdings Pty Ltd, number C31 of 2002. I allowed the appeal against the sentence of the Industrial Magistrate. I set aside the orders of the Industrial Magistrate and I fined the respondent the sum of \$25,000.00 in default, levy and distress. I reserved the question of costs in the Industrial Magistrate’s Court.

It now appears, although the matter was not raised at the hearing, that there is an issue as to whether the respondent should be allowed a period of time within which to pay the fine. For reasons which I developed in *Ray and Sue Boundy Pty Ltd and Daniel Paul Gwydir* 1999 162 QGIG 191, I am satisfied that s 329(e) of the *Industrial Relations Act 1999* vests the Court with power to do all that might be done if there were a slip rule in the industrial Court Rules. This is an appropriate case in which to find that there was a slip and to correct the slip.

I set aside the order made by the decision of 31 May 2002. I fine the respondent the sum of \$25,000.00. I allow the respondent 12 months from 31 May 2002 within which to pay that fine, in default, levy and distress.

As to the matter of costs in the Industrial Magistrate’s Court I confirm the order previously made by the Industrial Magistrate. Once again I allow the respondent the period of 12 months from 31 May 2002 within which to pay the costs previously ordered by the Industrial Magistrate in default, levy and distress.”.

Dated 17 June 2002.

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

Appearances:

Mr S. Habermann, directly instructed by Division of Workplace Health and Safety for the appellant.

Released: 17 June 2002

Mr S. Falvey of McInnes Wilson, Solicitors for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341 – appeal to the Court

Phung Minh Tat AND Anthony Neville Schostakowski
(No. C39 of 2002)

PRESIDENT HALL

17 June 2002

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 13 June 2002, the President stated:

“After hearing Mr Sciacca for the appellant and Mr Murdoch of counsel for the respondent and by consent of the parties I adjourn this matter *sine die*.

I order that the file on this matter be returned to the Industrial Magistrate’s Court in order that the parties may pursue an application under s 142A of the *Justices Act 1886* to reopen the proceedings in the Industrial Magistrate’s Court.”.

Dated 17 June 2002.

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

Appearances:
Mr S. Sciacca of Sciacca’s Lawyers for the appellant.
Mr C. J. Murdoch of counsel instructed by Crown Solicitor for the respondent.

Released: 17 June 2002

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INDUSTRIAL COURT OF QUEENSLAND

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

Lutheran Church of Australia – Queensland District AND Clive John Newman (No. C27 of 2002)

PRESIDENT HALL

18 June 2002

DECISION

The appellant is a corporation under the law. Amongst other things, it operates an educational facility at 66 Harts Road, Indooroopilly, Brisbane in the State of Queensland. At all material times there were approximately 1,700 pupils enrolled in the facility. The pupils ranged in age from primary school children to secondary school children. The facility accommodates approximately 200 boarders who range in age from primary school children in grade 6 to secondary school pupils in grade 12. The name of the facility is St Peters Lutheran College.

It is common ground that at all material times the educational facility which had more than 30 employees, was an employer for the purposes of the *Workplace Health and Safety Act 1995*. More importantly, it is common ground that the appellant was a “person in control of the workplace” for the purpose of the Act and as such had obligations under Division 2 of Part 3 of the Act. It is also common ground that at all material times a Mrs Sally Chandler was the chief executive officer of the educational facility. It follows (see s. 167) that conviction of the appellant for an offence against the Act will involve consequences for Mrs Chandler.

Within the substantial precincts of the educational facility is a chapel. The roof of the chapel is some 10 metres above the ground. Whereas a traditional chapel has a steep and peaked roof, the chapel at the educational facility conducted by the appellant had a roof which was substantially flat but with a gradual slope to the centre of the roof to allow for the run-off of rainwater. There was a parapet around the edge of the roof. It was some 300 to 400 millimetres in width. At all material times access to the roof might be had by way of an external ladder. The ladder consisted of metal rungs built into the brickwork on the eastern side wall of the sanctuary. At all material times the distance from the bottom rung of the ladder to the ground was 2.1 metres. (The lower rungs of the ladder have since been removed).

In the proceedings in the Industrial Magistrates Court to which I shall shortly refer there was evidence by a policewoman (height 169 centimetres) that but for a “popped” shoulder she would have been able to seize the bottom rung of the ladder, and would have had no difficulty in using her feet against the wall for support while she mounted the ladder and ascended to the roof.

On Sunday 18 June 2000 one of the boarders at the educational facility either fell or jumped from the roof of the chapel. He was killed on impact with the ground. Understandably, the death was investigated both by the Queensland Police Service and by officers from the Division of Workplace Health and Safety. On 18 June 2001 the complaint under the *Workplace Health and Safety Act 1995* was laid against the appellant. Formal parts omitted, the complaint (and the accompanying particulars) was as follows:

“. . . on the 18th day of June 2000, at Indooroopilly in the Magistrates Courts District constituted by the Central Division of the Brisbane District appointed under the *Justices Act 1886*, **Lutheran Church of Australia Queensland District**, being a person on whom a workplace health and safety obligation prescribed by section 28(2) of the *Workplace Health and Safety Act 1995* is imposed did fail to discharge the obligation contrary to section 24 of the *Workplace Health and Safety Act 1995*, in that being an employer the said **Lutheran Church of Australia Queensland District** did fail to ensure the workplace health and safety of others is not affected by the way the employer conducts the employer’s undertaking;

Particulars:

Other:

Place:

Undertaking:

Luiz Felipe Camolese Rodrigues.

St Peters Lutheran College, Harts Road, Indooroopilly.

Provision of educational services.

Failure: Lutheran Church of Australia Queensland District did fail to restrict or adequately restrict access of persons to the external ladder attached to the chapel building.

Lutheran Church of Australia Queensland District did fail to restrict or adequately restrict access of persons to the roof of the chapel building.

Lutheran Church of Australia Queensland District did fail to provide any or any adequate warning signage to advise of danger of ascending the external ladder attached to the chapel building.

AND IT IS ALLEGED that as a consequence of the failure to discharge the workplace health and safety obligation **Luiz Felipe Camolese Rodrigues** sustained fatal injuries.”.

It is the submission of the appellant that the reference in the particulars to “other” (being “Luiz Felipe Camolese Rodrigues”) is not sensible unless it is a reference to the “others” referred to in the body of the complaint. The further submission was then made that:

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“Accordingly, the proceedings were instituted and conducted on the footing that the appellant failed to ensure the workplace health and safety of Rodrigues, not of the school community generally.”.

I have no difficulty in accepting that cases may arise under the *Workplace Health and Safety Act 1995* in which to discharge an obligation to a particular employee or person, an employer or occupant of the workplace will be required to take steps other than the steps which would be sufficient in the case of an employee or other person who was a reasonable man, e.g., additional steps may be necessary to safeguard an employee operating a guillotine if the employee is blind. However, if such a case were to be made, one would expect some reference in the particulars to the disabilities or propensities of the employee or other person said to modify the content of the obligation to ensure his workplace health and safety. The particulars to this complaint make no such reference. It seems to me that rather than identifying Mr Rodrigues as the person whose access to the roof the appellant failed to restrict or adequately restrict, the particulars refer to Mr Rodrigues as “other” because the complainant was pleading the death of Mr Rodrigues as a circumstance of aggravation at s. 24(1)(a). In my view the Industrial Magistrate was correct to proceed on the view that the gravamen of the case was the access to the dangerous place (constituted by the roof) which the ladder provided.

The appellant takes a further preliminary point that the Industrial Magistrate refrained from determining whether or not Mr Rodrigues had committed suicide. (In fairness to the Industrial Magistrate I can understand that as a courtesy to the family of Mr Rodrigues, who were not parties to the proceedings, an Industrial Magistrate would not embark upon such an inquiry unless it was necessary to do so). The submission is that the *Workplace Health and Safety Act 1995* does not require employers or the occupants of workplaces to protect employees or other persons against the risk of self harm. I can accept where there is neither a regulation nor a ministerial notice there will be many cases of self harm in which an employer or occupant of a workplace will make out a defence under s. 37. One can accept also that there will be cases in which the circumstance that an employee or other person has engaged in wilful self harm will be relevant to the assessment of the objective gravity of the offence. It is, however, impossible to find anything within the *Workplace Health and Safety Act 1995* which would justify excision of all cases of self harm from the purview of the Act. Indeed, such a construction is inconsistent with a legislative scheme which, on the issue of liability, focuses upon the steps which the employer or occupant of a workplace took or did not take rather than upon the consequences of the steps taken or not taken. There is in my view no substance to the preliminary point.

To understand the way in which the matter was dealt with in the Industrial Magistrates Court one must understand something of the *Workplace Health and Safety Act 1995*.

Section 30 imposes obligations on persons in control of workplaces. Section 30 provides:

“Obligations of persons in control of workplaces

30.(1) A person in control of a workplace has the following obligations –

- (b) to ensure the risk of injury or illness from a workplace is minimised for persons coming onto the workplace to work;
- (c) to ensure the risk of injury or illness from any plant or substance provided by the person for the performance of work by someone other than the person’s workers is minimised when used properly;
- (d) to ensure there is appropriate, safe access to and from the workplace for persons other than the person’s workers.

(2) For this section –

‘**person in control**’ of a workplace does not include the occupier of domestic premises.”.

By s. 24 breach of the obligation is a simple offence. What the occupants of a workplace must do in order to discharge the obligations at s. 30 varies according to whether there is or is not a regulation, ministerial notice, an advisory standard or industry code of practice about the relevant risk. Section 26 deals with how the obligations may be discharged where there is a regulation, ministerial notice, advisory standard or industry code of practice. Section 26 provides:

“How obligations can be discharged if regulation etc. made

26.(1) If a regulation or ministerial notice prescribes a way of preventing or minimising exposure to a risk, a person may discharge the person’s workplace health and safety obligation for exposure to the risk only by following the prescribed way.

(2) If a regulation or ministerial notice prohibits exposure to a risk, a person may discharge the person’s workplace health and safety obligation for exposure to the risk only by ensuring the prohibition is not contravened.

(3) If an advisory standard or industry code of practice states a way of managing exposure to a risk, a person discharges the person’s workplace health and safety obligation only by –

- (a) adopting and following a stated way that manages exposure to the risk; or
- (b) adopting and following another way that gives the same level of protection against the risk.”.

How the obligations at s. 30 are to be discharged if there is neither a regulation, a ministerial notice, an advisory standard, or/and industry code of practice is described at s. 27 which provides:

“How obligations can be discharged if no regulation etc. made

27.(1) This section applies if there is not a regulation or ministerial notice prescribing a way to prevent or minimise exposure to a risk, or an advisory standard or industry code of practice stating a way to manage the risk.

(1) The person may choose any appropriate way to discharge the person’s workplace health and safety obligation for exposure to the risk.

(2) However, the person discharges the workplace health and safety obligation for exposure to the risk only if the person takes reasonable precautions, and exercises proper diligence, to ensure the obligation is discharged.”.

Here, there was a relevant advisory standard. It was the *Workplace Health and Safety Risk Management Advisory Standard 2000*.

It may be admitted that the *Workplace Health and Safety Risk Management Advisory Standard 2000* is a generic risk management document concerned with establishing a process for identifying hazards at workplaces and how to manage exposure to the risks associated with those hazards. I am, however, unable to accept the submission that within the meaning of s. 26(3)(a) the occupant of the workplace discharges his workplace health and safety obligation by making a genuine (not sham) attempt to implement the processes described in the Standard. The essential five steps required by the Standard are:

- “1. **Identify** hazards
 1. **Assess** risks that may result because of the hazards
 2. **Decide** on control measures to prevent or minimise the level of the risks
 3. **Implement** control measures
 4. **Monitor** and **review** the effectiveness of measures.”

The essential five steps under the Standard are the very steps at s. 22(2). Section 22 provides:

“Ensuring workplace health and safety

22.(1) Workplace health and safety is ensured when persons are free from –

- (a) death, injury or illness caused by any workplace, workplace activities or specified high risk plant; and
 (b) risk of death, injury or illness created by any workplace, workplace activities or specified high risk plant.

(2) Workplace health and safety can generally be managed by –

- (a) identifying hazards; and
 (b) assessing risks that may result because of the hazards; and
 (c) deciding on control measures to prevent, or minimise the level of, the risks; and
 (d) implementing control measures; and
 (e) monitoring and reviewing the effectiveness of the measures.

(3) However, this Act also specifies particular ways in which workplace health and safety must be ensured in particular circumstances.

(3) Compliance with subsection (2) does not excuse a person from an obligation to ensure workplace health and safety or a particular obligation imposed on the person under this Act.”

If compliance with s. 22(2) does not excuse a person from an obligation to ensure workplace health and safety it is impossible in the absence of express language or necessary implication to read an advisory standard made pursuant to s. 41 and given effect by s. 26(3), as elevating a genuine attempt to take the steps at s. 22(2) to a discharge of the obligation to ensure workplace health and safety. (The validity of an express advisory standard in those terms may be left for another day).

The true intention of the *Workplace Health and Safety Risk Management Advisory Standard 2000* is that an employer or occupant of a workplace must take each of the five essential steps prescribed by the Standard. So to construe the Standard is not to repeal s. 27. Section 27 recognises that its field of coverage may be eaten away by regulations, ministerial notices, advisory standards and industry codes of practice.

The Industrial Magistrate found that the appellant failed at the first hurdle, i.e., the Industrial Magistrate found that the appellant did not identify the hazard created by the ladder which gave access to the roof. At first blush the finding is a little unusual. There is clear evidence that particular officers of the educational facility were aware of occasions on which students had used the ladder to gain access to the roof of the chapel. There were written instructions to students to refrain from accessing the roof. However, in a considered and *bona fide* attempt to discharge its obligations under the *Workplace Health and Safety Act 1995*, the appellant relied on a designated workplace health and safety officer and external consultants to identify hazards and manage risks. It was open to the Industrial Magistrate to find that the officers who knew of the use of a ladder to reach the chapel roof had not shared their knowledge with the natural persons to whom discharge of the obligations under the Act had been delegated, i.e., it was open to the Industrial Magistrate to find that the appellant’s left hand did not know what the right hand was aware of. And in fairness to the Industrial Magistrate I should observe that His Worship expressly referred to the inadequacy of the recording of the incidents of access to the roof as denying the external workplace health and safety auditors a proper paper trail. In my view there is no basis for interfering with the finding of the Industrial Magistrate.

Once that finding was made the appellant fell outside s. 26(3). The finding that the appellant did not adopt and follow the way stated by the Standard for managing exposure to risk inevitably negatives the defence at s. 37(1)(b)(i). The Industrial Magistrate’s further finding that s. 37(1)(b)(ii) had not been made out was plainly open to His Worship. The hazard posed by the ladder was, in truth, quite obvious. The risks associated with presence upon the roof were equally obvious. The appellant did not take “reasonable precautions” and exercise “proper diligence” to discharge its obligations. The appellant relied on administrative controls constituted by written directions not to access roofs (amongst other places) while a physical means of removing the hazard, *viz.*, removal of the lower rungs of the ladder, was both available and obvious.

There is an appeal against the Industrial Magistrate’s decision to record a conviction and to impose a penalty of \$60,000.

Because the death of Mr Rodrigues arose out of the very risk, *viz.* the risk of falling from the roof, against which the appellant had failed to ensure an entrant’s safety, the breach of the Act was a proximate cause of the death. In those circumstances the maximum penalty was \$300,000.

This Court has no general power to go behind the discretions which an Industrial Magistrate exercises in determining to record a conviction and to impose a sentence. To succeed the appellant must bring its case within the well known rule in *House v The King* (1936) 55 CLR 499.

