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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
CA257/02	Excel Concrete Drivers - Certified Agreement 2002	24/6/02	CA635/97
CA269/02	Taringa Steel Pty Ltd - Certified Agreement	27/6/02	
CA280/02	Thiess Inner Northern Busway (Section 3) - Certified Agreement 2002	28/6/02	
CA274/02	RACQ Technical Services Enterprise Bargaining Certified Agreement 2002	5/7/02	CA284/99
CA284/02	Australian Training Company Limited - Transport and Distribution (Road Transport) Level 2 Taxi Driver Traineeship Certified Agreement 2002	5/7/02	
CA302/02	Safe Food Enterprise Development - Certified Agreement 2002	8/7/02	

E. EWALD
Industrial Registrar

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – power to recover unpaid wages and superannuation contribution

**Automotive, Metals, Engineering, Printing and Kindred Industries Union of Employees, Queensland AND
Abakos Digital Images Pty Ltd (No. W29 of 2001)**

COMMISSIONER BLOOMFIELD

10 July 2002

Claim for unpaid wages – Award coverage in issue – Definition of “surveying” in Surveying (Private Practice) Award considered – Employer concerned not engaged in surveying (as defined) – Application dismissed.

DECISION

Background

The Automotive, Metals, Engineering, Printing and Kindred Industries Union of Employees, Queensland (the Union) has made an application under s. 278 of the *Industrial Relations Act 1999* for an order that Abakos Digital Images Pty Ltd (Abakos) pay unpaid wages amounting to \$2,657.69 to Michael Knight.

The Union alleges that Mr Knight was at all times during his employment engaged as a Cartographic Drafter within the meaning of clause 3.1(4)(b) of the Surveying (Private Practice) Award – State (the Surveying Award).

Abakos, on the other hand, contend that Mr Knight's employment was, at all times, regulated by the Draftpersons, Production Planners and Engineering Assistants' Award – State (the Draftpersons Award) and its predecessor Award.

It is common ground between the Union and Abakos that if Mr Knight's employment is regulated by the Surveying Award he is owed the amount of money claimed. It is also common ground that if his employment is not regulated by that Award it is, properly, covered by the Draftpersons Award. Consequently, it is necessary to consider whether Mr Knight's duties were such that they were covered by the Surveying Award.

Award Coverage

Clause 1.2 – "Award Coverage", of the Surveying Award is (relevantly) in the following terms:

"1.2.1 Subject to subclauses 1.2.2 and 1.2.3 hereof this Award shall apply (to the exclusion of all other awards or industrial agreements) to the classes of employees for whom rates of pay are prescribed herein who are employed within the industry of Surveying as defined in clause 3.1.1 of this Award."

"Surveying" is defined in clause 3.1 – "Definitions" as follows:

"3.1.1 "Surveying" means the act or process of determining the form, contour, position, area, height, depth or any other similar particulars of the earth's surface, whether on land or water, or of any natural or artificial features on, below or above any part of that surface or planning the position or the length and direction of the bounding lines of any part of that surface, or of any such natural or artificial features thereof and includes the making or obtaining of a plan or plans thereof. It includes the acquisition, management, interpretation and analysis of data; the portrayal and dissemination of derived information in written, graphical, numerical, digital, photographic or magnetic media; and associated consulting, design, drafting, administration, management and technical support activities."

It is necessary, therefore, to determine whether Abakos is in the industry of "surveying". Deciding that question is not without difficulty because of the nature of the company's activities. In order to decide the point it is necessary to consider the evidence given by the various witnesses and I do this below.

Evidence and Submissions

Mr E. Moorhead, who appeared for Mr Knight and the Union, said in his opening that Mr Knight's duties were to take data from hard copy and soft copy sources and enter them into a CAD (Computer Aided Design) system in a format that was convertible to a Geographical Information System (GIS mapping system). He said Mr Knight was managing, interpreting and analysing data about the shape and contour of the land and of maps. Mr Moorhead also said that Mr Knight was involved in the portrayal and dissemination of derived information and the reading of graphical, numerical, digital, photographic or magnetic media.

Mr Knight said his job title during his employment was "Cartographic Technician". His duties involved digital data capture from hard copy plans to electronic media for inclusion on a GIS mapping system and included:

- (a) revising plans for inclusion into a GIS mapping system;
- (b) working from surveyors' notes and plans to put plans into a CAD system in a Digital Cadastral Database (DCDB) for the creation of cadastral maps;
- (c) coding GIS databases from surveyors' notes and original plans – which allowed for the inclusion of different forms of data, such as sewerage systems and electricity wiring, on cadastral maps.

Mr Knight said he held an Associate Diploma in Cartography which he had completed in the Australian Armed-Services in November 1993. He said he used the skills he had developed during his Associate Diploma course in his position at Abakos.

Under cross-examination Mr Knight conceded his job title was "CAD Operator" and not Cartographic Technician as he had stated in his written statement. He also conceded he had not created cadastral maps, although he used a cadastral base for the creation of the GIS package. Importantly, he also indicated that only two persons out of the company's workforce of "about 2 dozen" had qualifications in surveying. His immediate supervisor was not one of those people.

Mr Thistleton, who gave evidence on Mr Knight's behalf, said Mr Knight had the knowledge and ability to carry out basic line construction and turned to his supervisor for clarification of ambiguous statements or interpretations of data where that was needed. Mr Thistleton said Abakos used cadastral information (as opposed to cadastral maps) "as a backdrop or a guide in the production of other products".

Mr Thistleton said Abakos was involved in the capture of data from soft digital information, from scanned information or from reading the information from paper plans or field books. Information was placed into a CAD system in the form of "dumb" lines. Such an example was an electricity grid system. After the grid was drawn in the form of lines, various attributes were applied to those individual lines using software. Examples of such attributes were: the voltage of the electricity line; the type of cable; the depth of the cable if it was underground; down to, in some instances, who had constructed the cable joints and the year in which that might have been done. Once the attributes were applied the data was converted by software to the client's required GIS format.

Mr Thistleton said there were rules in relation to the way that the work was done. There was to be no gaps in the line work and all the end points had to have the same geographical coordinates. The particular rules to be followed were usually supplied by the client. In situations where the rules could not be rigidly adhered to it was necessary to make a judgement or to seek the guidance of a supervisor.

Under cross-examination Mr Thistleton agreed that none of Abakos' employees had a title of "Cartographic Technician". He also said that Abakos did not capture any cadastral information as such. Nor did it put together cadastral maps. He also agreed that the main aim of Abakos' data capturing exercise was to make the information available for the particular client to interpret, to manage and to analyse.

Mr Thistleton also indicated that Abakos performed a wide variety of work, including:

- scanning and vectorising architectural drawings;
- scanning and vectorising mechanical drawings;
- scanning and vectorising patterns for laser cutting of fabric.

In response to a question from the Commission Mr Thistleton gave an example of the tasks that would fall to a person at Abakos who was asked to process some mining plans. He said the mining company would be asked to provide reproduction material for the particular area they wish to have processed. With luck, the mining company would provide separate information, e.g. the contours would be separated from the drainage which in turn would be separated from roads, fences and things like that. It would be Abakos' role to scan the individual sheets of reproduction material and clean the line work up from the raw vectors. Depending on the quality of the scan, staff may even "raster edit", which involved a process of adding or deleting pixels to the image. After the task had been vectorised and the line work cleaned, staff would separate the various bits of data using computer software. The software would allow staff to produce separate drawings showing such things as the contours, the drainage, the sealed roads, the unsealed roads, the fences and so on. It was a question of what the client might want.

Mr Thistleton said the staff had to interpret or "interpolate" the raw data because some of it was quite old, e.g. in feet and inches which had to be converted to metres and centimetres. The only management involved was in managing the plans. The only analysis was a validation process, "through the magic of digits", to validate the data, e.g. to make sure the end points were lower than the start points in a sewerage system.

Mr Peter Cross, a joint owner of Abakos until he left in 1996, said the company had commenced operations in 1989 to provide a bureau service for the conversion of hard copy drawings to data format and to develop software specifically directed at that type of conversion process.

Mr Cross said the conversion process was the same as traditional map and drawing production techniques except the operators now used a cursor (like a mouse) instead of scribing or drawing tools. The hand conversion process was termed "hand digitising" and was labour intensive. It required good hand/eye dexterity and concentration during the line following or data input process.

He said all the work at Abakos related to the conversion of hard copy data. The client provided the specifications for their work. The work undertaken by Abakos' draftpersons consisted of line work with or without an annotation. Abakos had developed software to reflect the client's specifications and, therefore, to authenticate the work completed by the draftsperson.

