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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
CA281/02	Crest Electronics - Certified Agreement 2002	11/7/02	
CA137/02	Lutheran Church of Australia Queensland District Support Workers Certified Agreement2001	12/7/02	CA68/00
CA200/02	J & P Richardson Industries Pty Ltd Certified Agreement No 5	12/7/02	CA298/00
CA201/02	AC Installation Services Pty Ltd Certified Agreement - 2001/2002	12/7/02	
CA276/02	John Robinson t/a John Robinson Carpentry - Certified Agreement	12/7/02	
CA277/02	Trojan Timbers Pty Ltd - Certified Agreement	12/7/02	
CA292/02	Justzo Enterprises Pty Ltd - Certified Agreement	12/7/02	
CA293/02	DWS Panels Pty Ltd - Certified Agreement	12/7/02	
CA294/02	Mirage Industries Pty Ltd - Certified Agreement	12/7/02	CA279/95
CA295/02	Glass & Aluminium Contracts Pty Ltd - Certified Agreement	12/7/02	
CA303/02	G Crumpton & Sons Enterprise Bargaining Agreement Certified Agreement	12/7/02	
CA298/02	WFM Electrical Services - Certified Agreement 2002	16/7/02	
CA299/02	Ralcrest Pty Ltd - Certified Agreement 2002	16/7/02	CA490/97
CA300/02	Eastern Tree Service Pty Ltd - Certified Agreement 2002-2005	16/7/02	

The following Agreement has been amended:

No/s	Title	Date approved
CA435/00	Crowd Control Industry - LHMU - Certified Agreement	10/7/02

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

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

Allens Arthur Robinson AND WorkCover Queensland (No. C44 of 2002)

PRESIDENT HALL 15 July 2002

DECISION

On 7 January 2000 a former employee of the appellant filed an application for worker's compensation. The claim was rejected. The former employee sought a statutory review of the decision rejecting his application. The statutory review officer upheld the former employee's submissions and reversed the decision rejecting his claim for compensation. In reliance on s. 498 of the *WorkCover Queensland Act 1996* the appellant appealed to the Industrial Magistrates Court. The appellant was unsuccessful. This is an appeal against the decision of the Industrial Magistrate.

There was but one issue before the Industrial Magistrate. The issue was whether a disorder of which the former employee admittedly suffered at all material times fell outside the definition of "injury" at s. 34 because of the operation of s. 34(5). The contention of the appellant was that because the disorder had arisen out of reasonable management action taken in a reasonable way, the disorder could not be found to be an "injury" for the purposes of the *WorkCover Queensland Act 1996.* As (correctly) understood by the Industrial Magistrate, the respondent's case was that the former employee had been vulnerable to the disorder which he developed because of a pre-existing condition and that in those circumstances s. 34(5)(a)(b) had no application. To understand that submission one must know something of the history of s. 34.

Prior to an amendment which took effect on 1 July 1999 s. 34(4)(5) provided as follows:

"(4) **'Injury'** does not include a personal injury, disease, or aggravation of a disease sustained by a worker if the injury is a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances –

(a) Reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

(b) the worker's expectation or perception of reasonable management action being taken against the worker;

(c) action by WorkCover or a self-insurer in connection with the worker's application for compensation;

(d) circumstances in which a reasonable person, in the same employment as the worker, would not have been expected to sustain the injury.

(5) For subsection (4), in deciding in a particular case whether management action was reasonable or whether management action was taken in a reasonable way –

(a) regard must be had to what action or way of taking action would have been reasonable for a worker of ordinary susceptibility to psychiatric or psychological disorder; and

(b) regard must not be had to a particular worker's susceptibility to a psychiatric or psychological disorder.".

The submission seems to have been that issue subs. (4)(d) was an exhaustive test to be applied in the case of a worker with a pre-existing vulnerability to psychiatric or psychological disorder; if that was so as soon as it emerged that a particular claimant had such a predisposition the claim might be tested only against paragraph (d) and paragraphs (a), (b) and (c) became irrelevant. The argument then moved to the current form of s. 34. Since 1 July 1999 the exclusion of psychiatric and psychological injuries has been dealt with by s. 34(5) which provides:

"Despite subsections (1) and (3), **'Injury'** does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances –

(a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;

(b) the worker's expectation or perception of reasonable management action being taken against the worker;

(c) action by WorkCover or a self-insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable

management actions taken in a reasonable way –

- action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker
- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with the worker's employment.".

The submission is that the restructuring of s. 34 does not change the construction of paragraphs (a), (b) and (c), and that with the deletion of the only barrier to recovery by a claimant with a pre-existing vulnerability to psychiatric or psychological disorder there is no basis for the exclusion of such a claimant if the disorder from which the claimant had come to suffer was otherwise within the definition of "injury".

In my view the respondent's submission is misconceived. I can think of no basis for denying s. 34(4)(a), (b) and (c) of the pre 1 July 1999 version of the Act application where the claimant had a pre-existing vulnerability to the disorder which became the subject of a claim. Such a construction would not deny s. 34(4)(d) any field of operation. One can conceive of the case in which an employer so dealt with an employee known to be predisposed to the development of a psychiatric or psychological disorder that s. 34(4)(a) would be held to have no application. Section 34(4)(d) may well have operated in such a case to deny the developed disorder characterisation as an "injury". Additionally, there were cases such as *Priddle v WorkCover Queensland* (1999) 162 QGIG 170 where s. 34(4)(d) operated to deny a remedy, not because of vulnerability to psychiatric or psychological disorder, but because a reasonable person in the position of the claimant would have taken steps to eliminate or avoid the stressors to which the developed condition was attributable.

In reliance on s. 14(B)(1)(a) of the *Acts Interpretation Act 1954* I have resorted to the second reading speech of the Minister responsible for the introduction of s. 34 in the form which it took prior to 1 July 1999. Materially, the Minister said:

> "Amendments to the definition of 'injury' were introduced in January 1996 in an attempt to control this trend. However, under these amendments employers have still been held responsible for claims where reasonable management action had been taken. This is considered to be inappropriate especially when a worker may have a pre-existing disposition to psychiatric or psychological disorder. It is intended that regard be had, when making a decision about the reasonableness of the management action, as to how a worker of ordinary susceptibility would have reacted. A 'reasonable person test' has also been introduced so that consideration must be given to whether a reasonable person in the same situation would have been expected to sustain an injury.".

That passage confirms my view that s. 34(4)(a), (b) and (c) of the Act in the form which it took prior to 1 July 1999 did apply to a case of a claimant with a predisposition to psychiatric or psychological disorder. I have found nothing to indicate an intention that the changes of 1 July 1999 were intended to limit the effect of what were previously s. 34(4)(a), (b) and (c). Indeed, any such conclusion would be inconsistent with the decision of this Court in *WorkCover Queensland v Kehl* (2002) 170 QGIG 93. Regrettably, because submissions before the Industrial Magistrate were concluded before *WorkCover Queensland v Kehl, ibid,* was argued, the case could not be drawn to His Worship's attention. In the result, the Industrial Magistrate accepted the respondent's submissions. The decision of the Industrial Magistrate must be set aside.

There is an issue between the parties about whether the Court should exercise its power at s. 510(1)(c) of the *WorkCover Queensland Act 1996* to substitute another decision for the decision of the Industrial Magistrate, or should remit the matter to the Industrial Magistrate to be heard and determined according to law. In my view it is appropriate to take the former course. The Industrial Magistrate has made all the necessary findings as to credibility. The evidence about whether the conduct of the appellant was reasonable management action taken in a reasonable way is all one way. It is all one way because of a forensic decision taken by the respondent that the case should be conducted on the basis that s. 34(5)(a) had no application where, as here, there was a predisposition to psychiatric or psychological disorder. In my view the respondent is bound by the conduct of its case before the Industrial Magistrate.

I allow the appeal. I set aside the decision of the Industrial Magistrate. I order that the claim for compensation be rejected.