It may be conceded that there were significant mitigating factors. By His Worship’s decision upon penalty of 28 February 2002 the Industrial Magistrate expressly referred to them and marshalled them up. No relevant factor seems to have been omitted. Granted that the fine of \$60,000 is at or about the top of the “tariff” range some criticism has been levelled at the weight which the Industrial Magistrate may be taken to have attributed to various mitigating factors. The difficulty, of course, is that the top of the “range” is set by sentences which are themselves mitigated sentences. Further, the existing “tariff” identifies an initial starting point on the basis of the objective gravity of the offence which is so modest as to allow limited scope for factors of mitigation.

(I am not prepared to revisit the so-called "tariff" in the absence of submissions upon that matter and of notice to the party affected by the sentence that the "tariff" itself must be put in question). Whilst on the evidence led, it seems to me that the appellant was entitled to have the matter dealt with on the basis that Mr Rodrigues committed suicide and that the death did not propel the breach to the level of gravity which it might have done in other circumstances, this is not a case in which the sentence is clearly unreasonable. In my view I cannot, consistently with *House v The King*, *ibid*, interfere with the sentence.

The discretion of the Industrial Magistrate to record or refrain from recording a conviction is a discretion "at large", compare *R v Brown, ex parte Attorney General* [1994] 2 QdR 182 at 194 per Lee J. The appellant has been unable to identify any incorrect principle or irrelevant consideration upon which the Industrial Magistrate acted. No failure to recognise a relevant consideration has been identified. Notwithstanding that the appellant is a first offender, the decision is not clearly wrong. Once again, it is not proper for this Court to interfere.

I dismiss the appeal.

Dated 18 June 2002.

D.R. HALL, President.

Released: 18 June 2002

Appearances:

Mr A. Herbert, instructed by McCullough Robertson Solicitors, for the appellant.

Mr M Griffin SC and Mr S. Habermann, directly instructed, for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

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

WorkCover Queensland AND Farrant James Howgego (No. 2) (No. C62 of 2001)

PRESIDENT HALL

18 June 2002

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 17 June 2002, the President stated:

"On 21 November 2001 I published a decision in this matter by which I allowed the appeal and remitted the matter to the Industrial Magistrates Court to hear and determine the matter according to law.

An issue has now arisen as to the effect of that order. The issue is not between the parties. The parties are *ad idem* that there would be significant savings of time and of cost if the matter were dealt with by submissions on the existing transcript, before the Industrial Magistrate who first heard the matter. I can understand why considerations of cost would induce the parties to take that view. Indeed, by the decision of 21 November 2001 I contemplated that that might occur.

The issue, of course, is between the parties and the Industrial Magistrates Court. It appears that the matter has been listed before a different Industrial Magistrate. In those circumstances the respondent to the original appeal seeks an interpretation of the order made by this Court on 21 November 2001. I doubt that I have any jurisdiction to entertain such an application. In any event, I am not disposed to grant it.

If there had been an argument before the Industrial Magistrate, into whose hands the matter apparently is to come, about whether the matter should be referred to another Industrial Magistrate or adjourned *sine die* and there had been an appeal against that decision, I should not have dealt with the appeal. I should not have dealt with the appeal, not because of any fixed view that there is no appeal against an interlocutory decision, but because it seems to me that such a matter is entirely a matter of practice and procedure for the Industrial Magistrates Court and is a matter in which this Court, which knows nothing about the availability and circumstances of Industrial Magistrates, should have no role.

I dismiss the application. In all of the circumstances it seems to me that there is no proper basis for an award of costs."

Dated 18 June 2002.

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

Appearances:

Mr G.J. Clair of Q-Comp, WorkCover Queensland for the appellant. Mr M. Hine of Murphy Schmidt, Solicitors for the respondent.

Released: 18 June 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Christopher Douglas Wilson AND Brisbane City Council (No. B2295 of 2001)

COMMISSIONER BLOOMFIELD

7 June 2002

Reinstatement – Dismissal – Termination of employment – Boilermaker – Racist remarks in lunchroom – Offence taken by indigenous employee – Breach of Council policies – External investigator appointed – Complaint made to Anti Discrimination Commission – Arbitrated matter – Remarks made by Applicant were unacceptable – Dismissal was not harsh, unjust or unreasonable – Application dismissed.

DECISION

Background

Mr Christopher Douglas Wilson seeks relief in relation to his alleged unfair dismissal by Brisbane City Council (BCC) on 7 December 2001. Mr Wilson was dismissed following an investigation into an incident which occurred on 31 October 2001 in the lunchroom at the Cityfleet workshops at Acacia Ridge. His termination letter advised him that the investigation had determined that he had contravened Council policy and potentially the *Anti-Discrimination Act 1991*.

Mr Wilson had worked at Cityfleet's workshop for four years with a labour hire company before becoming an employee of the City Council in about December 2000. At the time of his termination he was paid six weeks in lieu of notice.

The incident on 31 October 2001

Mr Wilson's dismissal followed an investigation into a complaint lodged by Mr Jason Rogers an apprentice tradesperson (mechanical) with City Council's fleet division (Cityfleet). Mr Rogers is one of several indigenous employees employed by the Council under its Equity and Cultural Diversity Policy.

The most complete account of the incident is contained within a document filed with the Anti-Discrimination Commission of Queensland (ADCQ) by Mr Rogers. Such documents are normally confidential between the parties but the complaint was tabled into evidence and its contents were frequently referred to by each of the parties. Although normally reluctant to refer to such a document I do so, on this occasion, because of the completeness of the account of events furnished by Mr Rogers. Notwithstanding that his witness statement filed in the Commission was, in itself, more of a summary of the incident, it is clear that Mr Rogers did not resile from the material contained in the ADCQ complaint and, indeed, referred to it as if it was part of his actual witness statement.

Mr Rogers' account of the incident is as follows:

"The incident happened at the Brisbane City Council depot (Cityfleet) of 243 Bradman Street, Acacia Ridge on the 31st October 2001 during the morning smoko. I was sitting at a table and Chris Wilson came and sat opposite me. He is a tradesman/boilermaker, we know each other by sight and by name, but not much more. The table was full with about ten people sitting around it. There are two other tables, which were also full. I was the only Indigenous person in the room. Chris Wilson then started to say to me 'Your fucking friend is back, you know he's a fucking drug addict hey', 'Yes he's a fuckin' Hep B carrier.' I asked curiously 'How do you know this?' Chris then said 'Look I just know he's a fucking drug addict and a fucking Hep B carrier, he shouldn't be allowed to fuckin' work around us.'

A third party asked who he was talking about and what was he talking about. He then said to that person 'That fucking Aboriginal trainee welder.' He then looked at me and said 'Aborigines all rott the fucking system.' 'They fucking get everything for free, fucking cars, the lot.' I then said to him 'I've worked for everything I ever fuckin' got MATE! I've never gotten anything for free.' He then said out loud to me 'Aborigines get in the fucking Council easy and once they're in they get an easy fucking run. Then as soon as they get in trouble they start crying fucking discrimination.'

He then said 'What the fuck is this Cultural Leave? What kind of fucking rule is that? Just because your Aunties, Uncles fucking cousin dies you all want time off work. That's fucking bullshit, when we (meaning whites) have someone die in our family we don't give a fuck, we're straight back at work.' 'There's one set of rules for everyone and another set of rules for fucking Aborigines in the Council. That's fucked.' He then went on to say to me 'Who the fuck is this Flo or Jo? (meaning Flo Watson). Who the fuck are they? We don't get fucking help like that, that's bullshit.'

I then said 'What about the murris (Aboriginals) like Gary Richardson and I, who are trying to get a trade? We don't rott the system! What about Gary Richardson getting Apprentice of the Year twice.' He then said to me 'Those awards are not for the whole of Council, that was for you people (Aborigines) in City Fleet.' I told him 'No! They were awards for the whole of Council.'

A third party then asked Chris Wilson 'How do you know about Aboriginals?' He then said loudly 'I lived in an Aboriginal community for 6-7 years and they're all just FUCKING BLACK SCUM' and he looked straight at me, directing what he said to me.

Throughout this ordeal, Chris was speaking loudly enough for everyone at our table to hear easily and for the people sitting at the other tables to hear if they wanted to. I was shocked and extremely angered, but I maintained my self-control. After he said all of this I then stated 'Listen here, I don't have to fucking sit here and listen to you talk shit about Aboriginals.' I stood up abruptly and said 'Let's fucking go and sought this outside' (Meaning out of work grounds). He jumped up and yelled "Come on then!". I started to walk toward the door and down the hallway. Bob Allen who was sitting next to Chris Wilson then came and grabbed hold of me, telling me to calm down and that I was out of control. I told him to 'Get your hands off me'. I then went and packed up my toolbox with Bob Allen following me. I then said to Bob Allen that what he said was racist and totally wrong and he agreed. I was swearing and very upset about what Chris Wilson had said.

I then walked back inside with Bob Allen and saw Tony Fragoudakis (Tony was sitting next to me at smoko). I said to Tony Fragoudakis 'You're a witness Tony, you heard the racist comments he said.' Tony said 'Yes, it was racist and very wrong.'

I went and sat in my car about to go home and thought I better report this to the Human Resources Manager – Malcolm Dick. So I went back in and got Bob Allen and we both went up to Malcolm's office and reported it to him.

I did not do or say anything to provoke what Chris Wilson said. Chris has done similar things in the past on 3 to 4 occasions. Starting off by making comments about Steele (the Aboriginal trainee welder who Chris was originally talking about) but then making more general remarks about Aboriginal people, directing at me and within the hearing of others. I did report one of those incidents to my supervisor Rod Cain (and) Chris's supervisor Paul Bradley

Other evidence about the incident

Evidence about the incident was given by Mr Wilson, Mr Bob Allen (a Team Leader and the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland, (AMEPKU) delegate) and by Mr Chris Collins – all called by AMEPKU – as well as by Mr Tony Fragoudakis – called by the Council.

Mr Collins said he was under a great deal of pressure at the time of the incident. His wife had left him a week or so before and six months earlier he had been diagnosed with cancer (melanomas). On the day of the incident he was to visit a cancer specialist for a further check-up.

Mr Wilson said he walked into the smoko room with Mr Collins. They were talking about a Mr Jackson, another indigenous apprentice. Mr Wilson said he was critical of the (positive) treatment Mr Jackson received and he was also critical of Cityfleet's policy towards indigenous apprentices. He said his criticisms were not directed towards indigenous people but, rather, towards Brisbane City Council's affirmative action policy for indigenous people.

Mr Wilson said he commented to Mr Collins that the behaviour of Mr Jackson would not be tolerated in any other workplace. He referred to Mr Jackson's absences from work and his use of a BCC car to buy cigarettes and to get his tax file number. He said he told Mr Collins that Mr Jackson would not have been given such treatment if he was white.

Mr Wilson claimed that Mr Rogers intervened in the conversation and asked him why he had not given Mr Jackson a ride to work saying words to the effect "Why didn't you pick up your mate". [Mr Wilson previously picked up Mr Jackson on his way to work and dropped him home for a number of months early in 2001. However, because of Mr Jackson's unreliability – not being ready to be collected and often being asleep – Mr Wilson had stopped transporting him several months before the incident]. Mr Wilson said the following exchange then occurred:

Mr Wilson: *He is not my mate – he is one of your mob. He has just had four months off and he is due back today but he is not here – typical scumbag.*

Mr Rogers: *You wouldn't know Aboriginals.*

Mr Wilson: *I think I do. I worked and lived in an Aboriginal community for fourteen months straight and worked in and out of Murgon for about seven years doing shut-downs every Christmas. In that time I witnessed a publican get killed by Aboriginals and saw public bashings, so don't tell me I don't know them. The majority of them were scumbags – they were constantly asking for smokes and calling white people 'Captain Cook white cunts'.*

Mr Wilson said that Mr Rogers then became very agitated and said "*I don't have to listen to this shit. C'mon cunt*" as he stood up and put his fists up to fight. Mr Wilson said he did not want to fight with Mr Rogers. He said he had not made any move to threaten or fight Mr Rogers and when Mr Rogers had threatened to hit him he said "*Can we talk about this. Let's talk about this.*". He claimed Mr Rogers began swinging punches at him and Bob Allen had to hold Mr Rogers back. Mr Rogers said "*I want that cunt*".

Mr Wilson said he went outside the workshop area and had a cigarette to calm down. He said he was shocked at Mr Rogers' reaction and did not think the argument would go that far.

Mr Bob Allen said he had been the AMEPKU delegate for Cityfleet for approximately six years. He said he walked into the lunchroom after the smoko break had begun, collected his steakburger at the bench and went to sit at a table. He sat down next to Chris Wilson. Mr Tony Fragoudakis sat directly across the table from him and next to him, directly opposite Mr Wilson, sat Mr Jason Rogers.

Mr Allen said he sat down and began to speak to Tony Fragoudakis. Chris Wilson and Jason Rogers were talking but Mr Allen did not remember what they were saying. Mr Allen said he took a bite of his steakburger and as he was chewing it Chris Wilson said something loudly that included the words "*they're all black scum*" followed by another sentence which included the words "*welfare cheats*".

Mr Allen said Mr Rogers responded by saying "*You are insulting my mother*". Chris Wilson replied by saying what some indigenous persons had called him in Murgon. Mr Allen claimed not to have recalled the words but said they included the term "*Captain Cook*".

Mr Allen said he sat in his place stunned by what was happening. Mr Rogers stood up and threw his chair back and one of the two men, he could not remember who, said "*Let's go outside*". The other said "*I'll take you on*" or something to that effect. He said Chris Wilson then went to stand up but he pushed him down in the chair. Mr Rogers left the lunchroom and Mr Allen followed to try to calm him down.

According to Mr Fragoudakis, the incident was sparked off by comments made by Mr Wilson about the time he worked in Murgon.

Mr Fragoudakis said Mr Wilson started by talking about how Aborigines were always asking for money when he (Mr Wilson) walked down the street in Murgon, about how they would abuse him and call him names if he refused. Mr Wilson said that it was very dangerous to use an ATM, as you were watched all the time, and there were always fights in the pubs. You could never trust them (meaning Aboriginals) and they were scum.

Mr Fragoudakis said Mr Rogers challenged Mr Wilson about his statements. Mr Rogers got very angry and upset and the two of them traded abusive language with each other. Jason Rogers wanted to go outside with Mr Wilson. Mr Fragoudakis said he tried to calm Chris Wilson down and told him he should apologise to Mr Rogers.

Mr Chris Collins said he walked into the lunchroom with Mr Wilson and they were discussing one of the apprentices in the heavy fabrication team. They continued their discussion after they sat down at the table in the lunchroom. Mr Collins said he and Mr Wilson were comparing the treatment of apprentices at Cityfleet to the treatment they received when they were apprentices. They were talking about how Mr Jackson would be absent from work and would turn up late and how this would not have been tolerated when they were apprentices. Mr Collins said they began discussing Mr Jackson's alleged problem with drug misuse. They were discussing how this raised safety concerns with the operation of machinery as well as the risk of contamination with hepatitis.

Mr Collins said that, as part of this conversation, Mr Wilson said, "*It seems as though there is them and us*". Mr Rogers then interrupted the conversation and said, "*How is your mate?*". Mr Wilson responded "*It doesn't really matter; he gets away with what he wants.*".

Mr Collins then said that Mr Wilson commented that one of the other indigenous employees got time off when one of his relatives died whereas other employees had to use bereavement leave or annual leave. Mr Wilson talked about his time at Murgon and said "*They are all black scum*". Mr Collins proffered the view that this comment was not aimed at Mr Rogers, nor was it intended to humiliate Mr Rogers.

Mr Collins said that Mr Rogers then said "*I don't have to listen to this shit*". Mr Collins said he then left the table to go to the microwave. Mr Rogers stood up and his chair went back, he was threatening Mr Wilson and said he wanted to go outside and "*sort it out*". Mr Wilson responded with words to the effect, "*Yeah, whatever you want*".

Mr Collins said that Bob Allen stood up and stood between Mr Wilson and Mr Rogers. Mr Rogers started to leave the room. Mr Allen told Mr Collins to make sure Mr Wilson did not go anywhere and followed Mr Rogers out of the lunchroom.