As an example of the type of work which Abakos performed, Mr Cross spoke about a contract for Sydney Electricity. He said Abakos was supplied with a cadastral map which showed that organisation's electricity assets. Abakos did not capture the cadastral features, just the electricity assets. In doing so it used various field notes that related to components on those maps. Once the data was inputted into the computer system it became data ready for use by the client in their own GIS system. The client received digital data from Abakos which enabled them to interpret, manage and analyse it as they saw fit with their own software.

Mr Cross said if it had been 50 years ago Abakos would have laid sheets of transparent material over the maps and copied the electricity lines. However, Abakos now used a CAD system to draw the electricity assets. By using the cadastral maps the company was merely giving the electricity assets some ground reference points.

Mr Cross said Abakos' draftpersons were never required to acquire, manage, interpret or analyse the data they converted from the hardcopy. Abakos was given raw data and asked to make a digital image which could be provided to the client as raw vectors or in a GIS format. If it was in the latter format it had particular attributes built in. Such attributes included, for example a reference number for a particular lamp post, the voltage of a particular electricity line, and so on.

Mr Cross said his background was in surveying and he had a degree in that field. He could "absolutely" state that Abakos was not in the surveying business.

Under cross-examination Mr Cross said the work which Abakos' employees performed was all "... line work – taking line work off somebody's hard copy and putting it into the soft copy. Whether the line works are veins of gold in mining ... or electricity or water pipes or telephone lines or gas lines or parking meters, it's all much the same ...".

Mr Cross also agreed under cross-examination that cartography was the next step of surveying and that was the role of a topographic draftsperson.

Mr Jorge Pereira also gave evidence on behalf of Abakos. He said that Abakos operated two business sections: a software development division and a bureau services division. The main activity in the bureau was graphical manipulation of information.

Mr Pereira said Mr Knight did work with hard copy sources, but his work was performed using MicroStation, which is a CAD system not a GIS system. The data inputted into the computer system using MicroStation was subsequently translated, using Abakos' own software, to a format that could be imported by a client's GIS system.

Mr Pereira said that Abakos did not create cadastral maps. No surveying knowledge was required by any employee to work on the company's CAD system. The company did not employ any Cartographic Technicians and no one had ever had such a title within the company.

Mr Pereira also said Abakos did work on data conversion for public utilities networks, such as electricity, gas, water and sewerage. However, this was not the only source of its work. Abakos' business was to create a digital copy of hard copy information provided to it. It could be asked to draw a line that symbolically represented a cable which had to be placed in a digital format at a certain distance from another line. However, the line could also represent some architectural information, mining information or information for a laser cutting machine in the fabrics industry.

Mr Pereira said that data conversion was performed for each client based on a set of detailed specifications provided by the client. The skill required from Abakos' CAD Operators was in reading the particular plans and interpreting the network or other information. CAD Operators were not involved in the management, interpretation and analysis of the data provided. The CAD Operators drew plans from the specifications and information which had been provided to them. There was no requirement for cartographic or survey interpretation or for exercising any judgement related to land features. In such contracts as the Sydney electricity contract, the project had involved the symbolic placement of electrical network information and assets on a geographically based system. However, the CAD Operators had to follow strict specifications relating to the placement of electrical components.

In his submissions Mr Moorhead said that Mr Knight was employed to “take the next step” by taking data produced by a surveyor and putting it into a refined product that would meet the specification of the client. Mr Moorhead said the Surveying Award had a classification for such work, namely a Cartographic Drafter.

Mr Moorhead said Mr Knight was required to interpret and analyse the maps and plans he was given and convert that material to a new electronic mapping system. This data was entered through the CAD system and later converted into the GIS mapping system for the individual client.

In his submissions Mr Pereira again repeated that the company was not in the surveying industry. He said it was strange that it was being alleged that the company operated in the surveying industry when it only had one or two people that had some cartographic or surveying background. He specifically rejected Mr Moorhead’s assertion that the company created plans and/or maps. In response to a question from the Commission about the nature of the company’s contract with Sydney Electricity Mr Pereira said Abakos had been supplied with a digital copy of a cadastral map and had merely used its CAD system to symbolically represent Sydney Electricity’s assets over that cadastral map. Abakos did not create any of the information *per se*. It merely copied information through its computer systems and technology, using a set of rules provided by the client, to the final digital copy. Mr Pereira said that GIS data did not need to be shown as a map. It could be shown without any mapping reference.

Conclusion

In order to determine whether Abakos is engaged in the industry of “surveying” as defined in clause 3.1 of the Surveying Award it is necessary to consider the definition in clause 3.1.1 (above) in light of the evidence. I set out the definition in a different format to make that process simpler and more logical. To me, the definition reads in the following way:

Surveying:

- means the act or process of determining the form, contour, position, area, height, depth or any other similar particulars of the earth’s surface, whether on land or water, or of any natural or artificial features on, below or above any part of that surface;
- means the act or process of planning the position or the length and direction of the bounding lines of any part of the earth’s surface, whether on land or water, or of any natural or artificial features on, below or above any part of that surface;
- includes the making or obtaining of a plan or plans thereof;
- includes the acquisition, management, interpretation and analysis of data;
- includes the portrayal and dissemination of derived information in written, graphical, numerical, digital, photographic or magnetic media;
- includes associated consulting, design, drafting, administration, management and technical support activities.

It is clear from the evidence that Abakos is not engaged in any of the activities mentioned in the first dot point above. Abakos is not engaged in the act or process of determining the form, contour, position, area, height, depth or any other similar particulars of the earth’s surface. Similarly Abakos is not engaged in the act or process of determining the form, contour, position, area, height, depth or any other similar particulars of any natural or artificial features on, below or above any part of the earth’s surface.

Leaving aside those aspects of Abakos’ business which clearly do not relate to surveying (such as architectural drawings and inputting data associated with laser cutting equipment in the fabric industry), it is clear from the evidence that Abakos relies upon maps and other information provided to it by its clients. This material already records the form, position, height, depth etc. of any natural or artificial features which the company has been asked to convert to a vectored or digital format.

The evidence also does not support any argument that Abakos is engaged in the activities set out in the second dot point. Abakos is not engaged in the act or process of planning the position or the length and direction of the bounding lines of any part of the earth’s surface. Nor is it engaged in the act or process of planning the position or the length and direction of any natural or artificial features on, below or above any part of the earth’s surface. It merely copies such information into its computers using a CAD system.

The third dot point seems to relate to the activities undertaken at either the first or second dot points (or both). On the basis that Abakos is not involved in the activities set out in the first or second dot point it logically follows that it is not involved in the making or obtaining of a plan which records the outcome or results such activity or activities.

The fourth, fifth and sixth dot points clearly relate to activities which are conducted in association with the primary aspects of surveying i.e. those tasks/activities mentioned in the first and second dot points, respectively.

In my view the reference to “data” in the fourth dot point is a direct reference to the result or outcome after the activities mentioned in the first and second dot points have been undertaken. If the point was not so restricted it could be read to include, for example, activities such as those performed by a research assistant within a stockbroking firm as well as a whole range of other activities which might be performed by people who are required to acquire, manage, interpret and analyse data. The dot point cannot be read to have such a wide possible effect.

The reference to “portrayal and dissemination” in the fifth dot point is, again, clearly a reference to the result of the activities undertaken in the first two dot points. Abakos is not involved in the portrayal and dissemination of such information *per se*. It receives information already prepared by its clients. Its task is not to portray and disseminate that derived information. Its task is to copy what is given to it through its CAD system to produce vectorised or digital data. The use to which that data is put is up to the client.

Similarly, the reference to “derived information” in the same dot point must be a reference to information derived from the activities mentioned in the first and second dot points. Again, if not so restricted, the term could have reference to a whole range of persons in a wide variety of industries which have nothing to do with surveying.

Finally, the reference to “associated ... activities” in the sixth dot point is designed to be a catch all provision to draw in other professional and quasi-professional activities which are closely related to the activities mentioned in the first and second dot points. The meaning of the words must be taken from the context in which they appear. They cannot have independent application and meaning.

Accordingly, I determine that Mr Michael Knight was not employed under the Surveying (Private Practice) Award – State during his period of employment with Abakos Digital Images Pty Ltd. Given such finding it is accepted by the applicant Union that Mr Knight’s employment was covered by the Draftpersons, Production Planners and Engineering Assistants’ Award – State and its predecessor Award and there was no underpayment of wages.