I reserve the question of costs in the Industrial Magistrates Court.

Dated 15 July 2002.

D.R. HALL, President.

Released: 15 July 2002

Appearances:
Mr R.P.S. Jackson, instructed by Allens Arthur Robinson, for the appellant.
Mr P.H.N. Major, directly instructed by WorkCover Queensland, for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 335 – application for costs

Department of Justice and Attorney-General AND David Carey (No. 2) (No. C42 of 2002)

PRESIDENT HALL 15 July 2002

DECISION

By a decision of 25 June 2002, 170 QGIG 306, I dismissed an appeal against the decision of the Queensland Industrial Relations Commission about a preliminary jurisdictional point. The respondent to that appeal now seeks costs.

The first submission is that there is power to award costs pursuant to s. 335(1)(a) of the *Industrial Relations Act 1999.* The argument is that the appellant appealed "vexatiously or without reasonable cause" in that the appeal had no objective prospect of success. Such a submission is always an awkward one. The Industrial Tribunal hearing the application for costs must comment upon the prospects of success of an application (here an appeal) which has been rejected. However, in this case, I entertain a clear view that the appellant's case was arguable. One issue was whether the matter fell within the decision in *Siagian v Sanel Pty Ltd* (1994) 54 IR 185 at 196-203 or within the decision in *Construction, Forestry, Mining and Energy Union v Newcastle Wallsend Coal Company Ltd* (1998) 88 IR 202. In the event, this Court took the view that the latter decision imposed a gloss upon the decision in *Siagian v Sanel Pty Ltd* (1994) 54 IR 185 at 196-203, that the Commission had appreciated the gloss and that it was open to the Commission to find that the matter fell within the propositions advanced in *Siagian v Sanel Pty Ltd* (1994) 54 IR 185 at 196-203. Critical to that decision was the view adopted by the Court of the following passage in the Commission's decision:

> "Although Mr Williams *might* have informed Mr Carey his contract was not being renewed and that he would not be required to come into the office for the balance of the period of his contract the manner of the communication of Mr Carey's termination leads me to conclude that the employment relationship came to an end on that day (see *Siagian v Sanel Pty Ltd* [1994] 54 IR 185 at 196-203; compare *Construction Forestry, Mining and Energy Union v Newcastle Wallsend Coal Company Ltd* [1998] 88 IR 202).".

This Court took the view that the passage indicated that the Commission was aware that a gloss had been placed upon the decision in *Siagian v Sanel Pty Ltd* (1994) 54 IR 185 at 196-203. However, it was always arguable that it followed from the word "compare" that the Commission was of the view that *Construction, Forestry, Mining and Energy Union v Newcastle Wallsend Coal Company Ltd* (1998) 88 IR 202 was inconsistent with the decision in *Siagian v Sanel Pty Ltd* (1994) 54 IR 185 at 196-203 and for that reason might be put to one side. If that submission had been accepted the Commission would have been held to have asked the wrong question. The Commission's decision upon the preliminary jurisdictional point might well have been set aside. I am not satisfied that the appeal had no objective prospect of success.

The second submission is that when one looks at the whole course of the appellant's conduct since the application for reinstatement was filed, it is apparent that the appellant has sought to delay and frustrate the prosecution of the respondent's application. Alternatively, it is put that the power at s. 335(1)(b) has been triggered by that same conduct. I adhere to the view which I expressed in *Julia Ross Personnel v Rebecca Wain* (2001) 166 QGIG 350 at 351, that s. 335(1)(b) is available where an appeal arises out of an application for reinstatement. However, I am quite unable to accept the submission that a review of the appellant's conduct indicates that it has sought to delay or frustrate the prosecution of the respondent's application for

reinstatement. There have certainly been numerous applications. The purpose of the application has been to narrow the issues and to ensure that time and expense is not put into the resolution of significant factual matters unless it is necessary to do so. Doubtless the appellant has acted out of self interest. But the appellant has not acted vexatiously, has not acted without reasonable cause and has not engaged in any unreasonable act.

The application for costs is dismissed.

Dated 15 July 2002.

D.R. HALL, President.

Released: 15 July 2002

Appearances:
Mr A.A.J. Horneman-Wren, instructed by McCullough Robertson, for the appellant.
Mr T. Bradley, instructed by Agnew Consulting Pty Ltd, for the respondent.

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INDUSTRIAL COURT OF QUEENSLAND

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

Beverley Lynn Mason AND WorkCover Queensland (No. C33 of 2002)

PRESIDENT HALL 12 July 2002

DECISION

The appellant, who is in her late 40s, is a high school teacher by occupation. On or about 20 October 2000 she had physical contact with a male student who forced his way past her and in the course of doing so pushed her wrist backwards. The incident caused the appellant physical pain. It also caused her to become emotionally upset. The upset settled into depression. She was unable to work at the school to which she had been assigned for the remainder of the academic year.

The appellant attempted to return to her school in the following year. In the course of that attempt she visited the school immediately prior to the commencement of the academic year. In the course of the visit she became involved in a discussion with the head of her department which caused her to decompensate. She claimed worker's compensation. Her application was rejected. The rejection was confirmed on a statutory review. From the decision of the statutory review officer the appellant appealed to the Industrial Magistrates Court. Again, she was unsuccessful. She now appeals to this Court.

It is not necessary to refer to the whole of the evidence which was led at the hearing *de novo* before the Industrial Magistrate. It is sufficient to say that the Industrial Magistrate came to the conclusion that by the time of the appellant's visit to the school on 23 January 2001 the impact of the incident of 20 October 2000 was wholly spent. Treating the incident of 23 January 2001 as entirely separate from the incident of 20 October 2000, the Industrial Magistrate held that although the interaction with the head of department had caused the appellant to decompensate the decompensation was withdrawn from the definition of injury at s. 34 of the *WorkCover Queensland Act 1996* by s. 34(5)(a) in that it arose out of or in the course of reasonable management action taken in a reasonable way. On the appeal, both limbs of the Industrial Magistrate's decision have been attacked.

In my view, this Court is not entitled to go behind the Industrial Magistrate's conclusion that the conduct of the appellant's head of department on 23 January 2001 was reasonable management action taken in a reasonable way. There had been a conflict between the evidence of the appellant and the evidence of the head of department about what had occurred. The Industrial Magistrate recorded, "I was impressed with [the head of department]…", and accepted the evidence of the head of department. Not having seen or heard the witnesses, this Court is in a position of permanent disadvantage. On all the authorities it would be quite inappropriate to go behind a finding of fact by the Industrial Magistrate so heavily influenced by a finding as to credibility, compare *S.S. Homtestroom v S.S. Sagaporack* [1927] A.C. 37 at 47 per Lord Sumner and *Warren v Coomb* (1978) 142 CLR 531 at 537 per Gibbs ACJ, Jacobs and Murphy JJ. Accordingly, I reject the attack upon the finding of the Industrial Magistrate that the action taken by the head of department on 23 January 2001 was reasonable management action reasonably taken.

The decision to separate out the incident of 20 October 2000 and the incident of 23 January 2001 is rather another matter.