Post-incident events

Mr Rogers said he told Mr Allen outside the smoko room that what Mr Wilson had said was racist and totally wrong and Mr Allen allegedly agreed that that was the case. Mr Rogers said he felt angry and publicly humiliated. He was also upset that the other staff members sitting at the table had done nothing to try to stop the incident escalating.

Mr Rogers said he then went to his car and intended to go home. However, after thinking about the matter, he went into the Team Leader's room and told Mr Allen and Mr Fragoudakis that they were material witnesses and he was going to report the incident to the Divisional Manager, Mr Boland. Mr Boland was not available so both Mr Rogers and Mr Allen went to see Mr Dick, the Human Resources Manager.

Mr Rogers said Mr Dick arranged for him to see Mr Les Collins, the Indigenous Support Officer at Human Resources. Arrangements were also made to see Ms Flo Watson, the Indigenous Counsellor. Ms Watson assisted Mr Rogers to write a complaint and to talk through the issues. A formal complaint was lodged on 1 November 2001.

Mr Paul Etherden said that he had occasion to go to Team Leader Bob Allen's office on 31 October 2001. When he walked into the office Mr Rogers was speaking to a Mr Fitzgerald. Mr Rogers was saying he wanted to fight Mr Wilson and appeared to be very agitated.

Mr Etherden said he tried to calm Mr Rogers down and Mr Rogers said "*I am going to get someone to come in and get you white cunts*". Mr Etherden said he was surprised and shocked at what Jason Rogers said because he believed he had treated Jason with respect since he came to Cityfleet. He thought he deserved the same respect from Mr Rogers. Mr Allen then came into the office. Mr Etherden said he told Mr Allen that Mr Rogers was upset and that Mr Allen should look after him. Mr Etherden said he and Mr Fitzgerald then left the office.

Mr Etherden said that at about two weeks after the incident Mr Rogers came to apologise to him. He said Mr Rogers told him that if he had said something wrong he apologised for it. Mr Etherden said he told Mr Rogers he understood that what was said had been said in the heat of the moment.

Appointment of external investigator

Immediately following the verbal report of the incident by Mr Rogers, Mr Dick took advice from the Brisbane City Council's solicitor on how to manage the situation. Mr Boland – the Divisional Manager – was also apprised of the situation and he requested that an external investigator be appointed to investigate the matter. Ms Sharmila Mercer of Mercorp Consulting Pty Ltd was engaged to undertake the investigation. A case management team was also established to oversee the investigation process.

On 1 November 2001 Council received the written complaint from Mr Rogers. The complaint contained the following recommendations:

1. Chris Wilson's employment be terminated.
2. All staff to be made aware of the incident and to understand the ramifications involved if this incident is repeated.
3. Ongoing cultural awareness training.

Ms Mercer's investigation apparently involved contact with all of the relevant witnesses as well as others who might be able to shed light on the matter. I say "apparently" because I informed the parties that I would not read the report unless all parties agreed. I indicated that I did not wish to be tainted by anything which might have been recorded in the report because it was appropriate that I decide the matter solely on the evidence presented before me. None of the parties pressed that I read the report. Consequently, I have not read Ms Mercer's report except for those parts of it which were put to the various witnesses. Those limited sections were extracted by my associate in order that I might understand the evidence.

Mr Wilson said he was asked to recount his version of events in an interview with Ms Mercer in early November 2001. He attended a further meeting with her on 10 November when she indicated that she had finished the report and it was out of her hands. Mr Wilson said that Ms Mercer told him that her personal opinion was that he and Mr Rogers should be split up but neither employee should lose their job. Mr Wilson said Ms Mercer contacted him again on or about 15 November and asked to meet him at a coffee shop. He claimed that Ms Mercer said that if he took a voluntary redundancy he would receive \$9,000. Mr Wilson said he responded by saying he did not want the money but wanted the stability of employment that his job offered.

There was apparently a further meeting between Mr Wilson, his union organiser – Mr Mackie, Ms Mercer and the case management team on 26 November 2001. The purpose of that meeting is unclear. Ms Price, a member of the case management team and Cityfleet's Human Resources Officer and Equity Liaison Officer, said it was to allow Mr Wilson and his organiser the opportunity to discuss the issues arising from the investigation. She said: "*The purpose of the meeting was to outline to Chris Wilson the evidence that he, Jason Rogers and others had provided, and to give him the opportunity to further address points raised.*".

However, her evidence under cross-examination was more equivocal. She indicated that Mr Wilson was informed of the processes which had been followed during the investigation but was not shown a copy of the report. Nor was he asked to comment on Ms Mercer's account of what he had allegedly said and/or admitted.

Council decided to suspend Mr Wilson, on full pay, on 27 November 2001. Prior to that time Mr Wilson had been on annual leave and paid stress leave. It apparently took the decision to suspend Mr Wilson because Jason Rogers was returning to work after stress leave and because Ms Mercer had recommended to the Council that it not allow Mr Wilson and Mr Rogers to work with each other again. Council determined that as all of the evidence pointed towards Mr Rogers being the victim it would be inappropriate that he be the one to be removed from the workplace. Accordingly, it took the decision to suspend Mr Wilson while it considered what to do about the whole matter.

Council's decision to terminate

Ms Price gave evidence that the case management team met on 3 December 2001 and endorsed the findings of Ms Mercer's report. In particular, the case management team agreed that Mr Rogers and Mr Wilson could not work together again on the same site.

On the same day Mr Dick received advice that Council had been notified of an Anti Discrimination Commission complaint lodged by Mr Rogers. Mr Wilson was contacted and a copy of the complaint was given to him at a meeting held at 4.00 p.m. that afternoon.

On the following day, 4 December, Mr Dick spoke to Brisbane City Works Human Resources Management Coordinator, at Mr Boland's direction, about the prospect of placing Mr Wilson in a boilermaking role somewhere within Brisbane City Works. The Coordinator advised Mr Dick there were no vacancies and, with Council's current restrictions on staffing, staff numbers could not be increased.

Later that day, Mr Dick spoke to the Council's Human Resources and Strategic Manager in the company of Ms Mercer. Mr Dick said the conclusion they reached was that in all the circumstances, termination of Mr Wilson's employment was the appropriate course of action. This conclusion was discussed with Mr Boland who endorsed the proposal. Mr Dick said Mr Boland instructed him to attempt to negotiate a suitable payout arrangement for Mr Wilson through the AMEPKU.

Over the period 5-6 December Mr Dick unsuccessfully endeavoured to negotiate a payout with Mr Wilson via the AMEPKU.

On 7 December Mr Wilson was called to a meeting with Mr Boland, Mr Dick, Mr Down (an AMEPKU delegate) and Mr Hore (a workshop supervisor at Cityfleet). Mr Wilson complained the meeting was short and the process was unfair. Mr Boland said to him "*I suppose you know what you are here for*". Mr Wilson responded "*Not really*". Mr Wilson said he was then presented with two letters. One offered him the ability to resign. The other letter terminated his employment. He asked if he was required to make a decision in front of Mr Boland and Mr Dick. They left him to discuss the matter with Mr Down, his union delegate. After discussing the matter with Mr Down, Mr Wilson called Mr Boland and Mr Dick back into the room and told them he was not accepting the "voluntary redundancy" i.e. resignation. Mr Wilson said his services were then terminated. He said he had not been given any reason for Council's decision.

Mr Down said he spoke to Mr Wilson outside the room before they went into the meeting. They discussed that BCC was likely to terminate Mr Wilson's employment. Mr Down said Mr Wilson told him that he had already spoken to Mr Mackie (the union organiser) about the matter and he would not resign.

Mr Down said Mr Boland asked Mr Wilson at the start of the meeting if he knew why he was there but he did not recall Mr Wilson's response. Mr Boland then told Mr Wilson that he had not followed the Council's equity and diversity policy and that Mr Wilson's actions (on 31 October) had caused problems in the workplace. Mr Boland told Mr Wilson he had the option of resigning, with a payout, or his services could be terminated. Mr Down said Mr Wilson was given the opportunity to discuss the matter with him before making his decision. Mr Wilson confirmed that he would not resign. Mr Boland was called back in and given that advice. Mr Boland then handed Mr Wilson a letter notifying him of the termination of his employment.

Mr Dick said Mr Boland spoke to Mr Wilson about the difficult situation that Council had been put in and the problems which Jason Rogers was experiencing because of the incident. Mr Dick could not remember whether Mr Boland touched on the Council's policies.

After considering the evidence of the four participants I am satisfied that the meeting went essentially as Mr Down suggested and that Mr Wilson was provided with reasons why Cityfleet had decided to terminate his employment, viz, that Mr Wilson had breached Council's equity and diversity policy and because the two (2) employees could no longer work together on the same site. Indeed, this was the reason set out in one of the letters given to Mr Wilson during the meeting when the option of resignation or termination was put to him.

Submissions on behalf of the Applicant

Mr E. Moorhead, of the AMEPKU, presented a well-prepared and well-argued submission in support of his contention that Mr Wilson had been unfairly dismissed and should be reinstated to his previous employment.

In particular, Mr Moorhead highlighted the differences between the evidence given by Mr Rogers and that given by those witnesses called on behalf of Mr Wilson. He submitted that the union's evidence should be accepted because it was consistent and because each of the witnesses was credible.

Mr Moorhead said the evidence given on behalf of Mr Wilson should be contrasted with the evidence given by Mr Rogers. Mr Rogers' account of events was inconsistent with the evidence given by other witnesses and, more importantly, was inconsistent with material contained within prior statements prepared by him. He highlighted the areas of alleged inconsistency.

Mr Moorhead also highlighted there was no evidence to support Mr Rogers' contention he had experienced three or four similar incidents with Mr Wilson in the previous months and that he had made a complaint about his treatment. Mr Moorhead highlighted that Council had not called other witnesses who were alleged to have been notified of the complaint and asked me to draw the appropriate conclusions under the rule in *Jones v Dunkell* (1950) 101 CLR 298.

It was submitted that whilst Mr Wilson had criticised Council's affirmative action policy, and other assistance measures directed towards its indigenous workforce, his comments should not be taken to be racist or offensive simply because he had argued that the same assistance measures should also be provided to non-indigenous people.

Mr Moorhead submitted that Mr Wilson's outburst on 31 October did not warrant his dismissal from Cityfleet. There was no history of any previous incident. Mr Wilson had apologised for his actions – in a letter to the Council in November – and had also offered to take part in any reconciliation process required by Council. The penalty of termination, given all of the mitigating circumstances, was disproportional to the offence.

Mr Moorhead also argued that Mr Wilson's termination was unfair because Council had failed to consider other options. He claimed that Mr Dick's evidence disclosed that Mr Wilson's termination had been pre-determined. He said Mr Wilson had been terminated in an attempt to limit Council's exposure in Mr Rogers' complaint to the Anti-Discrimination Commission. Mr Moorhead also said Mr Wilson would comply with Cityfleet's policy on equity and diversity and stressed, again, that Mr Wilson was willing to participate in any counselling or other process to solve the problems that had arisen between himself and Mr Rogers.

Finally, Mr Moorhead said that reinstatement was not impracticable. Any disharmony which existed in the workplace had arisen as a result of the unfair treatment given to Mr Wilson. Mr Moorhead said the evidence disclosed that Mr Wilson was well-respected by other indigenous employees of the Council. There would be no problems if he was returned to the workforce.

Submissions for the Respondent

Mr J. Thompson, on behalf of Council, submitted that the incident was a very serious breach of Council's policies and protocols. Further, Mr Wilson may have also breached the *Anti-Discrimination Act 1991*.

Mr Thompson said the evidence disclosed that Mr Wilson, and all other employees, had received extensive training in cultural awareness issues and Council's equity and diversity policies – which included training about what was appropriate, and inappropriate, behaviour in the workplace. I accept that this was the case.

Mr Thompson also said that Mr Wilson had engaged in behaviour which was racist, defamatory, belittling and damaging to Mr Rogers. In particular, Mr Thompson said that Mr Wilson's evidence that he had not directed any of his comments directly to Mr Rogers meant that Mr Wilson was "blind to reality".

Mr Thompson said that Mr Wilson's lack of response when questioned, under cross-examination, about whether he agreed to, and accepted, Council's equity and diversity policies spoke volumes about his approach to the whole matter.

Mr Thompson also said that, despite his denials to the contrary, Mr Wilson had clearly been involved in the investigation process and had attended three interviews with Ms Mercer. He said the evidence was that Mr Wilson, in the company of Mr Mackie (his union organiser), was given an opportunity on 26 November to comment on the evidence gathered about his involvement in the incident.

Mr Thompson also said that the ultimate decision to terminate Mr Wilson's employment was not harsh, unjust or unreasonable. It was clear on all of the material gathered by Ms Mercer, and anyone who had a reasonable knowledge of the events, that it would be impossible to put Mr Wilson and Mr Rogers back into the same work environment. Alternative positions into which Mr Wilson might be transferred had been explored but no other positions were available. Consequently, in light of the seriousness of the incident, and Council's inability to relocate Mr Wilson, termination of employment was not inappropriate.

Finally, Mr Thompson said if the Commission was of a mind to find that the termination was unfair it should find that reinstatement was impracticable. In support of his arguments in this area he referred me to the decisions of Wilcox J in *Nicolson v Heaven and Earth Gallery Pty Ltd* 126 ALR 233 and *Liddell v Lembke (t/a Cheryl's Unisex Salon)* (1994) 56 IR 447.

Conclusions

Did the incident occur?

I indicated (above) that I had not read the report of the external consultant, Ms Mercer. I took this decision for two reasons. Firstly, I did not wish to be exposed to any material which may have been mentioned to, or considered by, Ms Mercer. Secondly, I did not wish to be exposed to any of the conclusions she may have reached regarding the whole matter.

The scheme of the *Industrial Relations Act 1999* – especially s. 77 – dictates that it is for the Commission to determine whether any particular termination is harsh, unjust or unreasonable based upon the evidence before it. In that regard I have followed the approach of a Full Bench of the Australian Industrial Relations Commission in *King v Freshmore (Vic) Pty Ltd* (Print S4213 – 17 March 2000) where the Full Bench stated:

“When a reason for a termination is based on the conduct of the employee, the Commission must, if it is an issue in the proceedings challenging the termination, determine whether the conduct occurred. The obligation to make such a determination flows from s. 179CG(3)(a). The Commission must determine whether the alleged conduct took place and what it involved.

The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in the termination.” [In framing that statement the Full Bench referred to *Yew v ACI Glass Packaging Pty Ltd* (1996) 71 IR 201; *Sherman v Peabody Coal Ltd* (1998) 88 IR 408; *Australian Meat Holdings Pty Ltd v McLauchlan* (1998) 84 IR 1].

After considering all of the evidence I have decided that the incident on 31 October 2001 occurred essentially as Mr Rogers claimed. I have reached this decision notwithstanding that various parts of Mr Rogers evidence were not supported by the other witnesses who observed the incident. After listening to and observing the various witnesses I believe that Mr Rogers was, generally, telling the truth whereas I do not have the same view about the other witnesses to the incident. Further, some of the witnesses supported parts of Mr Rogers' version of events – including parts of the exchange which Mr Wilson denied.

Mr Wilson was evasive and uncertain and he avoided answering certain questions which he thought might damage his cause. He was also most uncomfortable [it was not just a case of being nervous in the witness box] when pressed, under cross-examination, about what he might actually have said to Mr Rogers.

Mr Allen's evidence was generally truthful insofar as it went. However, he was uncomfortable when pressed to provide more information than was recorded in his witness statement (above). I had the distinct feeling he knew more than he was prepared to admit.