As such, Matter No. W29 of 2001 is dismissed.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

Appearances:

Mr E. Moorhead, on behalf of the Automotive, Metals, Engineering, Printing and Kindred Industries Union of Employees, Queensland and Mr Michael Knight.

Mr G. Periera with Mr P. Kipsgaard, on behalf of Abakos Digital Images Pty Ltd.
Released: 11 July 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Training and Employment Act 2000 – s. 230 – appeal

Kerry Roy Anthony, Robert Chandra, James Chandra, John Mizzi, Peter Proctor, Derek Scott, Randall Scovell, Diane Thompson, Robert McGown, Timothy Kershaw AND Training Recognition Council AND Murrays Australia Limited (Nos. AT13, AT14, AT15, AT16, AT17, AT18, AT19, AT20, AT21, AT22, AT23, AT24, AT25, AT26, AT27, AT28, AT29, AT30, AT31 and AT32 of 2002)

COMMISSIONER BLOOMFIELD

8 July 2002

Appeals – *Training and Employment Act 2000* – Cancellation of training contracts – Whether substantial change in employer’s circumstances – Training Recognition Council’s obligations under s. 63 of T&E Act – Date of cancellation of training contracts – Whether Council may cancel training contract retrospectively held no power under s. 63 to cancel retrospectively – Denial of natural justice – Further submissions invited on remedy.

DECISION

The Commission has before it 10 appeals (AT13-22 of 2002) under s. 230 of the *Training and Employment Act 2000* (the T&E Act) by former trainees employed by Murrays Australia Limited (Murrays) against a decision of the Training Recognition Council (the Council) given on 8 February 2002 to cancel their training contracts with Murrays. In lieu of that decision the trainees request the Commission to reinstate the respective training contracts.

The Commission also has before it 10 appeals (AT23-32 of 2002) under the same Act by Murrays against the decision of the Council to approve the cancellation of the 10 training contracts from 11 February 2002. In lieu of that decision Murrays requests the Commission to substitute a cancellation date of 7 November 2001 in respect of 9 of the trainees and 15 November 2001 in respect of the remaining trainee. The appeals were lodged out of time and Murrays also requests an extension of time within which to lodge them.

Background

On 7 November 2001 Murrays terminated the employment of a number of its employees, including 9 trainees. On 15 November 2001 it terminated a further trainee. Murrays said the decision was taken for economic reasons associated with a drastic downturn in business which occurred in the aftermath of the 11 September 2001 terrorist attacks in the United States, and the collapse of Ansett the following day. At the time of the terminations Murrays employed 44 trainees.

Shortly after the terminations were effected Murrays established that it required the approval of the Training Recognition Council to terminate the training contracts. It approached the Council and made formal application to cancel the training contracts on 11 December 2001.

A delegate of the Council wrote to each of the trainees on 14 December 2001 to seek their views on Murrays’ application. Each of the trainees wrote to the Council opposing Murrays’ application.

The delegate of the Council considered Murrays’ applications and the trainees’ responses on 21 December 2001 and determined to refuse Murrays’ application. Information Notices (as required by s. 63(2) of the T&E Act) were sent to the parties on 21 December 2001 informing them of the delegate’s decision.

Murrays lodged appeals (AT1–10 of 2002) against the delegate’s decision with the Queensland Industrial Relations Commission on 15 January 2002. It also entered into discussions with senior officers of the Department of Employment and Training about the matter. This culminated in Murrays making a further detailed submission to the Council on 30 January 2002.

Murrays’ submission was then considered by the full Council in the form of a flying minute that was circulated to all members of the Council. The flying minute, which recommended that the Council approve Murrays’ application to cancel the 10 training contracts, was approved by a majority of members of the Council.

An Information Notice advising Murrays and the trainees that Murrays’ application to cancel the training contracts had now been approved was forwarded to the parties on 8 February 2002. It informed all parties that the Council had determined to cancel each of the 10 training contracts as from 11 February 2002. In light of this decision Murrays withdrew appeals AT1-10 of 2002 on 14 February 2002.

Each of the 10 trainees (on 4 March 2002) and Murrays (out of time on 21 March 2002) appealed the Council’s 8 February 2002 review decision.

Application for an extension of time for the Murrays’ appeals

The Council’s decision to cancel the training contracts was communicated to the parties on 8 February 2002 and took effect from 11 February 2002. Murrays’ appeal against the operative date of that decision was not lodged until 21 March 2002. The appeal is thus 17 days out of time. Murrays seeks an extension of time, pursuant to s. 230(3) of the T&E Act, within which to lodge the appeals.

Mr J.E. Murdoch SC, who appeared with Ms C. Arnold of Counsel for Murrays, said this was not a case where a time period for appeal had passed by simply due to inactivity. Murrays first raised its concern regarding the effective date of the Council’s second decision by way of letter to the Council dated 18 February 2002. A reply had not been received until 7 March 2002. Murrays had considered its position in light of that response and prepared and lodged its appeal. It was submitted if the time period for the appeal were to run from the date of the Council’s reply the appeals would have been made in time.

After considering the whole history of this case I have decided to exercise my discretion to grant the application for the extension of time within which to lodge the appeals.

Generally, Murrays has acted expeditiously in lodging documents and responding to requests or directions from both the Council and this Commission. In particular, Murrays has met all of the timelines set out in the Commission's directions orders.

Further, the record of the proceedings before the Council contains ample references to Murrays' frequent attempts to have the trainees' training contracts cancelled from 7 and 15 November 2001, the putative termination of the trainees' employment. As such, both the trainees and the Council have been on notice that Murrays would be seeking to have the effective date of the cancellation altered to such dates.

Applications to amend appeals

The trainees' appeals, amended on 27 March 2002, set out the following grounds of appeal:

- “(a) the Council erred in determining that the Respondent cannot perform its obligations under the training contract with the Appellant;
- (b) the Council erred in determining that there had been a substantial change in the Respondent's circumstances;
- (c) the Council erred in determining that any change in the Respondent's circumstances affected its capacity to perform its obligations under the training contract with the Appellant;
- (d) the Council failed to observe the procedures required by law in making the determination; and
- (e) the Council failed to accord the Appellant natural justice.”.

During the first day of the hearing Mr Reed sought leave to amend each of the 10 appeals by the trainees to include a ground to the effect that Murrays had adopted inappropriate selection processes and, in doing so, failed to allow the employees to have input into the selection process. Mr Reed submitted it was appropriate that such matter be aired in the present appeals because s. 72(1)(f) of the *Industrial Relations Act 1999* prevented the trainees from pursuing any claim for unfair dismissal where inappropriate selection criteria would normally have been a relevant consideration.

I ruled that I would not allow the appeals to be amended.

My reasons for doing so were, firstly, the lateness in the proceedings and, secondly, because the grounds did not relate to a matter relevant to the Council's consideration under s. 63 of the T&E Act. It was also not relevant that the trainees were apparently excluded from the unfair dismissal provisions of the *Industrial Relations Act 1999*.

At the commencement of the second day of hearing Mr Reed made a further application to amend the appeal. The first part of the amendment asked the Commission to determine that Murrays had acted contrary to s. 235(b) of the T&E Act by purporting to cancel the training contracts in other than a way allowed under the Act. Mr Reed also sought to add the additional relief that the trainees be awarded compensation pursuant to s. 237 of the T&E Act and that the Commission make an order under s. 240. The application to amend was strongly opposed by Mr Murdoch SC on behalf of Murrays (see transcript pages 141 to 153).

After considering the submissions I ruled to reject the application for a number of reasons. Firstly, the nature of the relief claimed would have made the case substantially different to that which the respondents had come to argue. Secondly, it was too late in the day for the appellant trainees to be given further latitude to amend given their demonstrated tardiness in complying with directions orders. Thirdly, the appeal was starting to become a moving feast as the appellant trainees identified new issues they wished to air or new remedies which they sought to obtain.

However, having reflected on the matter since the ruling, I have now come to the view that the matters dealt with in Chapter 8, Part 2, Division 2 of the T&E Act are, in fact, relevant potential remedies in this case. I canvass the import of this at the conclusion of my decision.

The nature of the appeals

Section 232 of the T&E Act is in the following terms:

“232.(1) An appeal to the industrial commission is by way of rehearing on the record.

(2) However, the commission may hear evidence afresh, or hear additional evidence, if the commission considers it appropriate to effectively dispose of the appeal.”.