As is commonly the case in appeals to an Industrial Magistrate under the *WorkCover Queensland Act 1996* there was significant medical evidence. The medical evidence was all one way. It was the evidence of all the medical witnesses that the events of 23 January 2001 had caused the appellant to relapse and that the incident of 20 October 2000 was a significant contributing factor to the decompensation post 23 January 2001. It may be conceded that the language, of at least some of the medical witnesses, had not been so forthright in the settling of medical certificates and drawing of pretrial reports. But by the time of the hearing, and perhaps with the benefit of hindsight, all opinion had hardened and all opinion was one way. This was not a case in which it was open to the Industrial Magistrate to find that the version of events given to the medical witnesses by the respondent, on the basis of which the medical witnesses had formulated their opinions, was not in accordance with the true facts. Granted that the question whether a psychological or psychiatric injury falls within s. 34 is a mixed question of fact and law for the Industrial Magistrate and is not a medical question, there are significant restraints on the formation of opinions which differ from all of the medical evidence, compare *Fernandez v Tubemakers of Australia Limited* [1975] 2 NSWLR 190 at 200 per Mahoney JA, *Tubemakers of Australia Limited v Fernandez* (1976) 50 ALJR 720 at 724 to 725 per Mason J (with whom Barwick CJ and Gibbs J agreed). Whilst one may accept that it is easier to go behind medical evidence that an event brought about a consequence than to go behind medical evidence that an event did not, and according to all accepted medical theory could not bring about a consequence, it is a step to be taken only with caution and in the presence of highly persuasive evidentiary material. Here, the Industrial Magistrate summarised the matters upon which reliance was placed as follows:

"… I say that the incidents are separate and distinct for three reasons:

1. The evidence from Mr Stevens and Ms Harrison that they had seen a document evidencing that Ms Mason was fit to return to work.

2. The statement from Ms Mason that ' I felt positive about returning to my full time duties as a teacher…'

3. The statement from Dr McVie the psychiatrist (see Exhibit 8 page 3 bottom paragraph):

'She stated that while her previous symptoms had settled initially with Aropax, support from the private psychologist, and absence from school over December/January, she stated that almost immediately after the discussion with the Head of Department, she relapsed to the stage of not being able to concentrate again.' ".

The finding at (1) relates to a claim of two other teachers at the high school at which the appellant was employed that they had sighted a medical certificate asserting that the appellant was fit to return to work from a date prior to 23 January 2001. Regrettably, the administration of the high school was unable to produce the document. The doctor to whom the certificate was attributed was unable to locate a copy. The finding is a little surprising. One can understand the administration of a high school mislaying (even an important) document. One can understand that human frailty may lead a medical practitioner to do likewise. The coincidence of both a high school administration and medical practitioner making the same error with respect to the one document is remarkable. However, once again, the Industrial Magistrate having observed the witnesses and having been impressed by them, it seems to me that I must accept the Industrial Magistrate's finding. But the finding says nothing about whether, with hindsight, the opinion expressed in the missing document was accurate or inaccurate.

As to the finding at (2), the appellant complains that she so expressed herself because she had (wrongly) been informed that she might claim compensation only for the incident of 23 January 2001. Once again, it seems to me that I cannot disturb the (apparent) finding of the Industrial Magistrate that the appellant meant what she said. However, I am entitled to part company from His Worship, and I do part company from His Worship, on the question whether the appellant's self-diagnosis should be given greater weight than the unanimous medical evidence. I do not think that it should.

As to the finding at (3), I accept the submission of counsel for the appellant that the Industrial Magistrate has selected a passage which in context has a different meaning and has quite misconstrued the opinion of Dr McVie. It is clear, that by the time of the hearing, it was the opinion of Dr McVie that the incident of 20 October 2000 was a significant contributing fact to the decompensation of January 2001. It seems to me that in construing a medical report in the light of evidence given on transcript I am in as good a position as an Industrial Magistrate, compare *Warren v Coomb* (1978) 142 CLR 531 at 537 per Gibbs ACJ, Jacobs and Murphy JJ.

In the circumstances, I am satisfied that the incidents of October 2000 and January 2001 may not be teased out and that the incident of 20 October 2000 should be regarded as a significant contributing factor to the decompensation of January 2001. I allow the appeal. In lieu thereof I order that the appellant's claim for compensation be allowed.

I have no power to allow the costs of the appeal to this Court. I reserve the question of costs in the Industrial Magistrates Court.

Dated 12 July 2002.

D.R. HALL, President.

Released: 12 July 2002

Appearances:
Mr P. Gorman, instructed by Gormans Lawyers, for the appellant.
Mr P.H. Major, directly instructed, for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 153 application to certify agreement

Lutheran Church of Australia Queensland District AND Queensland Nurses' Union of Employees and Others (No. CA137 of 2002)

LUTHERAN CHURCH OF AUSTRALIA QUEENSLAND DISTRICT SUPPORT WORKERS – CERTIFIED AGREEMENT 2001

COMMISSIONER ASBURY 12 July 2002

Application for certification of agreement – *Industrial Relations Act 1999* – s. 156 – Previous decision declining to certify agreement – Proposed amendment to application clause of Agreement – Finding that proposed amendment meets requirements of s. 151(3) of Act so that further ballot not required – Objection to certification by QNU – Consideration of requirements for certification of agreement – Relevant Award for application of no-disadvantage test – Onus on organisation seeking right to be heard to oppose certification of agreement to put material before Commission to substantiate argument and consideration of requirements of s. 156(1)(j) and exception provided in s. 156(2) – Finding that exception in s. 156(2) applies – Agreement certified in terms of amended application.

DECISION

In a decision released on 10 May 2002 (170 QGIG 75), I declined to certify an agreement entitled *Lutheran Church of Australia Queensland District Support Workers – Certified Agreement 2001* (the Agreement). The parties to the Agreement are Lutheran Church of Australia Queensland Care (Lutheran Community Care); The Australian Workers' Union of Employees, Queensland (AWU) and the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU).

The Queensland Nurses' Union of Employees (QNU) sought and was granted a right to be heard in relation to the certification of the Agreement on the basis that the classification structure in the Agreement as filed, went beyond the coverage of the awards which were said by the parties to the Agreement to regulate the work of employees proposed to be covered by the Agreement. This meant that the proposed Agreement could potentially over-ride the provisions of the *Nurses' Aged Care Interim Award – State*.

In summary, my reasons for declining to certify the Agreement, were that it did not specify the nature of the facilities to which it applied or the employees to be covered. Neither did the Agreement specify that it was intended to apply only to employees who would otherwise be covered by certain awards. As a result, I was unable to be satisfied that the Agreement passed the "no disadvantage test" as required by s. 156(1)(h). Further, I was unable to be satisfied that the requirements of s. 156(1)(j) were met, or whether the exception to those requirements in s. 156(2) applied. The matter was listed for further hearing pursuant to s. 158(1)(b) to give the parties to the Agreement the opportunity to take such action as may be necessary to enable the Agreement to be certified.

At that further hearing, on 6 June 2002, the parties to the Agreement sought to amend the application by inserting the following provision into the Agreement, in lieu of the existing clause 1.3:

"1.3 (a) Application

This Agreement applies to the employment by the employer of all employees whose employment is, or would be if not for the making of this Agreement, covered by the following industrial instruments:
(i) Award for Accommodation and Care Services Employees for Aged Persons – State (Excluding South-East Queensland);
(ii) Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division; Queensland);
(iii) Diversional Therapy – AWU – Industrial Agreement;
(iv) Private Hospitals and Nursing Homes Industry Award – State (Part C and other parts relating to employment in aged care facilities);
(v) Motor Drivers, Etc., Award – Southern Division.

(b) Relationship to other Industrial Instruments

This Agreement supersedes and displaces the operation of each of the industrial instruments referred to in (a), to the extent that those instruments apply to employees covered by this Agreement.".

It was submitted for the parties to the Agreement that the proposed amendment would more accurately reflect the intention of the parties with respect to the application of the Agreement. The Agreement is intended to replace a previous agreement (CA68 of 2000), which contains an application clause in similar terms to the proposed amendment to the Agreement in these proceedings.

A supplementary affidavit of Milton Barry Eckerman, the Director of Lutheran Church of Australia Queensland District, was tendered, which stated that only employees covered by CA68 of 2000 were balloted in relation to the approval of the Agreement subject of these proceedings. Further, the affidavit indicated that no ballot papers were requested by or provided to any Assistant Nurse, Enrolled Nurse, Registered Nurse or Clerk.