Mr Collins, also, was generally not comfortable when giving his evidence and he appeared not to be prepared to say anything more than had already been admitted by Mr Wilson. I did not believe Mr Collins' evidence that the majority of comments were made in a discussion between Mr Wilson and himself and were not directed to Mr Rogers. Even if they had have been, they would have been clearly within the hearing of Mr Rogers who was sitting directly across the table from Mr Wilson.

Finally, Mr Fragoudakis (a Council witness) was also clearly very uncomfortable when giving his evidence. Like Mr Allen, he appeared to know much more than he was prepared to admit. He presented as a witness who had decided to say as little as he could about the incident in the event that it might rebound on him at the workplace.

By way of digression I record that it was rather telling that despite the witnesses' protestations that they had not heard much of the conversation several of them were, nonetheless, prepared to make the following comments when asked how they viewed Mr Wilson's comments as racist:

- * Mr Allen said he believed Mr Wilson's actions could be regarded as racist.
- * Mr Collins stated he believed Mr Wilson's comments were “inappropriate at that time”.
- * Mr Fragoudakis told Mr Wilson he should apologise.

By contrast to the other witnesses who gave evidence about the incident, Mr Rogers generally appeared as a plausible and convincing witness. He stood up extremely well under intense cross-examination and his answers were consistent and, I believe, generally reliable. He did not hesitate during the delivery of his evidence and was able to easily explain the alleged inconsistencies between his witness statement, prepared for these proceedings, and the statement which he had provided to ADCQ. His explanations and, in particular, the way that his evidence was presented, convinced me he was essentially telling the truth.

This included his evidence about having been subjected to similar, but less severe, comments from Mr Wilson on 3 or 4 previous occasions. However, Mr Rogers' alleged complaint to his supervisors was not supported by any other Council witnesses – who might reasonably have been called. Accordingly, I do not propose to give any weight to this point when deciding the whole matter. I merely record that I accepted this part of Mr Rogers' evidence ahead of Mr Wilson's denials when assessing the credibility of witnesses.

However, whilst accepting the bulk of his evidence, I did not accept Mr Rogers' evidence that he could not remember what he said to Mr Etherden and Mr Fitzgerald (above) in Mr Allen's office shortly after the incident. During this part of his evidence Mr Rogers' demeanour and delivery changed completely. [It is well settled that in evaluating the evidence of witnesses I may accept part of the evidence of a witness whilst rejecting other parts of the same person's evidence (*Grayson v Crawley* 1965 Qd.R 318)]. Instead, I accept Mr Etherden's version of this incident.

Mr Rogers' verbal evidence made it clear when and how the whole incident started. Mr Rogers explained in clear terms (transcript p. 69, line 10) how Mr Wilson and Mr Collins had been discussing Mr Jackson (the other indigenous apprentice) before Mr Wilson turned to him (Mr Rogers) and said words to the effect "*You know he's a fucking druggie eh. You know he's a fucking Hep B carrier don't you?*" (see ADCQ complaint).

From there, the discussion was no longer between Mr Wilson and Mr Collins. It was the commencement of Mr Wilson's attack on Mr Rogers' aboriginality, his people and his culture.

It was a vicious and malicious attack on another employee. It was unsolicited and totally uncalled for. It was totally unacceptable behaviour. It was designed to taunt and to hurt. It was clearly directed at, and to, Mr Rogers and it is a nonsense to suggest otherwise.

Given the tirade, and the vehemence with which it was clearly delivered, I am not surprised that Mr Rogers attempted to defend himself by jumping to his feet and inviting Mr Wilson outside.

The disgraceful thing about the whole incident is that Mr Rogers should not have been left in such a position. Other nearby employees – including those witnesses to the incident who gave evidence – should have intervened and told Mr Wilson that the tone and nature of his comments was unacceptable and that he should desist.

Was Mr Wilson given a chance to provide his version of events?

It is clear from Mr Wilson's evidence that he was questioned, on three occasions, by Ms Mercer about his recollections of the incident. Whilst it is unclear whether he was given a chance to comment on whether he agreed with her record of those conversations, it is nonetheless, clear on his own version of events that he made some very unsavoury comments to Mr Rogers.

Most importantly – given that the applicant has the burden of proof to establish that his termination was unfair – it was not suggested that Ms Mercer had incorrectly recorded Mr Wilson's version of the incident. Although Mr Wilson said he had not seen Ms Mercer's report until the exchange of documents for the hearing, there was ample time for he and his representative to establish whether Ms Mercer had written anything which Mr Wilson did not agree with. There was no suggestion that she had. Accordingly, I can only conclude that Ms Mercer correctly recorded Mr Wilson's version of events and that the Council considered his version – along with all of the other employees' versions – when it decided to remove Mr Wilson from the workplace.

Similarly, it was not suggested that any of the other material contained within Ms Mercer's report was not a true reflection of what she had been told by any of the witnesses to the incident.

Consequently, although I have some reservations about what might have actually occurred on 26 November and whether Mr Wilson was given a chance to comment on Ms Mercer's record of Mr Wilson's version of events, I am satisfied that Mr Wilson was sufficiently involved in the process – both as an individual and via the union – that he was given a chance to give his version of events before Council took the decision to terminate his employment.

Other relevant issues

I am satisfied on the evidence given by Mr Wilson and by Ms Price that Mr Wilson received training in February 2001 in relation to cultural awareness and what was, and what was not, acceptable behaviour in the workplace.

Further, I am satisfied from Mr Wilson's evidence that he understands that his comments on the day may have been racist and may have been offensive to Mr Rogers.

I am also satisfied from the evidence of Mr Dick and Mr Boland that Council took a number of steps prior to terminating Mr Wilson's employment to see if he could be relocated to some other position within Brisbane City Council. I am satisfied that there were no other available positions into which Mr Wilson could be moved.

Was the termination harsh, unjust or unreasonable?

After considering all of the evidence in the proceedings I am satisfied that Mr Wilson did racially abuse Mr Rogers (as outlined above) on 31 October 2001.

I am also satisfied that the abuse was unsolicited, that it was totally uncalled for and that it was totally unacceptable behaviour. I am also satisfied that it was contrary to Council policies which were known to Mr Wilson.

I am satisfied from the evidence given during the proceedings that Mr Wilson and Mr Rogers would not be able to work together again within the same part of Brisbane City Council.

I am satisfied that it was entirely open to Brisbane City Council to reach a similar conclusion and, as a consequence, decide to remove Mr Wilson from its Cityfleet division because he could no longer be employed by that division.

Whilst termination of employment is the ultimate penalty for any transgression within the workplace I am satisfied that it was the appropriate option in this instance.

Mr Wilson engaged in a vicious and malicious attack on Mr Rogers. Mr Rogers views the matter so seriously, and feels so harmed by the incident, that he is unwilling to participate in a mediation process with Mr Wilson. Clearly, the two employees can no longer work together.

In such circumstances it would be inappropriate for Council to attempt to move the victim, Mr Rogers, from the workplace. That would constitute a "double penalty" to the victim and would send the wrong message to Mr Wilson and all other employees at Cityfleet.

I am satisfied that there being no other position into which Mr Wilson could be transferred it was appropriate for the Council to take the only other step then reasonably open to it, namely, termination of Mr Wilson's employment.

There was nothing harsh, unjust or unreasonable about that decision. Mr Wilson’s actions and behaviour created the set of circumstances which gave rise to Council’s decision. He can blame no-one but himself that Council was left with no other practical option other than termination of his employment.

Accordingly, for all of the abovementioned reasons, I dismiss application No. B2295 of 2001.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

Appearances:-

Mr E. Moorhead, of the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland for Mr C. Wilson.

Mr J. Thompson for the Brisbane City Council.

Released: 17 June 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (S. Guley) AND Queensland Rail (No. B2154 of 2001)

COMMISSIONER THOMPSON

18 June 2002

Application for reinstatement – Extensive witness evidence – Long-term employee – Grievance lodged – Attitude and behaviour – Previous industrial dispute and recommendations made – Eves and Carmody report – Briton report – Witness credibility – Termination harsh, unjust and unreasonable – Reinstatement or re-employment impracticable – Compensation awarded.

DECISION

Background

An application was lodged with the Industrial Registry on 3 December 2001 by the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (AMEPKU) (applicant) seeking the reinstatement of a member, Mr Shane Guley, whose employment with Queensland Rail (QR) (respondent) had been terminated effective from 28 September 2001.

The application provided a deal of information of events leading up to the dismissal in addition to an outline of the processes utilised by the respondent.

Prior to the substantive hearing, the matter had been before Commissioner Asbury (in D298 of 2001), and a preliminary hearing had been held before the Commission as constituted (decision released on 28 March 2001).

Applicant

The applicant was represented by Ms Bernadette Callaghan, of Counsel, and relied upon evidence called from Mr Guley, Mr Bernard Misztal, Mr Stephen Williams, Mr David Hawkswell, Mr Brendan Kneen, Mr Steve Ceisioika, Mr Ian Saunders and Mr Gavin Challinor.

Evidence of Mr Guley

Mr Guley, a Fitter and Turner by trade, commenced employment with the respondent in September 1985, and was employed in a number of different classifications until promoted to the position of Master Scheduler in or around January 1998.

According to Mr Guley, the job itself was of an extremely stressful nature with a fair degree of responsibility, with him reporting directly to Mr Syd O’Sing, the Operations Manager.

During the course of his employment, Mr Guley was an active participant in Union matters within the workplace, holding a number of positions throughout his years of employment.

His evidence was that, apart from an incident in or around October 1999 in which a Mr Les Moore filed a complaint in respect of his behaviour, he had no knowledge of other concerns relating to his conduct.

In relation to the incident involving Mr Moore, it was settled in an amicable way between the parties without the need for the matter to be formally processed.

Mr Guley, sometime around June 2001, became aware that a complaint had been laid by Mr Shannon Connolly against him over an incident in which it was alleged that he had threatened Mr Connolly over his actions in lodging a grievance against the AMEPKU convenor (Mr Misztal) and Shop Steward – Motor Shop (Mr Kneen).

On 14 June 2001, Mr Guley was interviewed by QR Investigators, Ms Rayleen Eves and Mr Keith Carmody over the Connolly allegations and his evidence reflected his recollection of that interview, including comments to Ms Eves over her failure to wear footwear that was of an approved standard as required by the *Workplace Health and Safety Act 1995*.

Whilst being interviewed, he raised with the investigators, a number of concerns he had about particular matters and was advised to lodge his own grievances if he felt so inclined.

The findings of the investigators (Eves and Carmody) were that the allegations against Mr Guley, made by Mr Connolly, were substantiated.

Mr Guley’s evidence was that he then lodged grievances against a number of persons, which were investigated by Mr John Briton, a consultant hired by the respondent.

As part of that process, he was interviewed by Mr Briton and, at paragraph 20 of his affidavit of evidence, in recalling that discussion, stated:

“Following this investigation Britain [Briton] had an interview with me advising me in general terms that a number of people had made comments concerning my behaviour. Britain [Briton] never advised me who these complainants were nor did he advise me of the specifics of the complaints. He did mention that people made comments that they were intimidated by my physical appearance, he also mentioned that people had made complaints that they had to do my work when I was doing my trade union work. He also said that whilst they made comments that they feared me they also said that I was a good bloke and the sort of bloke that would do anything for them and that they could ring me at anytime of the day or night and I would do what I could do for them.”.

He also recalled Mr Briton making comments about Mr Lindsay Cooper – the General Manager of the Rockhampton workshops, being on a “hit list” compiled by Mr Guley, and of his belief that the managers of the workshop were not competent at their jobs.

According to Mr Guley, a report was produced by Mr Briton, after which on 26 September 2001 he received a show cause letter from QR under the signature of Mr Brian Bock, Group General Manager Workshops, which stated in full:

“Dear Mr Guley,

I refer to matters arising from your formal disciplinary interview conducted on 26 September 2001.

The formal disciplinary interview was initiated after receiving the investigation findings of your grievance and the findings of the grievance of Mr Shannon Connolly.

At your formal disciplinary interview you were advised that you had breached a number of QR Policies including QR’s Code of Conduct under section 5.2.2 Role of Employees, QR’s Workplace Harassment, Bullying and Violence in the Workplace Policy and QR’s Grievance Management Policy under section 5.2.1 Aggrieved Employee.

You were given a record of disciplinary interview detailing the issues raised with you during that process. You were given the opportunity to comment on the allegations made against you. These allegations included your display of unwelcome behaviour towards Shannon Connolly that was intended to offend, humiliate and intimidate him. During the course of the investigation you also attempted to intimidate Mr Carmody and Ms Eves who were conducting the investigation.

With regard to your lodging of a number of grievances against individuals, it was found by an independent investigator that none could be substantiated. QR considers that the lodging of these grievances by yourself was intended only to provoke those to who the grievances were directed.

QR view your breach of these Policies and your associated behaviour most seriously and consequently requests that you show cause as to why your employment should not be terminated.

Please provide a written response to this show cause letter marked attention to myself to the reception desk at the Rockhampton Administration Building (320 Murray Street) by 1500hrs, Friday 28 September 2001. If you do not respond, I will presume that you have no explanation or reason why your employment should not be terminated, in which case QR may proceed to terminate your employment.

Meanwhile, you are excluded with pay from the workplace until further notice commencing upon the receipt of this letter.

[Signature]

Brian Bock

Group General Manager Workshops.”.

In correspondence dated 28 September 2001, Mr Guley responded to the show cause letter, in which he refuted the allegations that had been levelled against him, and clearly stated that he had not been treated fairly throughout the process.

He believed that the decision of QR to exclude him (on full pay) from the workshop and to issue the show cause letter was “overly excessive”.

On 28 September 2001, a notice of termination was delivered to Mr Guley’s home by courier which, at paragraphs 3 and 4, stated:

“Your response has been received but does not satisfy QR, particularly as you did not provide any extenuating circumstances that demonstrate to QR that your services should not be terminated. You have used the opportunity in your ‘Show Cause’ response to refute the allegations made against you. As indicated to you at your formal disciplinary interview, the findings from the investigations into the grievances lodged have substantiated breaches of the above mentioned policies. These findings are reflected in the record of disciplinary interview which you have refused to sign.

Your failure to provide any further information or evidence that could sway QR otherwise, has left QR no choice but to terminate your employment – effective immediately.”.

Following the termination, a Notice of Industrial Dispute was filed in the Commission, which led to a conference before Commissioner Asbury, after which a further show cause letter was issued to Mr Guley on 12 October 2001.

The second show cause letter went into significant more detail in terms of the investigation and in following the recommendation of Commissioner Asbury, at paragraph 4.3 of the show cause letter:

“Consistent with the Commission’s recommendation I confirm that:

- (a) You are currently excluded from the workplace and will continue to be excluded; and
- (b) The termination of your employment is suspended pending the show case process being completed; and
- (c) You are deemed to be on leave and will remain on leave until the show cause process is completed; and
- (d) You are not to have contact with any person who has made a statement in either investigation. The exception is, that you may have contact with union officials who have made statements in either investigation, but you are not to have contact with any employee, manager or other person who has made a statement in either investigation.”.

The Union, under the hand of Mr Andrew Dettmer, Assistant State Secretary, in correspondence dated 25 October 2001, responded to the show cause letter on behalf of Mr Guley, making the point at paragraph 2, of concerns in respect of the process:

"I make the preliminary observation that your letter demonstrates complete pre-judgement of the case. The proper function of a show cause letter is to indicate that there are allegations and evidence of sufficient substance to require our member to show cause. Your letter goes beyond that and clearly indicates, even should we be able to show cause on our member's part, a response may be pointless, given your pre-judgement."

Mr Dettmer went on to further question QR's handling of the matter and sought clarification on a range of issues.

Whilst further correspondence was generated between the parties, QR's decision to terminate Mr Guley remained unchanged.

Mr Guley provided an affidavit in response to the affidavits relied upon by the respondent, and much of what was contained within the 102 paragraphs of this document could be simply summed up as denials to all of the allegations levelled against him.