Mr Murdoch SC said in an appeal by way of rehearing the powers of the appellate body are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate body, the order that is the subject of the appeal is the result of some legal, factual or discretionary error (*Allesch v Maunz* [2000] HCA 40 per Gaudron, McHugh, Deane and Hayne JJ at para 23).

Mr Murdoch SC said the record upon which the appeal should be determined was all of the correspondence and other material considered by the Training Recognition Council. This material had been provided to the Commission.

Mr Murdoch SC strongly opposed the leading of fresh or additional evidence by the trainees. He said they did not meet the criteria outlined in *Workers Compensation Board of Queensland v David Griffiths* (1997) 155 QGIG 940 which identified the circumstances under which fresh evidence could be led.

Mr C.J. Murdoch, Counsel on behalf of the Training Recognition Council, supported the submissions of Mr Murdoch SC in relation to the nature of the appeal. In doing so he also referred me to *Allesch v Maunz*.

In addition, Mr C.J. Murdoch highlighted that “the record” was defined by rule 109(1) of the *Industrial Relations (Tribunals) Rules 2000*. He said that the record (as defined) had been filed with the Commission and served on the other parties and the matter should be determined on the basis of material contained within that record. Mr C.J. Murdoch also opposed leave being granted to the trainees to lead any fresh or additional evidence.

Mr R. Reed of Counsel, who appeared for the 10 trainees, said it was not true that the words “rehearing on the record” automatically denoted an appeal of the type where only an appealable error could be identified or, in other words, an appeal of the type set out in *House v The King* (1936) 55 CLR 499. Mr Reed said the High Court had drawn such a distinction in *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 when it had determined that the nature of an appeal must be gleaned from an examination of the relevant legislative provisions (per Mason J at 621-2).

Mr Reed said the nature of the distinction had been further discussed by the Queensland Court of Appeal in *Aldrich v Ross* [2001] 2 QdR 235. In that decision, Thomas JA (with whom Pincus JA and Muir J agreed) said:

"[11] ... The nature of the review in a situation like the present of course depends on such indications as appear in the relevant legislation ...

... [29] In the cases to which reference has been made in which the principles of House v The King have been held applicable, there seems to be an underlying assumption that examinable reasons exist for the decision, or that there exists a right to have reasons that can be scrutinised and to which due respect can be paid. Different principles may well be called for when that underlying assumption is absent.

... [41] In the end, although there are countervailing factors, I consider that the Misconduct Tribunal is required to make its own decision on the available evidence rather than merely to determine the correctness of the original decision in the limited manner permitted by an appeal in the strict sense against the exercise of a discretion."

Mr Reed urged me to adopt a similar approach to that taken by the Court of Appeal in *Ross*' case and to determine the appeal by way of hearing *de novo* or, at the very least, by consideration of the record supplemented by additional evidence which the trainees sought to lead.

In my view, the nature of the decision making process adopted by the Council does not lend itself to a review based upon the principles established by the High Court in *House v The King* (for example, the Council did not conduct any formal proceedings, did not keep any formal record and did not disclose formal reasons for its decision – although the Information Notice does contain a summary). Accordingly, some different approach is required.

In *Sperway* Mason J said:

"The nature of the proceeding before the administrative authority may be of such a character as to lead to the conclusion that it was not intended that the court was to be confined to the materials before the authority. There may be no provision for a hearing at first instance or for a record to be made of what takes place there. The authority may not be bound to apply the rules of evidence or the issues which arise may be non-justiciable. Again, the authority may not be required to furnish reasons for its decision. In all of these cases there may be ground for saying that an appeal calls for an exercise of original jurisdiction or for a hearing de novo.

On the other hand the character of the function undertaken by the administrative authority in arriving at its decision may differ markedly from the instances already supposed. The authority may be required to determine justiciable issues formulated in advance; to conduct a hearing, at which the parties may be represented by barristers and solicitors, involving the giving of oral evidence on oath which is subject to cross-examination to keep a transcript record; to apply the rules of evidence, and to give reasons for its determination. In such a case a direction that the appeal is to be by way of rehearing may well assume a different significance.

But in the end the answer will depend on an examination of the legislative provisions rather than upon an endeavour to classify the administrative authority as one which is entrusted with an executive or quasi-judicial function, classifications which are too general to be of decisive assistance. Primarily it is a question of elucidating the legislative intent. A question which in the circumstances of this case is not greatly illuminated by the Delphic utterance that the appeal is by way of rehearing. ..."(at 621-2).

It seems to me that this is the type of appeal discussed by Mason J above in *Sperway* and by the High Court in *Coldham, re Ex parte Brideson* [No 2] [1990] 170 CLR 267, which was distinguished in *Coal & Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 74 ALJR 1348. In the latter decision the High Court said:

"[15] The provision considered in Brideson [No 2] conferred power on the Commission to take further evidence, a provision which is indicative of an appeal by way of rehearing. It also required the Commission to 'make such order as it [thought] fit'. The latter requirement indicated that the Commission's appellate powers were not constrained by the need to identify error on the part of the primary decision-maker, but, rather, that the Commission was obliged to give its own decision on the evidence before it."

Such an approach was endorsed by the Queensland Court of Appeal in *Aldrich v Ross* in its consideration of s. 23 of the *Misconduct Tribunals Act 1997* which requires the Misconduct Tribunal, like this Commission, to determine an appeal by way of rehearing on the evidence.

After considering the submissions of the parties, I decided to follow the approach revealed in the reasons of Thomas JA in *Aldrich v Ross* and to make my own decision based upon the evidence available to me rather than merely determine the correctness of the original decision made by the Council.

Additional evidence

Mr Reed submitted that I should admit fresh or additional evidence about the selection process by which Murrays came to choose the 10 trainees for termination. Further, he submitted that I should admit additional evidence from a number of current employees of Murrays about that selection process and about the hours of work being worked by Murrays' employees both prior, and subsequent, to the termination of the trainees' employment.

After considering the submissions I ruled to set aside notices to appear which had been served on Ms Cathy Jones and Mr Matthew Stewart, both Operations Clerks employed by Murrays. Mr Reed could not inform me how their evidence might assist me to determine the appeal. It seemed that they were called as part of a fishing exercise in the hope that some evidence might fall which could assist the trainees' appeal. I did not deem it appropriate to hear such evidence in order to effectively dispose of the appeals.

I also ruled that I would not admit any evidence which went to the processes by which the various trainees were chosen for termination. In that regard it was common ground that Murrays had used a form of selection process to determine which employees (including trainees) it would terminate.

I made such ruling because the appeals now before the Commission relate only to the Council's decision made under s. 63 of the T&E Act. Relevantly, s. 63 of the T&E Act provides as follows:

"63.(1) If a party to a training contract can not perform the party's obligations under the contract on any of the following grounds, the party may apply to the council in writing to cancel the contract –

(a) if the party is an employer –

(i) if the employer has ceased business; or

(ii) there has been a substantial change in the employer's circumstances and the change has affected the employer's capacity to perform the employer's obligations under the contract;

...".

It was not open to the Council to consider whether Murrays adopted appropriate selection processes. The Council was confined to a consideration of the narrow circumstances set out in s. 63 of the T&E Act. The section confined the Council to a consideration of whether Murrays was affected in its ability to perform its obligations under the training contract by a substantial change in its circumstances.

For the same reasons, the appeals now before the Commission are similarly restricted to the matters set out in s. 63.

In addition, Mr Reed urged me to admit evidence which would have the effect of allowing the trainees to comment on the material lodged with the Council by Murrays after the Council had rejected Murrays' initial application for cancellation of the training contracts. In particular, Mr Reed said the trainees should be given the opportunity to comment on Murrays' letter of 30 January 2002, which appeared to have been relied upon by the Council to found its ultimate decision to cancel the training contracts.

Mr Reed said the Council's failure to allow the trainees any input into the final decision making process constituted a denial of natural justice. He said natural justice would again be denied if the trainees were not given the opportunity to comment on Murrays' supplementary material in the appeal hearing.

Mr Murdoch SC, for Murrays, and Mr C.J. Murdoch, for the Training Recognition Council, opposed the introduction of such evidence.

I agreed to allow the 10 appellant trainees to lead additional evidence in support of their respective appeals by allowing Mr Reed to require Mr Boulton, a supervisor of Murrays, to give evidence, and by allowing each of the 10 appellant trainees to give evidence on their own behalf but, in each case, limited to their employment and the matters relevant to s. 63 of the T&E Act.