It was also submitted for the parties that the proposed amendment to the Agreement subject of these proceedings meant that its effect would be identical to that of the certified agreement considered by the President in *Queensland Nurses Union v Churches of Christ* (2000) 164 QGG 192. In that case, the President found that an agreement which relied on the patronage of the *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division*, could not apply at any time to employees who were not covered by that Award.

Mr Herbert for Lutheran Community Care, Mr Reed for ALHMWU and Mr Simpson for AWU argued that the Agreement with the proposed amendment, would apply only to employees covered by the awards listed in clause 1.3 (as amended) and over-rides only those awards. While there may be a debate before other members of the Commission in relation to the application of the *Nurses' Aged Care Interim Award – State* and other awards containing the classification of "Personal Care Attendants" this was not a matter which the Commission as presently constituted should be concerned about, nor was this a matter which could prevent the certification of an agreement, which met the requirements of the Act for certification.

The proposed amendment was said by the parties to the Agreement to meet the requirements of s. 151(3) of the Act which provides that the steps in s. 144(2) and (3) are not required to be taken again, where the Commission is satisfied that a proposed agreement was amended only:

(a) for a formal clerical reason; or
(b) in another way that does not adversely affect a relevant employee's interests.

In this case, it was submitted that the amendment was for the purpose of clarifying the effect of clause 1.3 of the Agreement as filed, and was consistent with the understanding and intention of the parties at the time the agreement was negotiated. Further, the proposed amendment would not adversely affect a relevant employee's interests.

Objection to the certification of the Agreement was maintained by Mr Healy for the QNU. Mr Healy argued that even if the Agreement was amended as proposed by the parties to it, the classification structure in the Agreement would still describe nursing work, covered by the *Nurses' Aged Care Interim Award – State*. This fact enlivened s. 156(g) so that nursing employees should have been involved in the negotiations for the agreement and the balloting process. Without the votes of nurses and assistants in nursing being taken into account, it was argued that the Commission could not be satisfied pursuant to s. 156(g) that a valid majority of relevant employees employed at the time, had approved the terms of the Agreement. Further, the QNU should have been invited to become a party to the Agreement, pursuant to s. 156(j).

Mr Healy contended that the exception in s. 156(2) does not apply because the QNU has not been given an opportunity to be party to the agreement, and further that the Union has members or potential members conducting work pursuant to the Agreement. Because the requirements set out in these provisions had not been met, the Commission must not certify the Agreement. Mr Healy also submitted that the Agreement did not meet the requirements of the "no disadvantage test".

I am satisfied that the amendment sought by the parties to the Agreement is formal or clerical, and that it will not adversely affect a relevant employee's interests. In forming this view, I have given consideration to evidence in affidavit form and submissions of the parties to the Agreement, which was essentially uncontested, and which establishes that:

- It is custom and practice with respect to the conduct of enterprise bargaining negotiations between Lutheran Community Care and employees, that separate agreements are negotiated for nursing and support work.
- Negotiations for an agreement to cover nurses, and assistants in nursing are currently underway.
- The parties to the Agreement subject of these proceedings did not intend nor envisage that the Agreement would cover nurses or assistants in nursing.

Accordingly, I grant leave to the parties to amend the application in terms of the amendment to clause 1.3 of the Agreement, tendered at the hearing into this matter on 6 June 2002, and set out above.

In relation to the question of whether the Agreement should be certified, it is well established that the Commission must certify an agreement if and must not certify an agreement unless the requirements in s. 156 have been met. Further, the Commission must not certify an agreement where any of the reasons for refusing to do so, as set out in s. 157, pertain. In short, the Commission can require no more, and accept no less, than the matters set out in those sections.

In my decision of 10 May 2002 (170 QGIG 75) I found that the requirements of s. 156 had been met, with the exception of those matters provided for in s. 156(h) and s. 156(j). I also found that none of the grounds for refusing to approve the Agreement as set out in s. 157 pertained.

I accept the submissions of Mr Herbert, Mr Reed and Mr Simpson for the parties to the Agreement that as a matter of law, the Agreement can only operate with respect to the employment of persons who are covered by the awards listed in clause 1.3 as amended. It follows that the Agreement can have no application to any employee covered by the *Nurses' Aged Care Interim Award – State* or indeed any other award. In the event that Lutheran Community Care engages in the type of "re-badging" exercise which the employer in *Queensland Nurses Union v Churches of Christ* undertook, the outcome will be the same. As was the case in *Queensland Nurses Union v Churches of Christ*, the Agreement subject of these proceedings, which because of the amendment to clause 1.3, now relies on the patronage of specified awards, will have no application to employees covered by the *Nurses' Aged Care Interim Award – State*, which is not specified in clause 1.3.

Section 156(h) provides that the Commission must certify an agreement if and must not certify an agreement unless the agreement passes the no-disadvantage test. That test is prescribed in s. 160. Subsection (1) of s. 160 provides that an agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their employment conditions. Subsection (2) of s. 160 provides that an agreement disadvantages employees only if the Commission considers it would result in a reduction in the employees' entitlements or protections. Subsection 6 of s. 160 defines "entitlements or protections" as those under a relevant award or Chapter 2 of the Act.

Schedule 5 to the Act provides a definition of "relevant award" in relation to a person to whom a certified agreement will apply, as an award regulating any employment conditions of persons engaged in the same kind of work as that of persons under the agreement and that immediately before the initial day of the agreement, binds the person's employer.

I am now satisfied that the *Nurses' Aged Care Interim Award – State* is not a relevant award for the purposes of the application of the "no-disadvantage test" to the Agreement subject of these proceedings. Further, I am satisfied that the Agreement meets the requirements of that test in any event, even if on a strict reading of the definition of a relevant award in Schedule 5, the *Nurses' Aged Care Interim Award – State* was capable of being so considered. Mr Healy for the QNU raised only one point with respect to the contention that the Agreement did not pass the "no-disadvantage test". That point was that the Agreement was said not to contain provisions for the translation of employees from the classification structure in the body of the Agreement to the new classification structure contained in Schedule 2.

In my view, the Agreement meets the requirements of the "no-disadvantage test" on the basis of the wage rate levels contained in Schedule 1 and current role descriptors which are used to align employees with those levels. I am told by the parties to the Agreement that these descriptors are well established and have been in place for some time. Further, I have evidence in the form of an affidavit of Mr Eckermann which deposes that the Agreement passes the "no-disadvantage test" together with the fact that the Agreement has been signed by the State Secretaries of both the AWU and the ALHMWU, which in my view is a very good indication that those requirements are met. It is also clear that the proposed classification structure in Schedule 2 to the Agreement is to be the subject of a translation exercise, which is to be conducted during the life of the Agreement. Further, I am satisfied that it would be inappropriate to apply the proposed rates for the *Nurses' Aged Care Interim Award – State* as a result of the decision of a Full Bench of the Commission in *QNU v QCCI and Others* B1019 of 2002, tendered by Mr Healy. Those rates are proposed and are subject to further discussion between the parties in that matter. They are not currently included in the Award.

Section 156(j)(i) of the Act provides that for an agreement to be made with an employee organisation, other than an agreement for a new business, each employee organisation that is bound by the award or industrial agreement that binds the employer or would bind the employer, apart from an award under the Commonwealth Act, is a party to the agreement. The exception to this provision is contained in s. 156(2) which provides that subsection 1(j) does not apply, if the Commission is satisfied that an employee organisation mentioned in subsection 1(j) has been given the opportunity to be party to the agreement but does not want to be a party, or has no members who are to be bound by the agreement.

On 4 April 2002, Mr Healy for the QNU, in response to a question from the Commission, stated that the QNU was not seeking to be a party to the Agreement, but simply seeking to oppose its certification. This submission was altered somewhat at the hearing on 6 June, where Mr Healy said that this position remained unchanged, but by virtue of the provisions of s. 156(j), the QNU ought to be a party to the Agreement, and because the QNU was not a party, the Agreement could not be certified.