Cross-examination of Guley

Counsel representing QR, Mr Richard Perry, cross-examined Mr Guley, at length (108 pages of transcript) across a range of issues including:

- Briton Investigation
 - Interview between Guley and Briton
 - Briton raising concerns expressed by a number of persons over Guley's behaviour (page 70, line 40 of transcript):

"Perry: Can you now then give any reason why it would be the case that so many people with whom you work have made allegations of the very serious kind which are set out in these statements?

Guley: I believe they just don't like me and they did not like me being a trade unionist.

Perry: All right. All of them?

Guley: All of them.

Perry: A number of them are also trade unionists, are they not?

Guley: They're members of unions, yeah.

Perry: Yes. So is your explanation, to the best of your ability, for what appears in these statements that they don't like you or don't like you because you're a trade unionist?

Guley: I don't – do not believe they like my trade – such a strong trade union activist. . .

...

"Perry: But, from your position, these people are prepared, quite falsely, to make serious allegations of misconduct against you for no other reason than they don't like you?

Guley: Yes."
- Specifics of complaints against Guley
- Treatment of managerial personnel
- Use of language in the workplace (page 75, line 15 of transcript):

"Perry: Have you ever then used obscene language of any kind in talking to managers above you or to those whom you work with?

Guley: I may have let some swear words slip out occasionally, yes.

Perry: But no more than perhaps all of us might in -- ?

Guley: That's --

Perry: -- ordinary circumstances?

Guley: That's correct."
- Reinstatement (page 76, line 15 of transcript):

"Perry: And that were in deed you ever to be reinstated you would consider that it would be appropriate for you to conduct your relations with those with whom you work and the managers in the same way in the future as you have in the past?

Guley: Yes, I'd just continue how I do my work.

Perry: And continue in treating them the same way as you have in the past?

Guley: Yes."

- Incident involving Connolly over his lodgement of a grievance against Misztal and Kneen (page 85, line 38 of transcript):

“Perry: What is it that you say you said to Connolly when you went up into his office?

Guley: He – when I walked in I said, ‘What’s – something – what’s this – what’s this about Shannon?’ He immediately raised his hands in the air and said that I was threatening him by just being there – –

Perry: Right?

Guley: – – and I said something about what are you on about and, yes, I did raise my voice because his voice was raised and I said to him, ‘After all I’ve done for you,’ and I said, ‘You’re only going to cause industrial problems.’

Perry: Mmm?

Guley: And, ah, because we were all sick of all this sort of stuff, there was a number of shop stewards complaining about, ah, we couldn’t talk to people any more unless, ah, they were saying we were threatening them and offending them and all this. So, yes, I said, well – well – well, – probably get a visit from the Minister and as I walked out he said to me, ‘You’re threatening me.’ I said, ‘No, I’m telling you the facts.’

Perry: Right. Thank you. So as I understand it you went up to Connolly’s office to talk to him about what, the grievance that he had lodged?

Guley: Well I knew there was grievances, yes.”.

- Workplace Health and Safety –Eves’ (footwear)
- Allegations of abusive behaviour (in general terms)
- Incident with Cooper – Christmas 1997
- Allegations of disrespect towards O’Sing (page 113, line 20 of transcript):

“Perry: He’s also lying, what, when he says that you berated O’Sing for singling out your members?

Guley: No, we had a pretty heated discussion.

Perry: All right. Did you call O’Sing an idiot and mad?

Guley: I don’t recall calling him mad. I did call him an idiot.”.

- Abusive phone call to O’Sing (at home)
- Eves and Connolly investigation/report
 - Allegations of threats and intimidation
- Altercation with Ms Michelle Codd
- Refusal to wear corporate clothing
- Argument with Mr Paul Langley
- FC order
- Show cause notice.

The evidence from Mr Misztal, the Deputy Convenor for the Union, related to his close working relationship with Mr Guley, during which time he stated that he had never witnessed any acts of bullying as alleged against Mr Guley.

He recalled being involved in a meeting with Mr O’Sing and Mr Guley, at which comments were made in respect of Mr Guley’s dress standards.

Mr Misztal also provided an affidavit in response, which refuted some of the evidence contained in the affidavits of Cooper, Evans, Eves and Codd.

In cross-examination, the matter of numerous complaints against Mr Guley, raised by Mr Cooper at the meeting, were subject to an exchange (page 214, line 36 of transcript):

“Perry: Right. The general manager discusses with two AMWU officials complaints by a number of staff concerning the behaviour of your deputy convenor; is that right?

Misztal: That’s correct.

Perry: And you would’ve taken that, I assume, to be a serious matter?

Misztal: Ah, coming from Lindsay Cooper I didn’t.

Perry: Right. So when he relates to you that a number of staff have made complaints to him about Guley you didn’t discuss it with Guley simply because it was Cooper who was saying this?

Misztal: Well, it’s like this. He didn’t tell us who were the complainees.”.

The evidence from witnesses Williams, Hawkswell, Kneen, Saunders and Challinor was of a similar nature, in that none of these witnesses had ever observed any behaviour from Mr Guley that could be classed as intimidatory or bullying.

Generally, their evidence reflected strong support for the way in which Mr Guley had conducted himself in the workplace.

In the case of the evidence provided by Ceisioika, it was simply disregarded, for the reason that he had sworn an affidavit for the respondent as well as the applicant, with sufficient areas of conflict in the two affidavits to remove any level of credibility that may be attached to a witness in this type of proceeding.

Respondent

Evidence for the respondent was presented to the Commission from nineteen (19) witnesses.

Mr Bock, the Group General Manager – Workshops, whilst giving his evidence in re-examination, stated that the decision to terminate Mr Guley was made without reliance upon the Briton Report (page 456, line 23 of transcript):

“Perry: You also said to Miss Callaghan that you had concerns about other employees of QR; can you tell me then in that context why it was that the Briton report was not discussed with Guley on the first occasion you interviewed him and the Carmody Eves report alone was relied upon?”

Bock: It was specifically – ah, people who had provided information to Mr Briton had requested that that information be kept confidential. Um, the nature of that information was such that ah, my responsibilities for all of the employees involved, I judged to be such that that information should be kept confidential.

Perry: And as it was kept confidential, did it play any part in your determination to terminate Mr Guley after the disciplinary interview process and the show cause letter process?

Bock: As much as – as I could humanly not have it in my mind, it did not play a part.”.

On the basis of Mr Bock’s testimony, the respondent’s evidence is documented in two distinct groupings, firstly being evidence relating to the matters subject of the Eves and Carmody investigation and, secondly, evidence relating to the alleged behaviour of Mr Guley as highlighted in the investigation and the report of Mr Briton.

The witnesses giving evidence in respect of Mr Connolly’s grievance, that was subsequently investigated by Eves and Carmody, were Connolly, Cooper, Mr Gary Ashton, Bock, Carmody, Mr David Dawes and Eves.

Mr Connolly, who holds the position as SAP Project Leader, believed that once he had attained this position, his relationship with Mr Guley changed due to the latter’s view of members of management.

On 29 May 2001, he lodged, in accordance with QR policy, a grievance against Mr Kneen and Mr Misztal, over a range of issues.

Contact was made by Ms Eves on 8 June 2001 for the purpose of arranging an interview to further discuss his grievance.

At approximately 6.55 a.m. on 12 June 2001, Mr Connolly claimed that Mr Guley burst through the door of his office and, in a loud voice, said words to the effect of “I hope you’re happy that you have caused the biggest shit stir.”.

On questioning from Mr Connolly as to what he meant, Mr Guley allegedly referred to the grievances that had been lodged by Mr Connolly.

At paragraph 19 of his affidavit of evidence, he recalled what next occurred:

“I informed Mr Guley that I found his behaviour threatening and asked him to leave. Mr Guley started to leave the room then turned back and said ‘we’re not going to take this shit, we’re out the gate’. He also said that I would be getting a visit from the Transport Minister. I told Mr Guley that I perceived this as a threat and Mr Guley replied that this was not a threat. He then left the office.”.

Mr Connolly contacted Ms Eves, expressing concerns at the confidentiality of his grievance being breached and of Mr Guley’s reaction.

Later in the month, Mr Connolly was interviewed by Eves and Carmody, and gave evidence of Mr Guley following Ms Eves and himself around the workshops at the time of the interview.

On 24 June 2001, he was interviewed by Mr Briton as a result of Mr Guley lodging a number of grievances against persons including himself.

He gave further evidence in relation to observations on the personal behaviour of Mr Guley, and of feeling intimidated by such behaviour.

Cross-examination of Connolly

Cross-examination of Mr Connolly included references to:

- Resignation from the Union
- Appointment to SAP Position
 - Union investigation of the appointment
- Change in relationship with Guley
- Interview with Briton
- Lodging of grievance against Kneen and Misztal and subsequent investigation

- Incident involving Guley on 12 June 2001 (page 287, line 42, of transcript):

“Callaghan: Right. And he confronted you?”

Connolly: Yes, he did.

Callaghan: Yes. And he never threatened you, did he?”

Connolly: Yes, he did.

Callaghan: Well I put it to you, Mr Connolly, that none of what you report in your hand – written report could be construed as a threat?

Connolly: I construe you’re going to get a visit from the minister as a threat.

Callaghan: Well, okay, is that the part that’s threatening?”

Connolly: The behaviour and attitude was also threatening but that’s the words that were said that I found most threatening.

Callaghan: The – the comment that you’re going to get a – that you’re going to get a visit from the minister?”

Connolly: Yes.”.

- Guley’s behaviour toward Connolly (page 292, line 40 of transcript):

“Callaghan: So there’s never been any – you’ve never had any other problem at work with Mr Guley other than that particular incident?”

Connolly: That’s right.

Callaghan: Is that correct?”

Connolly: Yes.

Callaghan: So as far as you’re concerned Mr Guley has always behaved appropriately to you except for that one incident?”

Connolly: Yes.

Callaghan: Thank you. Okay. That, of course – I’d like to take you to paragraph 30. Read paragraph 30 of your affidavit please. Have you read paragraph 30?”

Connolly: Yes.

Callaghan: That is in conflict, isn’t it, with what you’ve just told me?”

Connolly: No, you asked me if he ever showed inappropriate behaviour to me at work.”.

Mr Cooper, the General Manager of the Rockhampton Workshop, having held that position since June 1997, gave evidence of his knowledge and involvement in relation to the grievances lodged by Mr Connolly.

He further provided evidence of the grievance lodged by Mr Guley against himself and other management personnel and of the investigation by Mr Briton.

In relation to an incident in December 1997, at paragraph 15 of his affidavit, he stated:

“Sometime later, on the same night, Mr Guley came to the other area of the Criterion Hotel, and stood behind me staring at me with a madness in his eyes that I have not seen the likes of before. He then started abusing me calling me a ‘fucking cunt’ and saying that he was going to get rid of me. He then said ‘I’ll kill you, you fucking cunt’ and went to strike me. Before he could do so, Neil Pettit hit Mr Guley and he fell back on his behind to the ground. He sat there for a few moments glaring continuously at me then got to his feet and went to strike again. At this stage several Workshop staff grabbed him and I left. I recall that Neil Pettit, Stephen Williams and Ian Saunders were holding him.”.

Recalling a phone conversation with Mr Guley in 1998, at paragraph 20 of his affidavit, he stated:

“At approximately 10.00 a.m. on Sunday 1 March 1998 Mr Guley rang me on my mobile phone and was extremely abusive. He informed me that I as well as Mr O’Sing and Catherine Baxter were on his hit list. He accused me of replacing tradesmen with trainees and that Mr Dore had said there would be no tradesmen in the Wheel Shop in the future. He referred to Catherine Baxter as the ‘bitch with balls’ and told me several times I was on his hit list and implied he would get someone to get rid of me. This conversation went for approximately 12 mins. In the end I could not reason with him as he was becoming more threatening and abusive, saying ‘I will fucking get rid of you, you’re No. 1 on my hit list you cunt of a thing’ and stated that he would use his political connections to get rid of me, so I informed him I would be going to the police and hung up. I recorded the details of this conversation as well as my conversation with Mr Hick in my diary. Copies of my diary notes are attachment marked ‘LC-2’.”.

In his capacity as General Manager, he had received numerous complaints in respect of inappropriate behaviour by Mr Guley and, as such, on 13 March 2001, in speaking to Mr Guley, told him “this type of behaviour would not be tolerated”.

Whilst conducting the investigation of Mr Connolly’s grievance, Ms Eves had raised with him that she was “unsettled” due to the “hard time” given to the investigators by Mr Guley.

It was his opinion that, due to the type of behaviour exhibited by Mr Guley, any return to QR would not be an acceptable outcome. At paragraph 43(a), (b) and (c) of his affidavit, he stated:

“(a) He has seriously breached QR’s Code of Conduct.

- (b) Mr Guley refuses to accept or acknowledge that he has done anything wrong. He was given many opportunities over several years to change his behaviour but he either chose not to or is incapable of changing his behaviour and controlling himself.
- (c) His return would say to all QR staff that workplace bullying and inappropriate behaviour is acceptable and that QR just have to put up with it.”.

Some of the issues raised in cross-examination were:

- Procedures when a grievance is lodged
- Guley previously speaking to Cooper re: QR “getting rid of him”
- Awareness of the Connolly grievance
- Industrial situation in the Workshops (in general terms)
- Les Moore grievance
- Relationship with Connolly
- Interview with Briton
- Incident with Guley – December 1997 (page 411, line 32 of transcript):

“Callaghan: You never reprimanded Mr Guley about his behaviour at the Criterion that night; did you?

Cooper: I had no right to reprimand him. I – I certainly made it clear that I didn’t think that it was, ah, behaviour that should happen between, um, people at work, either inside the – the – side or outside. I made it clear that I wasn’t happy with it.”.

- Notes in his diary
- Phone call from Guley in 1998 over hit list
- Guley’s attitude towards O’Sing (page 420, line 40 of transcript):

“Callaghan: I put it to you that you never heard Mr Guley abusing Mr O’Sing?

Cooper: Yes, I did.

Callaghan: Abuse him. I put it to you, you might have heard them arguing?

Cooper: It was abusive – abusive argument.

Callaghan: Abusive. What words were used?

Cooper: He was calling him a fucking useless manager and – –

Callaghan: Fucking useless manager. I put it to you that you never heard Mr Guley say that to Mr O’Sing?

Cooper: I did.

Callaghan: Were you – were you – did you see them?

Cooper: Yes.

Callaghan: Whereabouts did it happen?

Cooper: In the – in the foyer outside the – the large – larger conference room – lecture room.”.

Mr Ashton, in evidence, recalled witnessing the incident involving Mr Connolly and Mr Guley in which he recalled Mr Guley saying “You’ll be hearing from the Minister over this.”.

Despite Mr Guley being “abrupt and boisterous”, Mr Connolly remained calm.

Ms Callaghan tendered an unsigned affidavit provided to the applicant by the witness and, whilst there were some minor discrepancies, at paragraph 5 of the unsigned statement where Mr Ashton stated:

“I can’t recall very much of the conversation although I can recall Shane saying words to the effect ‘you’ll be hearing from the minister over this’.”.

In his evidence, Mr Bock told of being informed by Mr Cooper that Mr Connolly had lodged a grievance, and whilst not familiar with the details of the grievance, upon making an enquiry found that the Human Resources Section had assigned investigators Ms Eves and Mr Carmody.

At the completion of the investigation, Mr Carmody told him that Mr Guley had been quite threatening during the process which had caused concern.

Not long after Mr Cooper informed him of Mr Guley’s grievance, and because of the nature of the complaint, he decided to engage an outside person rather than use an internal investigation team.

The reason for the choice of Mr Briton was that previously, when engaged for a similar task, he had endeavoured to resolve the matter by mediation, and Mr Briton had credentials that could not be questioned.

During the course of Mr Briton’s investigation, he was informed that a “significant amount of evidence was emerging which suggested that Mr Guley was, in fact, bullying”.