I considered that the appellant trainees should be provided with the opportunity to give relevant evidence about matters which occurred in the period between the Council's initial deliberations in December 2001 and its final deliberations in early February 2002. In particular, I decided that the appellant trainees should be given the opportunity to comment on the documentary evidence prepared by Murrays after 21 December 2001 – including its letter to the council dated 30 January 2002. The opportunity to present additional material included the opportunity to examine Mr Boulton about any relevant matter, although as it turned out, Mr Boulton's evidence did not shed much new light on the matter other than to indicate driver hours had taken a "dramatic dive" between November 2001 and February 2002.

Each of the trainees was permitted to give evidence in the form of an affidavit prepared prior to the proceedings. The affidavits set out the respective appellants' employment history with Murrays (the length of service ranged between 4 years 10 months and 12 years 7 months), how they came to enter into the traineeship in November 2000, and the circumstances under which they were advised that they had been made redundant. Each of them also gave evidence about their input into the Council's initial deliberations in December 2001 and the fact that they had not been provided with an opportunity to make further submissions in respect of Murrays' additional material in early 2002.

In that regard, each of them said, through their affidavit, words to the effect:

"I have since seen (Murrays') further submissions and I (comment as follows):

(a) Downturn in Tourism:

The downturn in tourism affecting Murrays is cyclical and traditionally picks up toward the end of the first quarter of each year.

(b) The selection of drivers was not conducted in a non discriminatory way. The assessment criteria are unfair and the assessments unreasonable.

(c) There are other options available to the Company such as reducing hours and putting off newer drivers."

(See, for example, the affidavit of Randall Scovell – Exhibit 2)

The trainees evidence did not deal in any substantive way with Murrays' assertions that there had been a substantial change in its circumstances which affected its ability to perform its obligations under the training contract. Rather, the trainees' evidence concentrated on possible alternatives to their termination and criticisms of the selection process.

In effect, the only evidence which the appellant trainees led to challenge Murrays' claim was the comment in each affidavit that the downturn affecting Murrays was only cyclical because work traditionally picked up towards the end of the first quarter of each year. No figures were led to support this assertion. Further, the assertion was not put to Mr Boulton in any way.

However, a number of the trainees did give evidence that Murrays had experienced a downturn in work in the months leading up to their termination in November 2001. The great majority of them also gave evidence that they had been requested to take their outstanding annual leave and long service leave entitlements. For example: Mr Anthony (Exhibit 1 – paragraph 13) said he had been told the company was going through a quiet period and was asked to take all of his leave entitlements; Mr Scovell (Exhibit 2 – paragraph 8) said he had been asked to take 30 days annual leave, which he did, and had returned to work about 2 weeks prior to his termination; Mr McGown (Exhibit 6 – paragraph 13) said he had taken 5 weeks long service leave and his remaining 1 week of annual leave; Ms Thompson (Exhibit 7 – paragraph 10) said she had taken 4 weeks annual leave and 4 weeks long service leave; Mr Proctor (Exhibit 10 – paragraph 10) said he had taken the small amount of leave which he was owed.

Is there a requirement to consider options other than cancellation under s. 63?

Mr Reed urged me to find that the Council was required to consider other options apart from cancellation of the trainees' training contracts. In particular, he said the Council should have considered other ways of overcoming Murrays' alleged training difficulties such as implementing a reduced hours scheme. Further, it was generally submitted that Murrays should have been required to terminate the employment of other members of its workforce – particularly recently engaged casuals – because Murrays had greater obligations to its formally contracted trainees than it did to other employees.

Mr Murdoch SC submitted, correctly in my view, that the Council was not required to consider other options allegedly available to Murrays to manage its workforce. Murrays had made an application to the Council under s. 63(1)(a)(ii) to cancel the various training contracts on the basis that there had been a substantial change in its circumstances affecting its capacity to perform its training obligations. That was the only relevant enquiry as that is the only basis for fulfilment of the requirements of s. 63.

Were the trainees denied natural justice in the Council's decision making process?

As this was a substantial limb of the trainees' argument, I have dealt with it for completeness.

Section 63 of the T&E Act requires the Council to determine any application for cancellation for the reasons set out therein by fair procedures prescribed under a regulation.

Part 4 – Fair Procedures, of the Training and Employment Regulation 2000 (the Regulations), sets out the procedures to be followed by the Council or any of its delegates. Regulation 25 requires, *inter alia*, the Council or its delegate to inform an affected person of the action the Council or delegate proposes to take under the relevant section and also requires the affected person to be given an invitation to state, within a reasonable time, why the proposed action should not be taken.

It is clear that this process was initially followed by the delegate before the making of the original decision on 21 December 2001.

However, subsequent to making that decision Murrays sought to make further representations to the Council, and, in essence, to have the original decision of 21 December 2001 reviewed. (There is some question in my mind as to the legitimacy of this process altogether as nothing in the T&E Act or the Regulations provides the right to, or mechanism for, review of a s. 63 decision.)

Nonetheless, whether viewed as a review, or, perhaps, a fresh s. 63 application, there is no question in my mind that, having received further submissions, and then being minded to determine the matter in completely the opposite way to that previously decided, the Council was bound to again go through the processes required by R.25 and R.26 of the Regulations, and give the trainees the opportunity to comment on the new materials submitted by Murrays, and the Council's new intentions.

With respect to the arguments of both Mr Murdoch SC and Mr C.J. Murdoch, I do not believe it is to the point that the trainees may not have been able to take issue with the fresh material put to the Council. Nor can I agree that R.27 and R.28 of the Regulations allowed the Council to act as it did without reference to the trainees.

R.27 and R.28 (relevantly here) would empower the Council to inform itself of matters in ways considered appropriate and ask for additional evidence from parties involved in the application, but, on my reading of the Regulations, they must be construed as relating to further enquiries during the period in time before a decision is made, not after. They cannot be viewed as a mechanism for the introduction of further information on a subject, after the making of a decision, without reference to other parties.

The clear scheme of the Regulations is to give all affected parties the opportunity to comment on an intended action (here of Council) and the facts and circumstances forming the basis or the grounds for the proposed action. In this case, in relation to the second decision of Council this was simply not done.

The trainees were not even aware that the Council was reconsidering the delegate's earlier decision (although there is evidence to suggest that one of the trainees found out about the review process on 6 February 2002 i.e. after the flying minute had been distributed). The Council made its second decision in the absence of any opportunity for the trainees to have any input. The Council did not follow the fair procedures set out in the Regulations.

For the reasons above, in my view, the 10 appellant trainees were denied natural justice in the context of the Council's overall decision making process.

Murrays' ability to meet its obligations under the training contracts

Murrays' initial application to the Council for cancellation of the training contracts was lodged on 11 December 2001. It said the application was made under s. 63(1)(a)(ii) of the T&E Act on a number of grounds, including:

- the trainees are redundant and have ceased working for Murrays;
- at the time of the redundancies Murrays was unaware of the requirement to have the training contracts cancelled prior to ceasing to employ the trainees;
- the retrenchments were unavoidable and remain necessary to ensure the viability and survival of the business;
- the current state of the tourism market and cost considerations mean that Murrays can no longer support the previous number of drivers;
- all of the trainees were selected for retrenchment after applying fair selection criteria;
- if the Council rejects the application Murrays would have to retrench other employees who would otherwise have been retained on merit.

Murrays recorded its changed circumstances and the outlook for the future as follows:

"The change in circumstances

At the time of the commencement of the traineeships the tourism industry was experiencing all time highs in business confidence given that it was generally expected that a significant increase in business would occur as a result of the exposure Australia had achieved as a result of the Olympic Games.

However with the combined events of September 11, 2001 and the collapse of Ansett there has been an unprecedented downturn in the tourism market. Reductions of 30% have been widely reported, with major hotel chains making staff redundant and closing floors in an effort to cope with the downturn in business. Murrays has suffered greatly as a result of these events. Murrays business from Japanese customers alone is down by some 50-60%.

As a result, Murrays immediately endeavoured to manage its workforce via the use of leave entitlements in the hope that the downturn would be only a short term phenomenon. Unfortunately, this was not to be the case and it became apparent that a permanent reduction in our workforce was immediately needed if the depot was to be in any position to support its drivers through the historically slower months of December and January and the continuing difficulties that lay ahead. Accordingly the decision was made to terminate some 15% of the workforce (via redundancies) as soon as possible. To facilitate this process all drivers (including trainees) were assessed against a set of 16 fair criteria to identify which of our drivers were to be made redundant. Some of the drivers selected for retrenchment were trainees.