As I have previously observed, there is no absolute requirement under the Act for a certified agreement to include all employee organisations who represent, or are entitled to represent every employee proposed to be covered. It is clear from the provisions of s. 142 that an agreement may be made with one or more organisations who represent or are entitled to represent any of the employees who are or are eligible to be members: *MIM Holdings Ltd and AMEPKU* (2000) 164 QGIG 318.

The QNU was not offered an opportunity to be a party to the Agreement. The uncontested evidence and submissions indicate that this is not surprising, given that negotiations are currently underway between the QNU and Lutheran Community Care for an agreement to cover nurses and assistants in nursing, in accordance with practice followed in previous bargaining rounds. The parties to the Agreement subject of these proceedings, contend that the QNU does not and will not have any members who will be bound by the Agreement. The QNU has put no evidence or any material before the Commission of membership among employees who will be covered by the Agreement, despite having ample opportunity to do so. In my view, it was incumbent upon the QNU as an organisation seeking a right to be heard, and to oppose the certification of an agreement, to produce the evidence and material necessary to substantiate its submissions as to why the agreement should not be certified.

Section (156)(1)(j) does not apply if the Commission is satisfied as to either of the matters in s. 156(2). On the basis of the submissions and evidence that is before me, I am satisfied that pursuant to s. 156(2)(b), the QNU has no members who are to be bound by the Agreement, and accordingly s. 156(1)(j) does not apply in the circumstances of this case. Further, I am of the view that for the QNU to succeed with an argument under s. 156(1)(j), that s. 156(2)(b) requires that there must be members who are to be bound by the agreement, not simply employees who may be within the coverage of the QNU during the life of the Agreement, because of the work that they may perform.

Accordingly, I am now satisfied that the *Lutheran Church of Australia Queensland District Support Workers – Certified Agreement 2001* meets the requirements of the Act necessary for certification, and I certify the Agreement in terms of the application in CA137 of 2002, as amended, with effect from Friday 12 July 2002. I order accordingly.

I.C. ASBURY, Commissioner.

Appearances:
Mr A. Herbert, Counsel, directly instructed, with him Mr P. Lucas, of Miles Witt Partnership and Mr M. Eckermann on behalf of the Lutheran Community Care.
Mr C. Simpson, of The Australian Workers' Union of Employees, Queensland.
Mr R. Reed, Counsel, directly instructed, with him Mr J. Martin of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.
Mr M. Healy of the Queensland Nurses' Union of Employees.

Released: 12 July 2002

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Transport Workers' Union of Australia, Union of Employees (Queensland Branch) AND Trenchless Contracting Pty Ltd (Nos. W203 and W204 of 2001)

COMMISSIONER THOMPSON 16 July 2002

Unpaid wages – Award coverage – *Civil Construction, Operations and Maintenance Award – State* – Arbitrated matter – Witness evidence – Allowances – Both former employees subject to underpayment of wages – Applications granted in part.

DECISION

Background

Applications were filed under s. 278 of the *Industrial Relations Act 1999* by the Transport Workers' Union of Australia, Union of Employees (Queensland Branch) (TWU) seeking to recover unpaid wages, allegedly owing, on behalf of Mr Robert Squires, in the sum of $7,567.05 (W203/01) and Mr Stephen Grieve, in the sum of $20,000 (W204/01) by Trenchless Contracting Pty Ltd (respondent).

It was agreed, by the parties, that in the interests of expediency and efficiency, both matters be heard conjointly.

Applicant

Mr David Prior, of the TWU, in opening submissions for the applicant, stated that the claims relied upon the application of the *Civil Construction, Operations and Maintenance Award – State* (Award) supported with the attached schedules and payslips provided to Messers Grieve and Squires.

The payslips would identify a meterage allowance paid to each of the former employees but, as such, this payment could not be traded off against the amounts claimed.

The evidence provided to the Commission would identify clearly the twenty-eight (28) day cycle of employment along with the failure to pay entitlements in relation to allowances and applicable overtime rates.

Evidence for the applicant in this matter was restricted to that of Mr Grieve and Mr Squires.

Mr Grieve

Mr Grieve commenced employment with the respondent on 21 January 1999 and continued until his resignation on 26 June 2000 with his duties being that of truck driving and directional drilling.

A flat rate of $14 per hour was paid throughout the course of his employment, and encompassed all allowances and overtime payments.

His evidence was that, whilst he was never advised by the respondent of the various terms and conditions of the applicable award, it was his understanding that the classification covering the work to be performed was Construction Maintenance and General Worker Level 3 – (CW3) in clause 3 – "Classifications" of the Award.

Notwithstanding, he held the belief that his duties would be more accurately described by the Award as Construction Maintenance and General Worker Level 4 – (CW4), his claim for unpaid wages had been based upon the classification of CW4 in the circumstances.

All work performed had been under the direction of a head driller in a team concept, with significant amounts of overtime being worked for which he received no payment for meal allowances, crib breaks or penalty rates, pursuant to the Award.

In terms of his work cycle, he understood that his employment was regulated by a twenty-eight (28) day cycle.

The claim had been formulated on the failure of the respondent to provide the proper payments in accordance with the Award.

Supportive of his claim, at paragraphs 29 through to 35 (inclusive) of his affidavit, Mr Grieve provided detail of a twenty-eight (28) day cycle and of the monies he believed was owing to him as a result of the underpayment by the respondent:

"29. As an example of my claim I refer to Page 5 of Schedule 1 of my Statement of Claim and refer to 28 day cycle commencing week ending 19 October 1999.

30. I worked 291.1 hours over that 28 day cycle as follows:

w/e 19.10.1999	43.1 hours
w/e 26.10.1999	83.5 hours
w/e 2.11.1999	82 hours
w/e 9.11.1999	82.5 hours
Total	291.1 hours

31. I was paid $4081.00 over that 28 day cycle as follows:

w/e 19.10.1999	$609.00
w/e 26.10.1999	$1169.00
w/e 2.11.1999	$1148.00
w/e 9.11.1999	$1155.00
Total	$4081.00

32. I worked overtime that 28 day cycle as follows:

Overtime

w/e 19.10.1999	12.7 hrs =	9 hrs @ 1.5 and	3.7 hrs @ d/t
w/e 26.10.1999	45.4 hrs =	18 hrs @ 1.5 and	27.5 hrs @ d/t
w/e 2.11.1999	44 hrs =	17.4 hrs @ 1.5 and	26.6 hrs @ d/t
w/e 9.11.1999	44.5 hrs =	17.9 hrs @ 1.5 and	26.6 hrs @ d/t
Total	146.7 hrs	62.3 hrs @ 1.5	84.4 hrs @ d/t

33. I accrued meal allowances over that 28 day cycle as follows:

Meal allowances

w/e 19.10.1999	5 meals @ $7.50 =	$37.50
w/e 26.10.1999	12 meals @ $7.50 =	$90.00
w/e 2.11.1999	10 meals @ $7.50 =	$75.00
w/e 9.11.1999	9 meals @ $7.50 =	$67.50
Total	36 meals	$270.00

34. I accrued entitlement to crib breaks over that 28 day cycle as follows:

Entitlement to crib breaks

w/e 19.10.1999	5 crib breaks @ $6.27 =	$31.35
w/e 26.10.1999	12 crib breaks @ $6.27 =	$75.24
w/e 2.11.1999	10 crib breaks @ $6.27 =	$62.70
w/e 9.11.1999	9 crib breaks @ $6.27 =	$56.43
Total	36 crib breaks	$225.72

35. I state that the amount claimed represents the difference between payment received and the amount due according to the Award for the 28 day cycle as follows:

	Paid	Owed	Amount claimed
w/e 19.10.1999	$609.00	$822.92	$213.92
w/e 26.10.1999	$1169.00	$1701.55	$532.55
w/e 2.11.1999	$1148.00	$1639.45	$491.45
w/e 9.11.1999	$1155.00	$1635.28	$480.28
Total	$4081.00	$5799.20	$1718.20".