Having been given examples of the counter-allegations that were emerging, he agreed to extend the breadth of the investigation beyond the original terms of reference.

On receipt of the Briton report, it became clear that the aggressive behaviour of Mr Guley was not an isolated matter, and therefore, a serious issue for the workplace.

Mr Bock, in paragraphs 26, 27 and 28 of his affidavit, spelt out the course of action implemented under his direction:

- “26. I recognised that no one had lodged a grievance against Mr Guley, but there appeared to be such a body of evidence supporting the serious allegations that had been made against him during the course of the investigation that there appeared to be significant breaches of the bullying policy. I was clearly duty bound to implement Queensland Rail’s bullying policy.
27. A decision was made in concert with David Dawes, the Manager Industrial Relations and Greg Coughlan, General Manager Human Resources that there was sufficient evidence to proceed with disciplinary action as a result of the Carmody and Eves investigation.
28. We decided that a disciplinary interview would be conducted based on the matters which emerged from the Carmody and Eves report into Shannon Connolly’s grievance, including the aggressive conduct towards Mr Carmody and Ms Eves.”.

An interview was conducted with Mr Guley on 26 September 2001 at which both Mr Dawes and himself attended, with a decision taken at the conclusion of the meeting to issue a show cause letter to Mr Guley as to why his employment should not be terminated.

Mr Guley was suspended from work on pay from that point of time and shortly afterwards members of the AMEPKU commenced industrial action.

After receiving Mr Guley’s response to the show cause letter on 28 September 2001, a notice of termination (dated the same date) was provided to Mr Guley.

Some days later, QR filed a Notice of Industrial Dispute, which was followed by a conference before Commissioner Asbury, from which emanated a number of recommendations which included the issuing of a second show cause letter.

Following the eventual receipt of Mr Guley’s response to the second show cause letter, and after consultation with Mr Dawes, correspondence was provided to Mr Guley reaffirming that the original decision to terminate his employment stood.

Ms Callaghan, in conducting the cross-examination of Mr Bock, raised a number of issues including:

- Allegations of bullying and harassment – did he generally become involved?
- Connolly grievance – who determined the investigators
- Change to workshop culture
- Outsourcing
- Policies and procedures
- Investigation of grievances – processes
- Contact with Briton during his investigation
- Eves and Carmody report
- Interview with Guley, Dawes and himself
- Termination of Guley (page 453, line 25 of transcript):

“Callaghan: There had been no formal warning issued to Mr Guley prior to him being issued with a show cause letter or had there been?”

Bock: I would have like to have issued a formal warning to Mr Guley.

Callaghan: Why didn’t you?

Bock: ‘Cause at the disciplinary interview process Mr Guley denied every aspect of the issues that we put to him and showed no interest in reflecting on his own behaviours leading up to that point. There was noting to issue a warning about.

Callaghan: So are you saying that Mr Guley was sacked because he didn’t make admissions?

Bock: No. He wasn’t sacked because he did not make admissions.

Callaghan: Mmm. He was sacked because of the results of the Carmody and Eves investigation; wasn’t he?

Bock: That’s correct.

Callaghan: Right. Okay. Then Mr Guley was given two days to respond to that show cause letter?

Bock: That’s correct.

Callaghan: Correct. And at the same time he was excluded from the workshop?

Bock: That’s correct.”.

Mr Carmody, an employee of QR for thirty-eight (38) years, has held his current position as Senior Industrial Officer since 1997, during which time he has undertaken numerous investigations ranging from sexual harassment, bullying, to all manner of workplace issues.

His evidence commenced with an overview of the investigation, conducted by Ms Eves and himself, of the grievance lodged by Mr Connolly, with a copy of the final report attached to his affidavit.

In terms of the involvement of Mr Guley in the process, at paragraphs 19 and 20 of his affidavit, Mr Carmody stated:

- “19. When Mr Guley was advised that he was required to attend for an interview, he stated that the process was a joke, that he had friends in very high places and if his name gets out as slander, the issue would not stop there. More worryingly, he said to us ‘After this is over, I don’t want to see you in Rockhampton again’. He completed the statement with ‘That’s not meant as a threat either’.
20. Mr Guley’s stance and tone of voice was such that those words were spoken in a very threatening way. I said to him ‘Are you threatening us?’ He said it was not a threat. However he said that in a tone which suggested it was a promise.”.

The attached report provided full disclosure on all the matters that were considered by the investigators, including:

- Background
- Terms of reference
- Methodology
- List and summary of all interviews
- Relevant legislation/policies
 - Grievance management policy
 - QR’s harassment, bullying and violence in the workplace policy statement
 - QR’s code of conduct policy
- Identification of those who made allegations
- Burden of proof
- Findings
- Additional observations
- Recommendations
- Education.

As the report related to Mr Guley, it found the allegation that “Shannon Connolly alleges that Shane Guley has victimised him, in the form of threatening behaviour, as a result of lodging the initial grievance” was substantiated.

By way of recommendation, at page 16 of the report, it stated:

“2. Discipline Action

In line with the findings and the relevant breaches detailed above, the investigators recommend the following disciplinary action be taken:

- Mr Shane Guley, Disciplinary Interview regarding the victimisation against Shannon Connolly.”.

Matters canvassed during the cross-examination included:

- Investigation skills and training
- Role during investigation
- Process after a grievance is lodged
- Guley’s attitude during interview
- Threat by Guley to Connolly (at page 478, line 24 of transcript):

“Callaghan: What was the threat?

Carmody: We’re gonna take – um, we’re not gonna take the shit. We’re out of the gate. Expect a call from the Minister for Transport. And other people came back and also said there was words definitely to that effect. That – that’s – that is a threat. That is an intimidating threat on a person in the workplace to say that they’re going to cause this – this – this massive industrial disruption is a threat.”.

- Report findings

Mr Dawes, the Manager – Industrial Relations at QR, became involved in the disciplinary process of Mr Guley when requested to accompany Mr Bock in the undertaking of the disciplinary interview.

Prior to the interview, he had been given a copy of the Eves and Carmody and Briton reports which, upon reading, formed the view that it would not be possible to put all of the allegations arising out of the Briton report to Mr Guley without divulging the source of the allegations.

Mr Dawes prepared a Record of Disciplinary Interview for use in the interview with Mr Guley which was held on 26 September 2001.

In his evidence, at paragraph 16 of his affidavit, he spelt out the specifics of the interview:

“In the course of the interview, there was no emphasis placed on Mr Guley’s grievance and the Briton Report outcomes, other than the fact that his grievance had not been substantiated. For the reasons indicated at paragraphs 7, 8 & 9 I was conscious not to put anything to Mr Guley that had arisen out of the Briton Report. I did not want Mr Guley or ourselves to be distracted away from the findings of Carmody & Eves. Brian and I clearly communicated to him that the basis of the disciplinary action was as a result of the Carmody & Eves investigation. This is reflected in the record of disciplinary interview. In the course of the interview, we broke for a short time and I typed up Mr Guley’s responses.”

It was Mr Dawes’ opinion that during the course of the interview, Mr Guley had “not offered a real explanation for his conduct”.

After the interview had concluded, he and Mr Bock decided that it would be appropriate to issue Mr Guley with a show cause letter.

The response to the show cause letter from Mr Guley was considered by Mr Bock and himself with the decision to terminate the employment of Mr Guley being subsequently made.

In response to the decisions taken by QR in respect of Mr Guley, industrial dispute by way of strike action took place.

QR filed a Notice of Industrial dispute which resulted in a conference before Commissioner Asbury in Rockhampton.

Despite a second show-cause being issued, and response being provided, QR determined that the decision to terminate the employment remained unchanged.

Mr Dawes’ evidence on whether reinstatement could be an acceptable consideration was dealt with at paragraph 60 of his affidavit:

“I also hold the opinion that it would not be practical to reinstate Mr Guley to another part of QR’s business. I base this opinion on the attitude displayed by Mr Guley toward persons in authority within QR at the disciplinary interview and in his second show cause response. In addition it has been a well publicised fact that the Chief Executive has taken a very strong stance on workplace harassment, bullying and violence in the workplace. The organization has gone to a great deal of time and expense to ensure that all QR employees can function in the workplace free of these pressures. I believe his attitude and behaviour will not be isolated to a particular workplace or particular employees. I believe that given Mr Guley’s clear denial of any wrong doing, reinstatement of him to another part of the business would result in exposing additional QR employees to his behaviour. It would follow that regardless of where Mr Guley was placed within the organization, because he does not see anything wrong in his behaviour, his behaviour would simply continue in another workplace.”

In cross-examination matters raised included:

- Decision to issue first show cause letter
- Preparation of disciplinary interview paperwork
- Carmody and Eves investigation
- Interview with Guley
- Second show cause letter
- Impracticability of reinstatement.

Ms Eves, a Senior Human Resources Advisor, gave evidence corroborating that of Mr Carmody in respect to the investigation of Mr Connolly’s grievance and the behaviour of Mr Guley during the course of the investigation.

The cross-examination of Ms Eves included reference to:

- Training as an investigator
- Connolly grievance
- Interview with Guley
- Guley’s behaviour/demeanour
- Wearing of open toe shoes
- Report recommendation for Guley (page 607, line 30, of transcript):

Callaghan: Okay. And your recommendation was that Mr Guley be subjected to a disciplinary interview regarding the victimisation against Mr Connolly?

Eves: That’s right.

Callaghan: Why – you’ve got – you recommend disciplinary action against Mr Misztal and disciplinary action against Mr Kneen and then a disciplinary interview against Mr Guley. What’s the difference?

Eves: Um, disciplinary action is more – there’s no difference as such. Disciplinary action may be a number of different, um, responses.

Callaghan: Why – why did you use different words for Mr Guley than the other two?

Eves: I’m not positive.

Callaghan: Would disciplinary action mean a disciplinary interview?

Eves: It may do but it may not.

Callaghan: But it may not?

Eves: That’s right.

Callaghan: A disciplinary interview must mean a disciplinary interview?

Eves: That's right.

Callaghan: Do disciplinary interviews always lead to show cause letters?

Eves: Ah, no.

Callaghan: No, okay. Can you have a show cause letter without a disciplinary interview?

Eves: Um, I believe so. It depends on the circumstances."

The remaining witnesses for the respondent, with the exception of Mr Briton and Ms Katy Steenstrup, provided evidence that related to alleged inappropriate behaviour by Mr Guley in the workplace, incidental to the matters subject to the Carmody and Eves investigation.

In most cases, these witnesses had been interviewed by Mr Briton as part of his investigation and copies of the record of interview emanating from that enquiry were attached to the witnesses affidavits filed in these proceedings.

For the purpose of expediency, this particular evidence is best documented in a summarised form.

Kiran "Bill" Gitsham – Product Controller – Wheel and Bogie Shop

- Witnessed inappropriate behaviour by Guley over a period of time
- Guley's hatred of Cooper
- Opinion that Guley is not capable of changing his conduct
- Interview with Briton

Catherine Baxter – Operations Manager – Rollingstock

- Received regular complaints from staff about Guley's behaviour
- Spoke to O'Sing about Guley's behaviour (paragraph 12 of her affidavit):

"I took the complaints made to me by my staff seriously. I had hoped that by Mr O'Sing talking to Mr Guley he would change his behaviour. However, that did not happen."

- Guley's standard of dress
- Being "stared" down by Guley on a regular basis
- Effect on workplace if Guley reinstated (paragraph 31 of her affidavit):

"If Mr Guley is reinstated I will certainly reconsider my employment options. I also believe that it would result in a lot of people not turning up to work. Since the termination of Mr Guley's employment the people in the workplace are more relaxed, and the atmosphere is not emotion charged. The staff working in the Scheduling Section relate better to each other. Meetings that are conducted are more cordial, and most noticeably the barbed comments that used to be injected by Mr Guley are absent."

- Interview with Briton

Michelle Codd – Materials Manager

- Incident involving Guley outside of work
- Guley's comments on O'Sing being incompetent (paragraph 14 of her affidavit):

"Mr Guley was constantly telling people around the office that Sid [Syd] O'Sing, Operations Manager – Components, was incompetent, a hopeless manager, that he did not know what he was doing and couldn't make decisions."

- Guley's behaviour – intimidating
- Guley giving her the "death stare" in meetings
- Reinstatement of Guley (paragraph 30 of her affidavit):

"If Mr Guley was reinstated I would consider leaving the Workshops Group and maybe even QR. I do not think I would be the only person who would take this drastic step. Most people, particularly in the office at Rockhampton Workshops, do not believe that they would be able to continue to work if Mr Guley was reinstated."

- Interview with Briton

Keith Jarvey – Personnel Officer

- No direct contact with Guley in the workplace
- Witnessed argument between Guley and O'Sing
- Guley's inappropriate behaviour (paragraph 12 of his affidavit):

"I recall another incident that occurred around Easter in 2001. It was definitely a Monday morning at approximately 6.45 or 6.50 a.m., however I cannot recall the date. I do remember that it was a major RDO. I had just left the kitchen in the main office at Rockhampton Workshop when Mr Guley came boring down the hallway. It was obvious he was ropable. I said 'good morning' to him but he just ignored me. Someone else, I cannot recall who, made some comment to Mr Guley to the effect of 'gee you look unhappy this morning'. Mr Guley turned around and said, in an aggressive voice, 'you can fucking shut up. I've had a cunt of a weekend'. He was very agitated and stormed out."

- Interview with Briton

Clarence Plummer – Project Officer – Workplace Strategies

- His role in delivering training sessions on discrimination, harassment and workplace bullying
- Advice given to Connolly prior to the lodgement of his grievance against Misztal and Kneen
- Witnessing an aggressive confrontation between Guley and O'Sing
- Interview with Briton

Sydney O'Sing – Operations Manager – Components

- Guley in the course of his employment reported directly to O'Sing
- Grievance lodged by Guley against O'Sing and a number of other managers
- Briton investigation of Guley's grievance
- Incidents involving inappropriate behaviour from Guley (paragraph 33 of his affidavit):

"Mr Guley's behaviour was inappropriate and in breach of QR's Code of conduct and the bullying policy. It was difficult however to act as people were not prepared to make formal complaints against Mr Guley as I have said, for fear of Reprisal. I was also very cautious of Mr Guley, primarily as I did not wish to be seen to be singling him out because of his union involvement."

- Complaints received about Guley's behaviour
- Reinstatement of Guley (paragraph 34 of his affidavit):

"In my view there has been considerable change in our work environment since the absence of Mr Guley. Generally the staff appear to be happier. There is less tension in the workplace, our discussions and meetings are more positive and open and our teamwork has improved. Everyone's focus has always been to ensure that the Rockhampton Workshop remains a sustainable business. However, in order for this to occur, everyone must be able to contribute and be accountable and responsible for their actions."

- Interview with Briton

Darren Stock – Contract Administration

- O'Sing intervening in an incident between Guley and Stock
- Behaviour of Guley inappropriate
- Interview with Briton

Craig Evans – Senior Employee Relations Advisor

- Phone call received from Cooper in 1997 (day after incident involving Guley in hotel at Christmas)
- Incident in September/October 2000 where Guley called O'Sing an "idiot" and "mad"
- Interview with Briton

Geoffrey Thompson – Manager – Manufacturing and Engineering Services

- Recalled being present at Criterion Hotel in December 1997 and witnessing an altercation involving Guley and Cooper in which Guley was the aggressor
- Guley's behaviour outside QR premises at the time of an industrial dispute in early 2000
- Interview with Briton

Katerine (Kate) Steenstrup – Manager Employment Equity, Human Resources

- Gave evidence of her responsibilities which included the development of policies and strategies on issues such as:
 - Anti-discrimination and equal opportunity programs
 - Bullying
 - Harassment
 - Violence
 - Work and family
 - Training (paragraphs 10 and 11 of her affidavit):

"10. All Regional Consultative Committees have been informed in relation to Queensland Rail's strategy and in relation to the policies, material and training.