The outlook for the future

In addition to the redundancies outlined above Murrays continues to manage its remaining workforce on a weekly basis. Discussions with major customers suggest that there will be no recovery in the current market conditions until at least March 2002 and at this stage it is too early to predict whether such a recovery will indeed eventuate. As a result Murrays has recently approached all remaining drivers at the Gold Coast depot to implement a leave roster that will require 1/3 of our drivers to be on some form of leave (paid or unpaid) for each of the next 6 weeks."

This submission did not satisfy the delegate of the Council and he determined to refuse Murrays' application.

Subsequent approaches to the Council, through officers of the Department of Employment and Training, culminated in Murrays being invited on 22 January 2002 (document 12 of the record) to provide additional information to facilitate a review of the original decision. Consequently, Murrays prepared and lodged a second submission to the Council by way of a letter dated 30 January 2002.

In this letter Murrays stated there had been substantial changes to its operations which were not temporary. Rather, they were permanent.

Murrays submitted it was "absolutely dependent" on inbound tourism and at the time the various traineeships commenced the tourism industry was experiencing all time highs in confidence. It said the events of 11 September, the collapse of Ansett and the extreme business conditions in Japan had led to an "unprecedented downturn" in Murrays' business. The downturn was in no way cyclical and nor was it part of the general business cycle. Murrays said this combination of circumstances required it to make changes to its workforce involving the redundancy of some staff – including non driving staff.

The letter emphasised that the "permanent or long term nature of the changed circumstances facing Murrays is supported by the fact that it is now over 2 months since the relevant trainees were retrenched and Murrays' business remains seriously weakened....Murrays is still unable to fully utilise its remaining workforce...". Murrays said staff were still being asked to take accrued leave or to take leave without pay on a rotational basis to try to avoid further retrenchments.

The letter also included some graphs reflecting the impact of the changed circumstances on Murrays' actual driver hours versus guaranteed hours, guaranteed charter hours and vehicle income [because of the commercial sensitivity of this material it is the subject of suppression orders under s. 679 of the *Industrial Relations Act 1999* issued on 21 March and 17 April 2002].

The most telling of these graphs was the latter one. It showed that vehicle income on a monthly basis had fallen significantly in the period July to October 2001 with a further reduction in the 2 months to December 2001.

Murrays' letter went on to indicate that the outlook for the future was uncertain. Whilst Murrays was hopeful of an improvement in the business environment it stressed that any improvement was likely to be modest and slow to develop. The letter also stressed that the question facing Murrays was not whether any improvement would allow it to re-employ the terminated trainees but, rather, whether any improvement in business conditions would be sufficient to enable it to continue to employ all of its (then) existing workforce.

Murrays also supplied some material from other parties to support its analysis of business conditions in the inbound tourism market and its forecast for the foreseeable future. This comprises a letter from the Gold Coast Tourism Bureau, a letter from the International Marketing Manager for Warner Village Theme Parks (the operator of 3 major tourist attractions on the Gold Coast) and a media release from the Australian Tourism Export Council dated 24 January 2002. ATEC's media release mentioned that December had witnessed a decline in international arrivals for the 4th successive month but observed there were signs that "a modest recovery was starting to unfold". The representative of Warner said anecdotal material from Tourism Qld and Brisbane Airports Corporation indicated a 40-50% downturn in business in the 4 months to the end of January 2002.

Murrays' letter to the Council concluded by requesting "that the original decision not to cancel the training contracts be reviewed and the training contracts be cancelled as originally requested".

By majority decision the full Council then acceded to Murrays' request to cancel the training contracts. The Council determined the cancellation would operate from a prospective date *viz* 11 February 2002.

Had there been a substantial change in Murrays' circumstances?

Mr Reed submitted that Murrays had an onus to show that, at the relevant time, it could not perform its obligations under each of the respective training contracts and that this failure was caused by a substantial change in its circumstances which had affected its capacity to perform its obligations under the contracts. Further, he submitted that Murrays must satisfy that onus in a substantial way given the serious consequences for the trainees, namely, the cancellation of their training contracts.

Mr Reed submitted that Murrays had not satisfied the onus. He said the evidence which it had produced to support its contentions was inadequate - the statistical material was less than conclusive, and Murrays had not provided appropriate financial or employment records to convince the Council or the Commission of the veracity of its claim. He also submitted that the available material needed to be assessed in light of the facts as they stood in late January/early February 2002.

Mr Murdoch SC said the Council's power to cancel a training contract was enlivened once one of the grounds in subsection 63(1)(a) of the T&E Act had been established. He submitted that in the present case there was evidence before the Council upon which the Council could satisfy itself that subsection 63(1)(a)(ii) had been established. There was evidence capable of supporting a conclusion by the Council that there had been a substantial change in the employer's circumstances *and* the change had affected the employer's capacity to perform its obligations under the contracts.

He said the Act required the change to circumstances to have been substantial but there was no stipulation as to the extent or magnitude of the effect on the employer's capacity to perform their obligations.

In support of his argument that there had been a substantial change in Murrays' circumstances that affected its capacity to perform its obligations under the training contract Mr Murdoch SC referred me to a number of decisions which had considered the word "substantial" in various legislative settings, *viz*: *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331; *Building Workers' Industry Union of Australia v Odco Pty Ltd* (1991) 29 FCR 104; *J Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers Western Australia Branch & ors* (1992) 111 ALR 502.

In *Tillmanns* Bowen CJ said at 338:

"The word 'substantial' would certainly seem to require loss or damage that is more than trivial or minimal. According to one meaning of the word the loss or damage would have to be considerable... however, the word is quantitatively imprecise; it cannot be said that it requires any specific level of loss or damage. No doubt in the context in which it appears the word imports a notion of relativity, that is to say, one needs to know something of the circumstances of the business affected before one can arrive at a conclusion whether the loss or damage in question should be regarded as substantial in relation to the business."

In *Odco* the Full Court accepted that the word "substantial" imported a notion of relativity and likened it to mean a major blow to the business. In *J Corp* French J generally referred to "substantial" as denoting non-trivial loss or damage in the context of a particular part of a business.

Mr Murdoch SC submitted that these authorities, and in particular *J Corp*, supported Murrays' submission that there was a clear and substantial change in its circumstances given the global and local downturn in the tourism market (highlighted above). It was sufficient if the "substantial change in circumstances" affected part of Murrays operations, being its Brisbane and Gold Coast depots.

Mr Murdoch SC also highlighted that the Council's decision was a quintessential exercise of its discretion. He submitted that the trainees had the burden of proving that the decision under appeal was wrong and said there was ample evidence available to the Council, and to the Commission, to support a finding there had been a substantial change in Murrays' circumstances.

Mr Murdoch SC particularly highlighted that none of the trainees expressly proffered the opinion to the Council, nor to the Commission, that there had not been a substantial change in Murrays' circumstances, save the assertion that the business downturn was cyclical.

The trainees' appeals

The trainees appealed against the Council's decision to cancel their training contracts and sought in lieu that their training contracts be reinstated. In view of my findings above in relation to the denial of natural justice to the trainees by the Council, I allow the trainees' appeals. I cannot, however, accede to their requested remedy.

Having reviewed the evidence placed before the Council, and having heard further relevant evidence from the trainees as deemed appropriate bearing on the matters in s. 63 of the T&E Act, I am satisfied that the preconditions for cancellation of their training contracts have been adequately met.

I find that:

- (i) there was a substantial change in Murrays' circumstances; and
- (ii) that change affected Murrays' capacity to perform its obligations under the training contracts.

I base my conclusions on:

- the evidence of a lack of available work before November 2001 which meant drivers (including trainees) were asked to take all outstanding annual leave and long service leave (e.g. Ms Thompson had been on 8 weeks' leave);
- the 30 January 2002 letter which demonstrates a drastic downturn in Murrays' patronage and income. This material is referred to above;
- other material attached to Murrays' 30 January 2002 letter which supports its submissions, anecdotally and otherwise, of a significant reduction in inbound tourism as well as the uncertain outlook for the future;
- evidence that the company was still attempting to manage the severe reduction in its workload as late as mid January 2002 by negotiating arrangements with its workforce to take unpaid leave approximately 1 week in 3 (this was despite the earlier redundancies in November).

I find no basis upon which to reinstate the training contracts. The contracts remain cancelled.

Murrays' appeals – effective date of cancellation of training contracts

Murrays appealed against the Council's decision to cancel the training contracts as at 11 February 2002 and sought that cancellation dates of 7 November 2001 (15 November 2001 for 1 trainee) be substituted.

I do not allow Murrays' appeals.