In his affidavit in reply, Mr Grieve dealt with a number of issues including:

- Denial that advice was given that his weekly payment would be inclusive of all his entitlements.
- Mr Colin Biggs was unaware (directly) of information relating to terms and conditions of employment that was given on commencement of his employment.
- Never described as a "driller's offsider".
- Disputed work performed as being covered by CW3.
- Payslips do not demonstrate any arrangement whereby hours were banked or accrued for any purpose.
- Payslips confirm all hours worked were paid at ordinary time.
- No recall of any agreement on overtime payments for ten (10) hour days.
- Weekly meterage payment cannot be substituted for non-payment of overtime.
- Reliance upon a "typical" twenty-eight (28) day cycle as demonstrated in his first affidavit.

Mr Grieve was subject to extensive cross-examination on a range of issues, including:

- Previous employment
- Awareness of overtime entitlement
- Award classification levels – CW3, CW4
- Certified Agreement (CA) negotiations
- CA – bonus rate provision
- Work tasks – performed
- Team structures
- Meal allowance
- Payment of daily allowance ($35) for meals whilst working away from home
- Hours of work – including work cycle

There were a number of questions raised in respect of meterage rates paid to Mr Grieve, and at page 63, line 30, of transcript:

"Rodgers: Yes. So you agree that once you commenced full-time employment you were being paid a meterage rate?

Grieve: Yeah, on permanent wage, yes.

Rodgers: On a permanent basis. Okay. Was there any mention of that meterage rate made to you? When did you find out about the meterage rate because you've given me evidence now that Victor Kien made no mention of a meterage rate. Do I understand you correct or have I misunderstood?

Grieve: No, $14 an hour. I didn't know there was no meterage rate or anything until I was there a couple of weeks and they – someone discussed meterage, you're going to get meterage but you don't get it until you become permanent.

Rodgers: Okay. And then - - ?

Grieve: And I said, 'Well, how does that work?'

Rodgers: Yes. And what did they tell you?

Grieve: Well, they said, 'You do so many metres when you're permanent and you cover 220 or whatever the example was for the week and you keep a record of that and put – and give it to the head driller and he puts in with your wages of whatever hourly rate and the meterage that you covered over that period of time'.".

Further, at page 81, line 52 of transcript, Mr Grieves was questioned on the failure to include payment for meterage in the calculations before the Commission:

"Rodgers: Yeah but you say at clause 31, 'I was paid 481 over that 28 day cycle.' You were actually paid more than that. You were paid meterage on top of that. Why have you left meterage out of your calculations?

Grieve: Because it's not the meterage I'm claiming for.

Rodgers: Yeah but how can you just ignore it?

Grieve: Because it's a bonus, it's an incentive.

Rodgers: But you've already said it's not an incentive, you've already agreed with me that it's not an incentive. It's not linked to a target. It's not something which is paid to you as a gratuity as a Christmas bonus. It's paid for the hard yakka directly related to what you did?

Grieve: Yeah.

Rodgers: Metres in the ground equals dollars in your pocket?

Grieve: That's right. If you put it in.

Rodgers: So you put it in, you got rewarded for it, and you got paid. So why exclude it?

Grieve: Not correctly.

Rodgers: But why exclude it altogether?

Grieve: Because some weeks you didn't have it and some weeks you did.

Rodgers: Yeah but in the example that we're talking about you got it every week?

Grieve: No, hang on a minute. Hang on a minute. We went to Coffs Harbour and you missed out for six weeks, that's not getting it every week is it?".

Mr Squires

Mr Squires was employed in a casual capacity by the respondent on 2 February 1999, later taking a permanent position on 2 March 1999.

His duties were that of truck driving and directional drilling, for which he was paid at a flat rate of $14 per hour, with no additional payment being made for allowances and overtime rates, as prescribed in the Award.

It was his evidence that the appropriate classification for the duties he performed was that of CW3 in the Award and that his claim for underpayment was based upon that rate.

Whilst he was in the employ of the respondent, he received no payments for meal allowances, crib time or prescribed overtime rates as set out in the Award.

At paragraphs 29 through 35 (inclusive) of Mr Squires' affidavit, a calculation based on a four (4) week period was set out identifying areas of underpayment:

"29. I worked 249 hours over that 4 (four) week period as follows:

w/e 22.6.1999	75.5 hours
w/e 29.6.1999	49 hours
w/e 7.7.1999	64.5 hours
w/e 13.7.1999	60 hours
Total	249 hours

[30.]

31. I was paid $3237.00 over that 4 (four) week period as follows:

w/e 22.6.1999	$981.00
w/e 29.6.1999	$637.00
w/e 7.7.1999	$838.00
w/e 13.7.1999	$780.00
Total	$3237.00

32. I worked overtime over that 4 (four) week period as follows:

Overtime

w/e 22.6.1999	37.5 hrs	=	16.9 @ 1.5	and	20.6 hrs	@ d/t
w/e 29.6.1999	11 hrs	=	10.6 @ 1.5	and	.4 hrs	@ d/t
w/e 7.7.1999	34.1 hrs	=	14.9 @ 1.5	and	19.2 hrs	@ d/t
w/e 13.7.1999	22 hrs	=	16.9 @ 1.5	and	5.1 hrs	@ d/t
Total	146.7 hrs		59.3 hrs @ 1.5		45.3 hrs	@ d/t

33. I accrued meal allowances over that 4 (four) week period as follows:

Meal allowances

w/e 22.6.1999	7 meal allowances @ $7.50 =	$52.50
w/e 29.6.1999	3 meal allowances @ $7.50 =	$22.50
w/e 7.7.1999	6 meal allowances @ $7.50 =	$45.00
w/e 13.7.1999	4 meal allowances @ $7.50 =	$30.00
Total	20 meal allowances	$150.00

34. I accrued entitlement to crib breaks over that 4 (four) week period as follows:

Entitlement to crib breaks

w/e 22.6.1999	7 crib breaks @ $6.04 =	$42.28
w/e 29.6.1999	3 crib breaks @ $6.04 =	$18.12
w/e 7.7.1999	6 crib breaks @ $6.04 =	$36.24
w/e 13.7.1999	4 crib breaks @ $6.04 =	$24.16
Total	20 crib breaks	$120.80

35. I state that the amount claimed represents the difference between payment received and the amount due according to the Award for the 4 (four) week period as follows:

	Paid	Owed	Amount claimed
w/e 22.6.1999	$981.00	$1357.35	$375.85
w/e 29.6.1999	$637.00	$701.19	$64.19
w/e 7.7.1999	$838.00	$1273.77	$435.27
w/e 13.7.1999	$780.00	$942.37	$162.37
Total	$3237.00	$4274.68	$1037.68".

Respondent

The respondent relied upon evidence given by Ms Nadia Taylor and Mr Biggs.

Ms Taylor, an Industrial Relations Consultant with Livingstones Australia since March 1998, had provided advice on industrial relations issues to Trenchless Contracting Pty Ltd since around June 1999.

Apart from assisting with the development and implementation of their certified agreement, Ms Taylor had undertaken an industrial audit, of which information gained had been used for preparing wage calculations in this matter.

In evidence, she stated that for both Mr Grieve and Mr Squires, the calculations were founded on the CW3 rate contained within the Award.

The respondent provided pay slips in addition to time and wages records to assist with that task, however, for both Mr Grieve and Mr Squires, there were a number of weeks where records were not available and, as such, those weeks were excluded from the calculations.

Her evidence went to specific detail as to the method of calculation, taking into account hours, overtime, allowances, sick leave, annual leave and public holidays.