11. The training has involved 2 hour sessions for all employees. The training makes it clear that a breach of the policy can result in dismissal."

Mr Langley, employed as a Master Scheduler, would not voluntarily provide evidence in these proceedings and, on the request of Mr Perry for QR, an attendance order, pursuant to s. 329(b) of the Act was issued by the Commission.

Mr Langley's evidence related to an altercation with Mr Guley over comments that Mr Langley had allegedly made in respect of the work ethic of some "shop floor" employees.

On the subject of Mr Guley's behaviour, at page 157, line 10 of transcript, in his evidence in chief:

"Perry: In the context then of what you have either been involved in or witnessed of Mr Guley's behaviour, how would you describe his conduct; acceptable or unacceptable in the workplace?"

Langley: At times unacceptable but that's only at times."

Ms Callaghan subjected each of the witnesses Gitsham, Baxter, Codd, Jarvey, Plummer, O'Sing, Stock, Evans, Thompson, Steenstrup and Langley, to various degrees of questioning during the cross-examination process.

Mr Briton, a consultant, was engaged by QR to investigate the grievance lodged by Mr Guley.

Instructions were given by Mr Bock on 5 July 2001 in relation to the conduct of the investigation.

Mr Briton, a most experienced investigator, in referring to the investigative methodology adopted, at paragraph 13 of his affidavit, stated:

"When making my recommendations on the final page of my report, I was conscious that any disciplinary process undertaken against Mr Guley would be part of a process involving an entitlement on his part to show cause why he should not be disciplined. I am acutely aware that I am a fact-gatherer, not a decision-maker, I merely make recommendations based on my experience, for the consideration of the employer."

On the investigation itself, he was originally limited to the grievances against the seven (7) persons, however as the investigation progressed, a number of disturbing allegations were levelled against Mr Guley which ultimately led to a larger number of people being involved.

The additional scope for his investigation was authorised by Mr Bock.

Mr Briton, in a second meeting with Mr Guley on 31 August 2001, raised the issue of the allegations against him and, at paragraph 22 of his affidavit, stated:

"Conscious that in our first meeting, Mr Guley had told me he expected the people against whom he had made a grievance to assert that he was 'aggressive' and a 'bully', I informed Mr Guley on 31 August 2001 that he was correct about what people would say and I wanted to put to him what they had told me. I told him that his allegations were denied and that people had made allegations against him which appeared to be serious breaches of the bullying policy. I told him words to the effect 'It looks bad for you.' I told him that was the case because not only did he appear to have breached the bullying policy but people had tried to counsel him in relation to it in the past and it appeared that he had not changed his behaviour."

In his evidence as it related to the findings of his investigation, Mr Briton, at paragraph 35 of his affidavit, stated:

"In formulating my findings I knew no one had formally disciplined Mr Guley, I recommended that he be formally disciplined and I was conscious that the initial step in any disciplinary process would be that he be given a show cause letter setting out the full allegations made against him and given the opportunity to respond."

Attached to the affidavit of Mr Briton was his report of the investigations carried out, including copies of all interviews obtained in the process.

In cross-examination, issues raised included:

- Investigation (brief given)
- Eves and Carmody report
- Briton's interviewing methods (beginning at page 511, line 25, of transcript):

Callaghan: Right. Okay. Now, I want to go to the processes that you used. Mr Briton, I notice in a number of the records of - or the notes taken by you of the interviews indicates that you actually led the person that you were interviewing. By that I mean that you actually told the person who had purportedly witnessed a particular event, what another person had said about that particular event?

Briton: You'd have to take me to those particular --

Callaghan: I will?

Briton: -- examples. . .

Callaghan: So you told Mr Gitsham about the incident before asking him?

Briton: The -- the process that I use in these interviews is I will refer to an incident like something that's happened on or alleged to have happened on such a such a date or something that will identify the incident and ask people what they recall of it and get them talking. They say what they say. If people don't recall the incident in sufficient detail I give them a bit more and I might say that Ms Baxter told me this or you know Mr O'Sing told me that, is that true? But the process to start with is an open-ended question inviting a response. . .

Callaghan: Next paragraph. 'I told Ms Codd that a number of people had told me that Mr Guley had told her at a function in January 2000 that he wouldn't rest until he got rid of Lindsay Cooper or words to that effect. I asked Ms Codd for her recollection of that occasion'. Are you concerned about putting words into her mouth about comments supposedly purportedly made by Mr Guley?

Briton: I was asking her whether comments that other people had told me that Mr Guley had made on that occasion were true. So I asked her that question. She then goes on to give a quite a well a long and comprehensive answer to that question."

Final Submissions

Applicant

Ms Callaghan provided extensive written submissions (49 pages in all) in which a number of matters were covered under the following headings:

- Undisputed facts (hopefully)
- Evidence
- Evidence on behalf of the applicant
- Evidence on behalf of the respondent
- The law
- Conclusions.

Applicant's Evidence

Ms Callaghan submitted that Mr Guley was a credible witness and that the cross-examination was unable to expose any inconsistencies in his evidence.

The evidence of the other witnesses on behalf of the applicant was also credible, with no inconsistencies, with the exception of Mr Ceisiolka, who had also signed an affidavit on behalf of QR.

Respondent's Evidence

Ms Callaghan, having carefully examined the evidence of each of the witnesses, raised a number of issues which, in her opinion, questioned both the credibility and consistency of the evidence.

A number of witnesses, according to Ms Callaghan, were "endeavouring to paint Guley in the worst possible light", including significant references to incidences that had occurred outside work that were not relevant to the considerations before the Commission as to whether the dismissal of Guley was unfair.

In relation to the evidence of Mr Bock on the circumstances of the disciplinary interview with Mr Guley at paragraph 34(d) of the submission, Ms Callaghan stated:

"Bock gave evidence that he and Dawes decided they would interview Guley only on the basis of the Carmody and Eves investigation. Following that interview, they issued Guley with a show cause letter as to why his employment should not be terminated. Bock denied that he actually decided to terminate Guley prior to interviewing. This is of course contrary to evidence by Cooper, who stated he was telephoned and told prior to Guley being interviewed that they were going to come to Rockhampton, interview Guley and then terminate him. Bock denied this had happened."

Ms Callaghan, in submissions, was quite scathing in her comments in respect of the evidence of Mr Briton and of his report. At paragraph 37(b) of the submissions, she stated:

"The most important evidence that came out of Briton was that he in fact led evidence from the people that he interviewed about Guley prior to compiling the Briton Report. Briton's evidence was that he first of all asked people for their recollection prior to telling them what others had said. Evidence shows that this was not the case nor is his evidence supported by his own notes of the various interviews he held with people. Stock's recollection of how Briton conducted the interview was that Briton read to him Connolly's statement first of all before asking for his recollections. (Page 565 line 1). It is my submission that Stock ought to be believed rather than Briton as Stock's recollection is backed by Briton's notes. This of course puts the whole Briton report into question, as clearly, all of the evidence obtained from those witnesses who were led by Briton as indicated in the notes, is contaminated and cannot be given any weight by the Commission."

Conclusions

The submissions concluded that the termination of Guley was unfair for the following reasons:

- He was never given a formal warning about his behaviour, nor given the opportunity to respond to that warning;
- QR had made up its mind about terminating him prior to putting any allegations before him;
- His words with Connolly concerning the grievance Connolly had raised about Misztal and Kneen and his behaviour during the investigation by Eves and Carmody did not warrant termination; and
- Allegations arising out of the Briton Report were never put to Guley.

On the issue of reinstatement, it was submitted that it would not be impractical, due to the size of QR, for a position to be found for Mr Guley, who was a skilled worker with a considerable number of years service.

If the Commission was of the view that compensation was a more appropriate remedy, then the maximum available under the Act was sought.

Respondent

The submissions from Mr Perry, on behalf of the respondent, were also substantial (50 pages in all), covering the following areas:

- General outline of submissions
- Summarised response to applicant's submissions
- Legal consequences of the proceeding before Commissioner Asbury
- Particular legal issues –
 - Function of pleadings in dismissal cases
 - Corroboration
 - Formal warnings
 - Procedural requirements
- Summary of evidence concerning various instances of misconduct
- Submissions as to credit
- Summary
 - Appendix A – Chronology of incidents
 - Appendix B – *Gorman & BHP Integrated Steel Division* [2000] NSWIRC 1079
 - Appendix C – *Arun Dube v QANTAS Airways Limited*, 26 June 1996, Industrial Relations Court of Australia, Judicial Registrar Murphy, Decision No: 279/96.

Applicant's Submissions

In response to the applicant's submissions and, in particular, the reasons said to summarise the basis for the contention that Mr Guley was unfairly dismissed, at paragraph 2.2 and 2.3 of the submission, it was stated:

"2.2 The first point to emphasise is that none of these matters were pleaded. It is not accurate to say that the second dot point arose only during the trial. Guley's position in evidence was that all of the QR witnesses who gave evidence of his conduct had lied because, either, they didn't like him or because of his union activity. That is, that his dismissal was based upon trifling grounds due to his particular industrial record. Nothing of the kind was pleaded and, in particular, no basis was laid for the conclusion that Guley alone (rather than Misztal or Kneen who were also the subject of substantiated grievances) was terminated due to industrial activity.

2.3 As to the various issues raised in the dot points, the Respondent submits that:

- (a) A formal warning was neither required nor necessary. The purpose of such a warning is to allow the employee to have the opportunity of remedying a particular deficiency in performance or changing particular behaviour. In this case Guley's consistent position was, firstly, that none of the instances of misconduct had occurred and, secondly, that he would continue to act, in the future, in the same way as he had acted in the past.

Obviously, the first step in modifying behaviour is recognition that that behaviour has occurred and acceptance that it is unacceptable. On both counts, Guley failed utterly. What then could any formal warning have possibly achieved?

Procedure and process are not, of course, ends in themselves. Unless there is a purpose, a warning, formal or otherwise, is irrelevant. Here no purpose could possibly have been served.

In any event, there was a wealth of evidence of informal attempts at behaviour counselling. . . ."

The respondent drew to the attention of the Commission the matter of *Gorman v BHP Integrated Steel Division* [2000] NSWIRC 1079, in which it was observed that there is authority for the proposition that the behaviour, that Mr Guley consistently engaged in, justified termination.

In that decision, a description of Gorman's behaviour was given:

"... life with Mr Gorman in the workplace was a continuing barrage of loud and aggressive behaviour, frequently intimidating, often offensive . . . Mr Gorman was not for turning. . .

What has emerged in this hearing is a series of altercations between Mr Gorman and his supervisors, sometimes related to work issues and sometimes what appears to me to be personal issues. . . ."

On the legal consequences of proceedings before Commissioner Asbury, it was submitted that the process of termination was complicated by those proceedings, in that a further show cause notice was issued (by agreement) and responded to, which had the legal effect that the initial termination was superseded.

The respondent ultimately made the decision to terminate on the context of both show cause notices.

In the submission, at paragraph 3.6, Mr Perry went on to say:

"The consequence of the subsequent show cause process is however to significantly broaden the factual bases upon which termination was effected. That is, the Respondent must be held to have terminated the Applicant upon the totality of the material contained in both investigations, upon the basis of the Applicants responses to both show cause notices and upon the basis of Guley's responses in the interview of 26 September."

The submission, in a most comprehensive manner, went to the evidence of many of the respondent's witnesses, and also, in same process, challenged a significant portion of the evidence given by Mr Guley.

In amongst this section of the submission, at paragraph 5.21, Mr Perry made a rather telling comment in respect of Mr Guley's threat to Mr Connolly as a result of the grievance lodged against Mr Misztal and Mr Kneen:

"12 June 2001 – Guley threat to Connolly

This incident was the instigating factor in the eventual termination. It reveals a serious attempt to threaten Connolly into withdrawing his complaint or ensuring that no further complaint was ever issued.

If conduct of this kind occurred in the context of a Commission hearing it would amount to contempt."

On the case of witness credit, it was submitted that the respondent's witnesses related a consistent description of Mr Guley's (inappropriate) behaviour, whilst Mr Guley simply fell back upon his constant refrain – "they're all lying".

Summary

The respondent, when faced with overwhelming corroborative evidence of a number of incidents involving Mr Guley, acted reasonably in relying on the Eves and Carmody report to terminate his employment.

It was put, at paragraph 7.6 of the submission that:

"The Respondent submits that it was open to it, on the face of the material to find that Guley had engaged in intimidating and threatening conduct in breach of the Respondent's Code of Conduct and its Workplace Harassment, Bullying and Violence in the Workplace Policy. The Respondent submits that the conduct initially relied on to terminate Guley's employment prior to the intervention of Commissioner Asbury, was of itself, sufficiently serious conduct to warrant dismissal."

In terms of a remedy, it was submitted that, in the event that the Commission finds that the termination was harsh, unjust or unreasonable, the evidence of the respondent's own employees is a compelling argument as to why reinstatement or re-employment, in any capacity or at any location, would be impracticable.

Mr Perry relied further upon the evidence of Mr Guley, at page 76 of transcript, to support his argument:

"Perry: And, therefore, there is no need nor any occasion for you to reconsider or modify any behaviour of yours?"

Guley: No, I don't see why, no.

Perry: No. And that were in deed you ever to be reinstated you would consider that it would be appropriate for you to conduct your relations with those with whom you work and the managers in the same way in the future as you have in the past?

Guley: Yes, I'd just continue how I do my work.

Perry: And continue in treating them the same way as you have in the past?

Guley: Yes."

Finally, if the Commission was minded to award compensation to Mr Guley, the following should be considered:

- "the lack of any remorse and total denial on the part of Guley that his behaviour was in any way unacceptable. A position that Guley has held firmly since the commencement of informal discussions with him regarding his behaviour and conduct in the workplace as early as 1997; and
- the fact that Guley was terminated on notice, being paid 1 months salary in lieu of notice."

Conclusion

Like any application for reinstatement, this matter had its fair share of "twists and turns", however, it became, in some respects, a little more complicated, in that, interwoven into the circumstances surrounding the termination of Mr Guley, were the findings of not one, but two investigations, commissioned by QR that related to the work situation involving Mr Guley.

Whilst the evidence of Mr Bock (referred to earlier in this decision [page 456, line 23 of transcript]) that QR had relied only upon the findings of the Eves and Carmody investigation to effect the dismissal of Mr Guley, I have formed a view that, on the reading of paragraph 26 of Mr Bock's affidavit there was certainly evidence that the Briton report had, to some extent, been influential in formulating the decision taken by Mr Bock to terminate the employment:

"I recognised that no one had lodged a grievance against Mr Guley, but there appeared to be such a body of evidence supporting the serious allegations that had been made against him during the course of the investigation that there appeared to be significant breaches of the bullying policy. I was clearly duty bound to implement Queensland Rail's bullying policy."

Eves and Carmody report

This internal investigation which, firstly, had the responsibility of investigating the grievance lodged by Mr Connolly on 29 May 2001 alleging that the AMEPKU Conveneyor, Mr Misztal, and Shop Steward – Motor Shop – Mr Kneen, had been responsible for issues relating to threatening, offensive and unwelcome behaviour towards him.

The terms of reference of this investigation were extended to enable the investigators to consider further allegations made by Mr Connolly that, on 12 June 2001, Mr Guley had "victimised him in the form of threatening behaviour as a result of lodging the initial grievance."

It is not necessary to go to the findings of the investigation as they related to Mr Misztal and Mr Kneen as they have no bearing on this matter, suffice to say that the findings were varied, in that, some of the allegations were substantiated and others not.

In respect of the allegations against Mr Guley, I am satisfied that the carriage of the investigation was such that Mr Guley was given every opportunity to present his side as to the allegations levelled against him in an environment free from any outside pressure.

On the behaviour of Mr Guley towards Ms Eves and Mr Carmody during the investigation, it would be difficult to reach any conclusion on the evidence before the Commission other than he had deliberately tried to intimidate the investigators as they went about their business and, as such, potentially have some impact upon the outcome of the investigation.