I do not believe s. 63 contemplates the date of cancellation being made retrospective, *viz.* to a time predating the Council's decision to cancel the contracts. In my view, it is the clear intention of s. 63(3) of the T&E Act that cancellation of a training contract be no earlier than the date upon which the s. 63(2) Information Notice of decision is given to the parties. Usual practice is for cancellation to be effective 4 weeks from the day the notice is given, although the Council has power to shorten the notice period if it is satisfied this is reasonable in the circumstances. (see s. 63(3) and (4)).

In this case, the decision to cancel the training contracts was taken on 8 February 2002 and the Council made a conscious decision to make the cancellations effective from 11 February 2002, the day the Council expected the parties to receive the Information Notice. The Council presumably either saw nothing to warrant backdating the cancellation or accepted it did not have the power to do so.

The Council felt it reasonable to ascribe the date of cancellation as the date the trainees received notice of same. That decision was clearly open to it. In terms of common sense and justice I also think this date is reasonable in the circumstances. This is because Murrays purported to terminate the training contracts in November 2001. It subsequently applied to have them formally cancelled in accordance with the legislative requirements. It did not satisfy the responsible body, the Training Recognition Council, that grounds existed under s. 63 to support its application until 8 February 2002.

Accordingly, in my view, the effective date of cancellation could have been no earlier than that decided by the Council, *viz.* 11 February 2002.

I find the effective date of cancellation of the trainees' training contracts was 11 February 2002.

Remedy – Are the trainees entitled to backpay or compensation?

Backpay

I have found above that the effective date of termination of the trainees' training contracts was 11 February 2002.

What flows from this finding is the question whether the trainees are entitled to receive any wages (backpay) for the period between 7 and 15 November 2001 – the putative termination of the trainees' employment by Murrays – and 11 February 2002, the effective termination (by cancellation) of their training contracts.

All parties touched briefly on the issue of the trainees' entitlements to backpay in their final submissions – see Mr Reed's outline of submissions (at paragraph 26) contending the trainees should receive backpay for this period; Mr Murdoch's SC outline of final submissions (at paragraph 122) conceding a claim for backpay is arguable "if the date of termination of the training contracts postdates the *defacto* date of termination of employment" (I note this submission was made in the context of others (at paragraphs 107-121); and in Mr C.J. Murdoch's outline in respect of AT23-32 at paragraph 23(d)) acknowledging the trainees' right to payment of wages.

The issue was also raised, in passing, during the hearing (see pp96-97 and pp148-151 of transcript). A variety of matters bearing on the right to backpay were also canvassed at other times, but only as tangential to other issues.

I am concerned that these brief mentions were not adequate opportunity for the parties to present their arguments on this point. Accordingly, I invite all parties to present submissions on the right of the trainees to claim backpay on the basis that the effective date of termination of the training contracts was 11 February 2002. Such submissions should be presented in accordance with the procedure outlined below.

Compensation

As mooted earlier, the question of the trainees' entitlement to compensation was raised by Mr Reed at the beginning of the second day of substantive hearing.

Mr Reed sought to amend the trainees' appeals by adding the following provision:

"A determination that Murrays, on 7 November 2001, purported to cancel the contracts of the appellant other than in a way allowed under the Training and Employment Act 2000 and to further add, alternatively, an order for compensation under section 237 of the Act equivalent to six months' wages at the rate payable to the appellant immediately prior to 7 November 2001 and a further subparagraph, that the Commission make an order under section 240 of the Act."

At that time there followed some debate on the appropriateness of the amendment at such a stage in the proceedings, which included submissions from the parties on whether the remedy/penalty provisions of s. 237 and s. 240 could in fact be invoked in the circumstances of the case, based on whether the threshold conditions of s. 235 were satisfied (see pp141-154 transcript).

At the time, and for the reasons set out earlier, I determined not to allow the amendment of the trainees' appeals as requested by Mr Reed.

Now, however, upon reflection, it appears to me that the factual matrix of this case clearly sustains the preconditions in s. 235 and enlivens in me the ability to consider whether payment of any compensation to the trainees under s. 237 would be reasonable in all the circumstances.

Subject to my concluding remarks regarding further submissions, I view my ability to consider the matters in Chapter 8, Part 2, Division 2 of the T&E Act as predicated solely upon the satisfaction of the requirements of s. 235, and as matters I may consider, if appropriate, on my own motion. I do not see myself as limited in this by my previous refusal of Mr Reed's application to amend, or by the absence before me of any other specific application by a party to consider the remedies provided by that Division.

Section 235 states:

"This division applies if –
 (a) *an appeal to the industrial commission is about the cancellation of a registered training contract; and*
 (b) *the commission decides the employer or the apprentice or trainee has purposed to cancel the contract other than in a way allowed under this Act."*

I agree with the parties' submissions that in s. 235 "contract" must be read as "registered training contract".

Despite Mr Murdoch's SC various arguments to the contrary (see pp145-147 transcript), including his assertion of a conceptual separation of the act of terminating the trainees' employment from that of terminating their training contracts, it seems plain to me that the requirements of s. 235 are satisfied.

There is:

- (a) an appeal about the cancellation of a registered training contract; and
- (b) the employer has purported to cancel the contract other than in a way allowed under the T&E Act.

In my view Murrays' putative termination of the trainees' employment contracts on 7 and 15 November 2001 was simultaneously a repudiation of Murrays' obligations under the training contracts sufficient to effect at least "purported" cancellation of the training contracts, and thus sufficient to satisfy s. 235(b).

An integral feature of a traineeship is that it is "employment based" training. In the absence of ongoing employment (and exposure to the everyday workplace environment) an employer cannot realistically fulfil their obligations under a training contract. Intentionally terminating a trainee's employment amounts to a purported termination of the "employment based" training contract (see *Bryden and Training Recognition Council (2001) 166 QGIG 305*).

For completeness I note that this manner of purported cancellation of a training contract (i.e. without the auspices of the Training Recognition Council) is not a method of cancellation allowed under the T&E Act (see Chapter 3, Division 4 of the T&E Act).

Having found that my jurisdiction under Chapter 8, Part 2, Division 2 is enlivened, I come to consider the question of remedy for the purported cancellation of the training contracts other than allowed under the T&E Act.

I have stated above that there is no basis for the resumption of the trainees' training contracts. The training contracts are cancelled and the issue is whether, under s. 237(b) of the T&E Act, the trainees should receive some compensation. I have determined that in the circumstances a further penalty payable under s. 240 would not be appropriate.

Section 237 states:

"If the industrial commission considers it would be inappropriate in the circumstances for training to continue, the commission may order –
 (a) *the contract be cancelled, and;*
 (b) *employer pay to the apprentice or trainee the compensation decided by the commission if the commission is satisfied the payment of compensation is reasonable in all the circumstances."*

Under the section, payment of compensation must be reasonable in all the circumstances.

Again, in a tangential way, some of the matters going to the reasonableness of payment of compensation, and perhaps a reasonable quantum, were touched upon at hearing and in final submissions.

However, due to my refusal to allow Mr Reed's requested amendment, none of the parties had the opportunity to address me specifically and directly on these questions.

I invite the parties to make further submissions directed specifically to reasonableness of payment of compensation in the circumstances, and of quantum.

Arrangements for further submissions

If a party has no wish to make further submissions on either of the above matters I will rely on the submissions I have from them to date.

I will re-list this matter for further submissions restricted to the above two matters on Friday, 26 July 2002 at 10.00 a.m.

Parties intending to make submissions should file outlines of arguments, and serve them on the other parties by 12.00 noon on Tuesday, 23 July 2002.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

Appearances:

Mr R. Reed, Counsel on behalf of Kerry Roy Anthony, Robert Chandra, James Chandra, John Mizzi, Peter Proctor, Derek Scott, Randall Scovell, Diane Thompson, Robert McGown, Timothy Kershaw.

Mr J.E. Murdoch, Senior Counsel, with Ms C. Arnold of Counsel, on behalf of Murrays Australia Limited.

Mr C.J. Murdoch, Counsel on behalf of the Training Recognition Council.

Released: 8 July 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 280 – application to reopen

Sandra Marilyn Fox-Spencer AND Education Queensland (No. B581 of 2002)

COMMISSIONER BLADES

4 July 2002

Unfair dismissal – Reinstatement application – Conciliation conferences – Application of *Workplace Relations Act 1997* s. 219 – Conference not complying with requirements of Act – Second conference – Time limitation applying from second conference – Lapse of over 12 months from date of second conference – Held application lapsed.