On the work cycle applicable to Mr Grieve at paragraph 13 of her affidavit Ms Taylor provided the basis upon how it operated in practice:

> "After the week ending 16 March 1999, Mr Grieve commenced working on a roster arrangement of four (4) week cycles. Accordingly, from that date, the ordinary hours of work for Mr Grieve have been calculated on the basis of 152 hours over a period of four weeks worked Monday to Friday. Mr Grieve is allocated payment for 38 ordinary hours for every completed week of work and two hours per week have been accrued towards a rostered day off ('the accrued hours'). Where insufficient time is worked in a particular week to be able to accrue time, four hours have been accrued in another week within that cycle.".

On the calculation of overtime, Ms Taylor's affidavit at paragraphs 14 and 15 spelt out the reasoning behind reaching a conclusion on that issue:

"14. All hours worked in excess of 10 per day have been deemed to be overtime ('the daily overtime'). This overtime is calculated at the rate of time and a half for the first three hours and double time thereafter.

15. The daily overtime and the weekend overtime have been added and entered as the Weekly OT subtotal. This amount is deducted from the total hours worked in the week and entered as the Weekly subtotal.".

In the calculations prepared for this matter, the monies paid to Mr Grieve and Mr Squires for meterage were included in the "all up" total amounts, with Ms Taylor giving evidence that each of the former employees had been paid an amount in excess of what they were entitled to earn under the Award.

Tendered with Ms Taylor's affidavits were two attachments (A and B) which comprehensively set out her calculations in respect of both Mr Grieves and Mr Squires' earnings whilst employed by the respondent.

In the evidence-in-chief on the matter of overtime, at page 200, line 40, of transcript, the following exchange occurred:

"Rodgers: The – can you explain, by reference to paragraph 21, where less than five days have been worked Monday to Friday, how you've worked out the overtime?

Taylor: Okay. Where less than five days have been worked I've averaged the overtime over the week. Sorry, I haven't averaged the overtime over the week. I've paid him overtime for any hours worked in excess of 10 hours per day.

Rodgers: If I can refer you to the calculation on the 7th of the 7th - - ?

Taylor: Mmm.

Rodgers: - - or the week ending the 7th of the 7th '99 - - ?

Taylor: Yeah.

Rodgers: - - which is 25 of 12 for Mr Squires - - ?

Taylor: Yes.

Rodgers: - - there is a week where, as opposed to 7.6 hours, you've paid overtime after 10 hours?

Taylor: That's right.

Rodgers: Can you explain, first of all, why you have utilised the 10 hour overtime facility?

Taylor: The Award allows employees to work up to 10 ordinary hours per day by agreement and on that basis we've calculated it – used that ability to work longer shifts and a shorter week and calculated in excess of 10 for that reason.

Rodgers: And this calculation is more favourable to the employer?

Taylor: That's right.

Commissioner: And when you say by agreement, did you have some evidence that there was an agreement that he would do – that he'd – that he'd agreed to that?

Taylor: Not personally but I guess from the pattern of them, the way they worked, it would be implicit that they must have agreed to work that many hours. Also my understand - -

Commissioner: Well, there's - -?

Taylor: Yeah.

Commissioner: - - a difference between working them and agreeing to working them, would you agree to that?

Taylor: I would agree with that.

Commissioner: He may well have been instructed to – to work those hours?

Taylor: It was also my understanding - -

Commissioner: So I'm just trying to ask you - - ?

Taylor: Yeah.

Commissioner: - - if you've – someone had mentioned that to you or if somebody had had some discussions?

Taylor: Certainly my instructions from the client were that the – the employees understood that, that they would be paid the – the same rate for all hours worked. Yeah.

Commissioner: Well, they certainly were paid that.".

Ms Taylor was cross-examined on a range of issues including:

- Time sheets

- Calculation of earnings (attachments A and B)
- Meal allowance
- Conducting industrial audit
- Meterage (page 215, line 26, of transcript):

"Prior: So despite having conducted an audit is there – is there any evidence that you have that the bonus or the meterage bonus in any way was an offset for overtime payments to employees?

Taylor: Yes, my understanding is the whole time that it was an offset for the – for the other entitlements under the Award that – that in exchange for – for those entitlements under the Award that – that in exchange for – for those entitlements under the Award that they were paid at a higher base rate and had the ability to earn meterage in compensation for that and they earned a lot – they appeared when we did the audit to be earning a lot more than they would have under the Award. . .

Commissioner: Do you know if there was any – or did you – in that audit did you have cause to ask about the offset arrangement that had been reached between the employer and the employees in terms of a meterage allowance to take the place of overtime and all other payments? Did your audit provide you with – did you see anything to that effect?

Taylor: Only to the extent that we examined again the times and wages records and held lengthy discussions with various managerial staff and it was just clear to us that that was the clear arrangement between them and the employees.

Commissioner: Well, it was happening but I wasn't sure whether - - ?

Taylor: I didn't have any direct communication with the employees as such.

Commissioner: So you've based it just on information that the employers gave you during the course of the audit?

Taylor: That's right. . .

Prior: Indeed, indeed. Would you agree that a general principle exists that over Award payments such as bonuses cannot be offset against Award entitlements unless the over Award or bonus is paid and attributable for the specific Award entitlement sought? Perhaps in simpler terms would you agree that there's a principle that you can't acquire that unless it's being applied for a specific entitlement under the Award?

Taylor: No, I don't believe the principle's that clear in Queensland.

Prior: So in context of what is before us what the respondent is alleging is that it is appropriate to offset the meterage against the payment of overtime; that is correct?

Taylor: That's correct.".

- Payment of flat hourly rate
- Certified agreement.

In re-examination on the meterage payment, the following exchange occurred at page 220, line 28, of transcript:

"Rodgers: And the two components of their payment system were - -?

Taylor: Were flat hourly rate which was higher than the ordinary rate in the award, plus the meterage. And they basically got those two amounts for every hour they worked.

Rodgers: So what was the relationship then between – in your mind, when you did the audit, between the meterage and the work that they performed?

Taylor: That it was directly related but it was in direct compensation for the longer hours they worked.

Rodgers: And when you did – you mentioned that you did some calculations. When you did those calculations did you include that meterage in your calculations?

Taylor: Yes.

Rodgers: And can I ask you why you included the meterage? Mr Prior has put it to you that perhaps you should have excluded it?

Taylor: Because I believed that – I've reviewed a lot of case law in this area and I believe that it was in direct exchange for the overtime payments that they would have got under the award, that that was the system that they used; it was in lieu of the system under the award and on that basis that is should be offset against any entitlements under the award. And also when we did the certified agreement the bonus was used to offset entitlements under the award for the no disadvantage test.".

The second witness for the respondent, Mr Biggs, was formally the General Manager of Trenchless Contracting Pty Ltd, commencing employment on 1 July 1999.

In the capacity as General Manager, his duties included tasks relating to wages, conditions of employment, rostering, allowances and classification of employees.

His evidence related to the duties of each of the former employees and went, in particular, to the work performed by Mr Grieve, which he believed ". . . would be most accurately described by Construction Worker Level 3 (CW3)".

The same classification was also applicable to the work performed by Mr Squires.

In terms of work location, his evidence was that Mr Grieve was predominantly engaged on “away work” with Mr Squires on “local work”.

In paragraphs 26 and 27 of his affidavit of evidence, he dealt with the issue of meal allowance and meal breaks:

“26. Up until approximately 15 December 1999 the Offsiders were supplied with an evening meal for each day he was engaged on away work paid for by the Head Driller using a credit card in the name of the Respondent. After 15 December 1999 the Respondent replaced the practice of providing an evening meal with a meal allowance of $35.00 per day for away work.

27. Meal breaks for the Offsiders were to be taken at each Offsider’s discretion. I am aware that from 1 July 1999 all employees were explicitly instructed to ensure that meal breaks were taken. I believe that at any time an employee did not have a meal break, it was at the employee’s election, in order that the job could be completed more quickly or to ensure continuity of the job.”.

In cross-examination, questions arose in respect of the following issues:

- Appointment of Mr Grieves and Mr Squires (page 231, line 35, of transcript):

  “Prior: Do you know what they were told upon engagement?