Having studied, in detail, the report in its entirety, I fully concur with the findings of the investigators and of their recommendation that required Mr Guley to be subjected to a disciplinary interview.

Briton Report

Whilst the original brief given to Mr Briton related to the grievances lodged by Mr Guley against a number of the QR Managers at the Rockhampton workshops, it became apparent that, during the life of the investigation, it changed to seemingly focus more on the alleged inappropriate behaviour of Mr Guley, both at work and outside of work hours.

Ms Callaghan, in her final submissions, left no doubt that it was the applicant's view that all of the evidence obtained from those witnesses was led by Mr Briton and, as such, was contaminated to the extent that it could not be relied upon by the Commission.

It was somewhat late in the proceedings when Mr Briton was called upon to give evidence and, when questioned by Ms Callaghan on the issue of his interviewing method, denied that he had led any of the persons interviewed.

Ms Callaghan further pursued the issue with Mr Stock, another of the respondent's witnesses who, at page 566, line 10, of transcript, stated:

"Callaghan: Okay, okay. Then – then Mr Briton read to you – well then – then the last paragraph talks about how Mr Briton actually read to you about an incident in early August 2000 when Mr O'Sing intervened in an argument between you and Mr Guley, okay?"

Stock: Yes.

Callaghan: Can you recall whether or not Mr Briton actually asked you about that incident prior to reading Mr O'Sing's comments to you?

Stock: I think it was same. I think he went on to read that one before he spoke about it."

On having closely examined the Briton report, including all of the transcripts of interviews carried out by him and consideration of the comments of Mr Stock, I am inclined to place little weightage upon the findings of the report but would suggest it is not beyond the balance of probabilities to form a view that at least at some stage of the investigation's life, QR had thoughts of relying upon the findings of the report to further strengthen their position in dealing with Mr Guley.

Witness Credibility

As often as is the case in matters such as this application, the Commission, in determining the outcome, must make a judgement based upon the credibility of those giving evidence in the proceedings.

Firstly, in looking at the evidence of Mr Guley who spent the best part of two days under cross-examination, he simply adopted a position where he denied almost every allegation levelled against him and relied upon either of two reasons as to why such allegations had been made, in the first place. Those being:

- That the persons, in giving evidence, did so on the basis that they did not like him
- His activities as a Union delegate had angered people who were anti-union and this was the reason they had made such allegations.

From my perspective, having listened closely to the evidence, particularly the cross-examination, of Mr Guley, I found that there was little genuineness about the witness, and that his demeanour, whilst giving evidence, was less than impressive.

In respect of the two reasons given by Mr Guley as explanations for the allegations against him, the evidence before the Commission from the respondent's witnesses could not, under any circumstances give credibility to such claims and it is my view that Mr Guley's evidence could not be given a high level of credence.

The other witnesses for the applicant, in my view, whilst offering little to assist the applicant's cause were, for the most part, credible.

It is not necessary to make comment in respect of all the witnesses for the respondent in terms of credibility, however the evidence of "key" witnesses, such as Mr Connolly, Mr Carmody, Ms Eves, Mr Bock and Mr Dawes does require some mention.

In the case of Mr Connolly, he knew from the moment that he lodged the grievance against Mr Misztal and Mr Kneen that "life" was going to be difficult and that position was further compounded when he reported (what he deemed to be) the threatening behaviour of Mr Guley on 12 June 2001.

During the course of his evidence, he withstood the rigors of Ms Callaghan's cross-examination and emerged from it (in my view) as a credible witness with an honest belief that the actions of Mr Guley were a deliberate attempt to intimidate him as a result of his lodging of the grievance.

The evidence of Mr Carmody and Ms Eves related to their investigations and the compiling of the report on the grievances lodged by Mr Connolly with each of the witnesses presenting as persons that the Commission accepts as both truthful and credible.

The evidence of Mr Bock, the person who, at the end of the day, determined the fate of Mr Guley, was generally acceptable however, the exception would be in terms of his evidence around the reliance upon the information provided to QR in the Briton report which, to some extent, was contradictory.

On the other hand, Mr Dawes, a most experienced industrial relations practitioner, clearly recalled his involvement in the process with great clarity, with his evidence being of assistance to the Commission.

Other witnesses, including Mr Gitsham, Ms Codd, Mr O'Sing, Mr Stock and Mr Langley were also, in the view of the Commission, witnesses that gave evidence in good faith and came across as honest and truthful witnesses.

Findings

On the evidence before the Commission, it is safe to say that Mr Guley, on becoming aware of Mr Connolly's grievance lodged against Mr Misztal and Mr Kneen, fronted Mr Connolly in an abusive and aggressive manner, threatening a number of reprisals which included the prospects of a visit from the Minister for Transport and threats of industrial action.

There was corroborative evidence before the Commission of the exchange between Mr Guley and Mr Connolly, from which I can draw no other reasonable conclusion other than the intention of Mr Guley to intimidate Mr Connolly into withdrawing the grievance he had lodged, or at least making it clear to "all and sundry" that the lodging of such grievances would not be tolerated into the future.

This finding is most serious, in that, any behaviour that threatens to impinge upon the right of any QR employee to utilise the established and well accepted procedures available in the area of grievances, threatens the very integrity of the employment arrangements of QR's extensive workforce.

There is no doubt from the evidence before the Commission that Mr Guley was a person with some "clout" in the workplace and Mr Guley was very much aware of his reputation, using it to his advantage in situations like that of his exchange with Mr Connolly.

QR, armed with findings of the Eves and Carmody report, had every reason to initiate disciplinary proceedings against Mr Guley and, in my view, should have followed the recommendations immediately after that report was handed down on 12 July 2001, rather than wait until the Briton report was finalised.

Clearly the Briton investigation was commissioned to investigate grievances lodged by Mr Guley against a number of managers and was, at the time, totally separate from the matters investigated by Eves and Carmody.

It would be a "long stretch of the imagination" for anyone to accept that QR's decision to commence with the disciplinary action against Mr Guley shortly after receiving the Briton Report was coincidental and, as such, I am of the view that QR either directly or indirectly relied upon, to some extent, the information contained within the Briton report.

In terms of the disciplinary process adopted by QR in dealing with Mr Guley, it was, to say the least, rather hasty, in particular, as it related to the issuing of the first show cause letter which required an immediate response from Mr Guley, followed up by the letter of termination.

The actions of QR in this instance led to industrial dispute, of which was subject to conferences before Commissioner Asbury.

Emanating from the conferences was a recommendation from Commissioner Asbury, which resulted in a second show cause letter being issued to Mr Guley containing significantly more detail than the original show cause letter.

At the same time, the response provided by the Union on behalf of Mr Guley also contained significantly more detail, however it seems that the second show cause letter had little impact with Mr Bock stating, in evidence, Mr Guley's termination was effective from the first occasion a show cause letter was issued.

Had QR given a more realistic consideration to the second show cause letter, followed by a transparent review of their original decision to terminate Mr Guley's employment, then the process itself may have been more fair all round rather than one that I have found to be questionable.

Whilst I have previously mentioned, concurring with the recommendation of the Carmody and Eves investigation that Mr Guley be subjected to a disciplinary interview, it is my finding that, having considered all of the evidence and materials before the Commission in these proceedings, the handling of that disciplinary interview process by QR did not, in all probability, provide Mr Guley with a reasonable opportunity to respond to the findings of the investigation.

I have also formed the view, based on the evidence, that the findings of the Briton report were, to some extent, relied on by QR in reaching their decision to dismiss Mr Guley and, without Mr Guley having been given access to the allegations contained in that report that had been levelled against him, clearly prejudicing his ability to provide a proper response to the show cause letter issued, in the first instance, by QR to facilitate the dismissal.

Therefore, it is my finding that the termination of Mr Guley was, at the time, harsh, unjust and unreasonable.

Remedy

Once the Commission becomes satisfied that an employee has been unfairly dismissed, it must first give consideration to the options of reinstatement or re-employment, as provided for at s. 78 of the Act.

In this matter, it is not contested that Mr Guley was, prior to his termination, a long-term employee of QR, with an acceptable level of skills which had enabled him to perform the tasks required for the position he held.

There has not been argument advanced in the proceedings that it is impracticable for the option of reinstatement to be considered for reasons that Mr Guley's former position has been filled or was no longer available, nor due to an inability to order re-employment based on the operational circumstances of the respondent.

Ms Callaghan, for the applicant, submitted that the reinstatement of Mr Guley was a reasonable proposition to which the Commission should give the utmost considerations.

Mr Perry, for the respondent, stated that during the proceedings, a compelling argument had been advanced as to why reinstatement or re-employment, in any capacity or at any location, would be impracticable.

From the Commission's perspective in looking at reinstatement or re-employment, it is important to consider such an order in the context of the ability of the parties to recommence the employment relationship in an environment where a harmonious and productive partnership can go forward.

The Commission must also take into account the evidence as it related to the reasons for the termination of Mr Guley by the respondent, and on this point, I am of the view that his actions and behaviour in threatening Mr Connolly was of such gravity that I would doubt whether a harmonious and productive employment relationship is at all possible in the circumstances.

I have taken into account the evidence of a number of the respondent's witnesses, given directly in the Commission, as to the behaviour of Mr Guley in the workplace, and find that it was unacceptable and inappropriate behaviour to the extreme.

Further, to order reinstatement or re-employment, I would also have to be convinced that Mr Guley would be prepared to undergo a somewhat extensive change in both attitude and behaviour and, based on the below listed comments of Mr Guley from the proceedings, it would seem that such changes, on his own admission, would not be forthcoming:

"Perry: And, therefore, there is no need nor any occasion for you to reconsider or modify any behaviour of yours?"

Guley: No, I don't see why, no.

Perry: No. And that were in deed you ever to be reinstated you would consider that it would be appropriate for you to conduct your relations with those with whom you work and the managers in the same way in the future as you have in the past?

Guley: Yes, I'd just continue how I do my work.

Perry: And continue in treating them the same way as you have in the past?

Guley: Yes."

On consideration of all of the evidence before the Commission, I consider that, for the reasons previously mentioned, reinstatement or re-employment would be impracticable.

That then leaves the Commission with the need to consider the awarding of an amount of compensation in accordance with s. 79 of the Act.

Again, on this issue, as with most other issues, the parties are at opposite ends of the scales, with Ms Callaghan requesting the maximum amount of compensation available, based upon Mr Guley's substantial period of service, with Mr Perry seeming to believe that the one months notice paid on termination being sufficient compensation.

In having given consideration to all of the relevant issues, in respect of the awarding of financial compensation, including the inappropriate behaviour of Mr Guley over an extensive period of time which, for all intents and purposes, was seemingly tolerated by QR's management, and of QR's failure to provide a proper and reasonable process, even after being handed a belated opportunity through the recommendations of Commissioner Asbury to rectify the situation, I have determined that QR pay Mr Guley compensation of four (4) months wages at the rate of remuneration at the time of his termination.

I order that such monies be subject to the deduction of the appropriate level of income tax and be paid within twenty-two (22) days of the release of this decision.

I order accordingly.

J.M. THOMPSON, Commissioner.

Appearances:-

Ms B. Callaghan, of Counsel, instructed by Mr E. Moorehead and Mr D. Harrison of Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland.

Released: 18 June 2002

Mr R. Perry, of Counsel, instructed by Ms H. Davis, of McCullough Robertson.

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Agforce Queensland Industrial Union of Employers (No. Q22 of 2002)

REGISTRAR EWALD

18 June 2002

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

DECISION

On 17 June 2002, Agforce Queensland Industrial Union of Employers lodged in the Registry under section 481 of the *Industrial Relations Act 1999*, the information as prescribed in section 36 of the *Industrial Relations Regulation 2000* in relation to its request for the conduct of an election by the Electoral Commission of Queensland for the following positions:-

<i>Office</i>	<i>Number of Positions</i>	<i>Method of Voting</i>
AGFORCE COUNCIL		
General President	1	Direct Vote by all Members
Vice-President	1	
Vice-President/Treasurer	1	
Council Member – Commodity Council Presidents		Direct Vote of
Cattle Council	1	Members of each Commodity Council
Sheep and Wool Council	1	(Rule 26.1)
Grains Council	1	
Council Member – Regional Representative		Direct Vote of
Region A	5	Members of each Region
Region B	4	(Rule 26.1)
Region C	5	
Region D	3	
Region E	2	
REGIONAL COUNCILS		
Regional President	1 for each Region	Direct Vote of Members
Regional Vice-President	1 for each Region	of each Region
Regional Vice-President/Treasurer	1 for each Region	
Regional Council Member		Direct Vote of Members
Region A	31	of each Region
Region B	21	
Region C	30	
Region D	23	
Region E	10	

Regions

The boundaries of the various regions have been determined by the Organisation. The Regional Councils have decided that the number of Regional Council Members is to be based on 1 person from each of the Branches within the particular Regions as follows:-

Region A: Agforce Far North, Agforce Wet Coast, Aramac, Barcaldine, Blackall, Boulia, Bowen, Charters Towers, Chillagoe, Cloncurry, Daintree, Gulf, Hughenden, Ilfracombe, Julia Creek, Longreach, Lower Burdekin, McKinlay, Mt Isa, Muttaborra, Nelia, Peninsula, Proserpine, Richmond, Southern Cape York Peninsula, Stonehenge, Townsville, Upper Burdekin, Western Gulf, Winton, Yaraka. (Total 31 Branches).

Region B: Alpha/Jerico, Anakie, Biloela, Blackwater, Calliope, Capella, Clermont, Dingo, Emerald, Gindie/Fernlees, Isaac/McKenzie River, Kilcummin, Mackay, Miriam Vale/Kolan, Moura & District, Mt Coolon/Belyando Crossing, Nebo, Rockhampton, Rolleston, Springsure, Theodore. (Total 21 Branches).

Region C: Beaudesert, Bongeen, Brookstead, Cecil Plains/Norwin, Central Burnett, Clifton, Crows Nest, Dalby, Durong, Esk/Kilcoy, Fassifern, Jandowae, Jimbour Plains, Karara, Kilkivan/Cooloola, Kingaroy, Lockyer Valley, Lowood, Malu/Oakey, Millmeran, Monto, Mundubbera/Eidsvold, Pittsworth, Stanthorpe, Texas, Tiaro/Woocoo/Biggenden/ Maryborough, Toowoomba, Warwick, Wondai & District, Yarraman. (Total 30 Branches).

Region D: Bendemere, Chinchilla, Dunkeld, Eumamurrin, Glenmorgan, Goondiwindi, Hannaford/The Gums, Hebel, Inglestone/Meandarra/Flinton, Injune/Arcadia Valley, Miles, Mitchell, Moonie, Muckadilla, Roma, Surat, Talwood/Bungunya, Tara, Taroom, Thallon, Toobeah, Wandoan, Yelarbon. (Total 23 Branches).

Region E: Augathella, Charleville, Cunnamulla, Lower Nebine, Lower Widgee, Morven, Quilpie, Tambo, Thargomindah, Wyandra. (Total 10 Branches).

Reason for Election

The Organisation advises that the term of office for the above named positions has expired.

Rule Changes

Recent changes to the Organisation's Rules allow for any Voting Member to nominate for the positions of General President, Vice-President or Vice-President/Treasurer and the term of office for all positions will now be 2 years..

Method of Election

I am satisfied the election is to be conducted as stated above by way of a preferential voting system (Rule 47) by secret postal ballot of the members. The result of the election is to be decided as per Rule 63 of the Organisation's Rules.

Conduct of Election

I have considered the request, supporting material, the Act, and the Rules of the Organisation, and am satisfied that an election is required to be held for these positions which are offices within the meaning of the Act.

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

Dated this eighteenth day of June, 2002.

E. EWALD,
Industrial Registrar.

Released: 18 June 2002.

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