DECISION

Sandra Fox-Spencer applies for an order to progress or revive reinstatement application No. B619 of 1999 so the matter can be heard and determined according to law. She also seeks an order to enable her to file a fresh application for reinstatement pursuant to s. 74(2)(b) of the *Industrial Relations Act 1999* (the Act).

Education Queensland alleges that the application for reinstatement originally filed by Ms Fox-Spencer has lapsed.

A convoluted argument was put on behalf of the applicant which generally addressed three points, being the issue of a Certificate under s. 75 of the Act, the applicability of Rule 201 of the *Industrial Relations (Tribunals) Rules 2000* and the Commission's general discretionary powers to order a remedy on moral or compassionate grounds. In my view, the issue is in short compass and what is to be decided is whether the original application B619 of 1999 has lapsed.

If the application has lapsed, Rule 201 does not apply and the Commission has no discretionary powers to overrule the provisions of the Legislation.

An application for reinstatement (No. B619/99) was lodged in the Commission on 10 May, 1999. What then happened was:

16.6.99 A conciliation conference was held before a Commissioner. The Commissioner issued two documents on that date which were placed in an envelope and sealed up. They were opened at my direction when this application was made. Both documents indicate that conciliation was unsuccessful but in the section dealing with whether the parties were informed of the possible consequences of further proceedings, the following note was made in one document:

“Jurisdictional point to be determined. No merit discussed”,

and in the other:

“No idea as certain legal questions yet to be determined”.

In that latter document, the Commissioner also indicated that the applicant was awaiting the outcome of another case which had taken some time to be heard and the provisions about the lapse of 6 months should not be used against the applicant.

A jurisdictional argument (obviously dealing with that legal question) then went to trial.

2.3.00 The decision about the preliminary point was released by a Commissioner.

17.5.00 The President released a decision on an appeal against the determination of the Commissioner.

3.10.00 Conciliation Conference held before yet another Commissioner. A Certificate, purporting to have been issued under s. 75(3)(a) of the Act certified that a conference was held, “that the Commission was satisfied that all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful” and, in so many words, indicated that there was a dispute about whether the termination was harsh, unjust or

unreasonable and recommended that the applicant explore the option put forward by the respondent to expedite the applicant's application to be considered as being suitable for permanent employment.

The Certificate also states that the applicant must, within 6 months of 3 October, 2000, take some action in relation to the application otherwise the application lapses.

The Certificate was posted to the applicant on 6 October, 2000 and she acknowledges that it was received "on or about 6 or 7 October 1999" (sic).

No further action was taken by the applicant until a letter was sent to the President on 24 October, 2001.

While the parties argued on the interpretation of the provisions of s. 75 by applying s. 710(4) of the Act, they inadvertently omitted reference to s. 720 which provides that the repealed Act i.e. the *Workplace Relations Act 1997* chapter 5, part 2 continues to apply to a dismissal within the meaning of that part that happened before the commencement of the section. (The *Industrial Relations Act 1999* commenced 1.7.1999). Section 219 of the *Workplace Relations Act 1997* is located within chapter 5, part 2 and it provides:

"(1) Before the commission hears an application under section 218, the commission must hold a conference to attempt to settle the matter by conciliation.

(2) ...

(3) If the commission is satisfied all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful, it –

(a) must inform the parties to the conciliation of –

(i) that fact; and

(ii) the possible consequences of further proceedings on the application; and

(b) may recommend the application be discontinued, whether or not it also recommends another way of resolving the matter.

(4) The application lapses if the applicant has not, within 6 months after the applicant has been informed by the commission under subsection (3)–

(a) taken any action in relation to the application; or

(b) discontinued the application."

Section 75 of the Act is in roughly similar terms but requires the issue of a written certificate, a step not required under s. 219.

It is clear in my view that the Commissioner conducting the conference on 16 June 1999 at no time intended the documents issued at that time or that conference to be a compliance with the provisions of s. 219 of the *Workplace Relations Act 1997*. The documents themselves show that the conference was not to be regarded as a conference under s. 219. That Act required that if the Commissioner was satisfied that all reasonable attempts to settle were unlikely to be successful, the Commissioner was to inform the parties of that fact (which was done) and to inform the parties of the possible consequences of further proceedings (which was not done). Both documents plainly reject the proposition that the statutorily required conference had been held. It is clear therefore that there had been no concluded conference as required by the provisions of s. 219(1). Time did not commence to run at the conclusion of that conference.

The second conference was held on 3 October 2000. While a written certificate purported to issue under s. 75(3) of the *Industrial Relations Act 1999*, it was not required by s. 219 of the *Workplace Relations Act 1997* which section still continued to apply to the application. The written certificate was irrelevant. At best, it was a record of roughly what occurred. It did not purport to be a full record of what occurred. While the written document was lengthy, it highlighted that there was a dispute, either in fact or in law, that the termination was harsh, unjust or unreasonable (which inferentially, could only be resolved at trial). It highlighted that the applicant had been subsequently engaged under contract by the respondent and it recommended that she pursue the option of applying for permanent employment before embarking upon a lengthy trial about the merits. In my view, the Commissioner conducting the conference was not required to do more and it must be accepted I think that the information contained in the written document does not purport to be an exact record of what transpired and has to be viewed in the light of the discussions at the conference and also the fact that the applicant was legally represented. The Commissioner was satisfied that the time limitation had commenced to run (and therefore compliance with s. 219(3)) because of the final notation placed on the written document advising the applicant to take some action within 6 months of 3 October.

The Commissioner who issued that certificate on 3 October, if satisfied that all reasonable attempts to settle were unlikely to be successful, was required to inform the parties of that fact and the possible consequences of further proceedings. From the very fact that the Commissioner indicated to the parties that the time limitation had commenced to run, there is evidence that the Commissioner was satisfied that s. 219(3) had been complied with. There is a presumption expressed by the Latin maxim *omnia praesumuntur rite et solemniter esse acta* that public and official acts and duties are presumed to have been regularly and properly performed (see *Price v Humphries* (1958) 2 Q.B. 353). There is no suggestion by either party that s. 219(3) had not been complied with.

It was not a requirement of s. 219 of the *Workplace Relations Act 1997* that the applicant be informed at all that the applicant had 6 months to take action or the application would lapse. However, she acknowledges receipt of that information about 7 October, 2000. She took no action until after one year later.

The application having lapsed, it cannot be revived.

That is enough to dispose of the matter. If an application has lapsed, an applicant cannot rely upon a rule such as Rule 201 of the *Industrial Relations (Tribunals) Rules 2000* which replaced Rule 136 of the *Industrial Court Rules 1997*, both of which deal with applications on which no action has been taken for 1 year. It would be almost an abuse if Rule 201 or Rule 136 could be used to circumvent the provisions of s. 219 but I accept the argument advanced by the respondent that it is settled that provisions of a general application give way to specific provisions when a conflict occurs. (*Golden Video Pty Ltd v Chief Executive, Department of Employment, Training and Industrial Relations* (2000) 164 QGIG 298).

To answer the final submission of the applicant regarding moral or compassionate issues, reference is made to the statement by Williams J in *Mr D v Logan Beaudesert District Health Service* (1999) 161 QGIG 267:

"It was also submitted that the Commission had power under s. 344(j) of the W.R. Act to extend the time period provided for in s. 219(4). As pointed out in Allerup supra a specific power to extend time would need to be conferred by the statute given the clear wording of s. 219(4). The contrast with s. 218 where express power to extend time is granted is significant. The term 'lapsed' must mean that the right created by the statute has come to an end, has terminated. As Fullagar J said in Esso Research and Engineering Co v Commissioner of Patents (1960) 102 CLR 347 at 350 the word lapse 'connotes finality'. If the statutory right has terminated because of lapse of time then something more than an extension of time is necessary to revive the right. The legislation would have to empower the Commission not only to extend time but also to revive the lapsed right. Section 344(j) does not go that far; it does not permit the Commission to resurrect a lapsed right.

The appellant further submitted that on appeal to this court I could exercise jurisdiction under the Rules of the Supreme Court to extend time. That contention is fallacious. In the circumstances the Industrial Court is bound by the provisions of the W.R. Act and the Industrial Court has no wider powers than the Commission when it comes to dealing with a lapsed application for reinstatement."

I rule that the application for reinstatement No. B619 of 1999 has lapsed. I order that application No. B581 of 2002 be dismissed.

B.J. BLADES, Commissioner.

Appearances:

Mr N. Vidler, with him Ms S.M. Fox-Spencer, for the applicant.

Mr R. Egan for Education Queensland.

Hearing date: 2 July 2002

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