  Biggs: I’m quite sure that would have been very, very clear which – all the employees at that time had a clear understanding of what their terms of appointment were.

  Prior: And what is that knowledge based on?

  Biggs: It’s based on verbal advice that the point – at the point of appointment which advised each employee what his – what his obligations were by the company.

  Prior: Okay, so to have that knowledge you’re relying on information provided to you by – by somebody else in the work place. Like, I Fred went to a meeting and people stated today and this is what I told them?

  Biggs: That’s correct.

  Prior: So, effectively, sorry, I’ll remove that word. So, to your knowledge then you were not present in any of these inductions?

  Biggs: No, I wasn’t.”.

- Meterage

- Roster system

- Pay slips

- Meal breaks and allowances.

<u>Final Submissions</u>

Applicant

Mr Prior provided, to the Commission, extensive written submissions (101 paragraphs in all) which covered issues under the following headings:

- Application for recovery of wages
- Commencement of employment
- Work classification – Steven Grieve
- Work classification – Robert Squires
- Wage rates
- Underpayment of wages – Steven Grieve
- Meterage payment
- Underpayment of wages – Robert Squires
- Meterage payment
- Statement of Nadia Taylor
- Statement of Colin Biggs
- Application for recovery of unpaid wages
- Offset of payments against Award entitlements
- Outcome sought

In relying upon previous authorities to support their argument, the applicant submitted, at paragraphs 94 to 98 (inclusive) of the outline of submissions:

“94. The Union maintains there is general principle that overaward payments such as bonuses, cannot be offset against award entitlements, unless the overaward or bonus is paid and attributable for the specific award entitlement sought to be offset.

95. Trenchless have not established any link between payment for metreage and non-payment for overtime worked and or payment for allowances accrued against hours worked during the course of employment.

96. This principle was discussed in *Poletti v Ecob* (No. 2) 31 IR at 321. At p. 329 the employer claimed to be entitled to aggregate all of the amounts due under the award and set against the total all of the amounts actually paid. 'The result, however, is that the appellant must forego having the excess set off against any other claim, particularly overtime'.

97. Other cases such as *Pacific Publications Pty Ltd v Canton* (1983) 4 IR 415 which dealt with payment of a 'specific gratuity' refer to *Ray v Radano* where the principle was discussed in the dissenting judgement of Sheldon J. in *Ray v Radano* (1967) AR (NSW) 471 at 478-479 'he is entitled under s. 92 to claim any balance due to him between his award entitlement for his work and any payment made to him by the employer which is properly attributable to that award entitlement. . . So in essence, my view is that because s. 92 restricts what can be claimed to be an award obligation, set-offs must also be restricted to payments which are referable, expressly or by implication, to the award obligation. . . If a complainant cannot enhance his claim under s. 92 neither can a respondent use private contract to reduce it'.

98. More recently the principle was applied in *Department of Industrial Relations AND Tic Tock Australia Pty Ltd* QGIG 167, No. 9 at page 203. 'The only way in which any amount can be argued to be offset, is where it is paid for exactly the same purpose as the applicant claims'.".

Mr Prior, in reply to the submissions of the respondent, provided to the Commission a further submission that went to a multitude of issues.

In respect of the respondent's comments regarding the leading of evidence during examination-in-chief by Mr Prior, at paragraphs 4, 5, and 6 of his reply document stated:

"4. The Respondent's representative raised an objection about the Applicant's representative leading Stephen Grieve during evidence in chief. The Commission acknowledged the objection and extended similar latitude to the Respondent in the circumstances.

5. The Applicant's representative acknowledged the objection and indicated that prior to the objection evidence in chief included comparison of up to four documents at a time – payslips; timesheets; Statement of Claim and Schedules filed in response and accordingly some considerable patience was required to present and cross reference documents to direct questions to the witness.

6. All questions asked and answers provided prior to the objection remain admissible and at no time were questions asked that either suggested a particular answer to a question asked or assume the existence of facts in dispute of which the witness has not given evidence before the question was asked *(p. 35 Advocacy in Practice. Glissan and Tilmouth Butterworths 1998).*".

Respondent

The final submissions from Mr Rodgers, on behalf of the respondent, covered a number of issues, including:

- Onus of proof
- Payment for meal breaks
- Overtime meal allowance
- Overtime claims
- Offsetting of over award payments
- Definition of wages
- Conclusion

In addressing the onus of proof, Mr Rodgers was critical in terms of Mr Prior's "leading" of both his witnesses and, at point one of his submission, in questioning the credibility and reliability of both Mr Grieve and Mr Squires as witnesses, stated:

"The Applicant's representative was clearly leading the witnesses of the Applicant in the extreme. The Applicant's witnesses clearly did not understand the statements to which they had signed and sworn.".

Mr Rodgers also raised issue with the methodology used by the Union in carrying out the calculations on behalf of Mr Grieve and Mr Squires in support of their claims against the respondent.

The submission relied upon previous case law in respect of all of the contentious issues and, in particular, as to the matters of overtime meal allowances and overtime.

Overtime Meal Allowance

"This intention is reflected in the discussion regarding such clauses by a Full Bench of the Australian Industrial Relations Commission in the Award Simplification of the Transport Workers (Australian Government Wages Staff) Award 1987 [Print G6798]. In discussing this the Full Bench cites the following from a Decision of Conciliation Commissioner Blackburn *Re: The Transport Workers (Oil Stores) Award 1949* as follows:

'*The amount to be allowed to employees who are required to work overtime and therefore miss a meal appears to me to have become of recent years an artificial measure in some industrial Awards. The original concept appears to have been based upon the circumstances of an employee without adequate notice being required to stay late at his work owing to the exigencies of his employment and thus discommoding his household arrangements and suddenly finding himself without any provision for a meal and with the waste of the meal prepared for him elsewhere. In most Awards the provision was originally and still is that if the employee did not have at least 24 hours notice of the fact that he would be required, through working overtime, to miss a meal, he should be paid an amount to enable him to buy the meal. From this initial concept of a meal allowance, there appears to be a growing idea that every employee, whose work detains him beyond his usual "knock off" time, must be paid a meal allowance. I will not be a party to such an arrangement; "meal allowance" should not be allowed to become merely an increase in wages'* ".

Overtime

"Macken J in *White v Mrs Murphy's Country Fried Chicken* (1984) AR 794 made the following finding in relation to this issue:

'*No employee is entitled to the payment of overtime or penalty rates unless such overtime is authorised by an employer and self-authorisation of overtime by employees trusted to work alone or in responsible managerial positions has never been recognised by tribunals. Overtime under such circumstances is allowed only where it is expressly or impliedly authorised and it may be authorised by implication where the circumstances permit of no alternative.'* ".

In conclusion, Mr Rodgers, at point 7 of his submission, stated:

> "The Applicant's case is based upon misunderstandings and misapprehensions. The onus of proof has not been discharged because the witnesses (except where their evidence was obtained through the most blatant leading) clearly were not able to provide a consistent account of what had occurred. The connection between the payments made, the work done and the Award requirements have been established sufficiently to satisfy the Commission that the Applicant's case cannot succeed. What the Applicant seeks is to recover double (or more) payments for breaches which aren't breaches, for overtime which wasn't authorised and for underpayment where payment has, in fact, been made. The Applicant's case rests almost entirely on the supposed inability to offset yet, in doing so, overlooks the evidence that the employees had full knowledge of the method of calculation which, inevitably, had to take into account any authorised overtime which was worked.".

Conclusion

In the determination of what has been a most complex matter, I have found it necessary to address the following areas separately in arriving at an outcome:

- Classification structure
- Hours of work
- Meal allowance
- Crib break
- Overtime
- All-up hourly rate – meterage
- Leading of evidence

Classification structure

The argument between the parties in respect of classification levels related only to the employment of Mr Grieve who was paid as a CW3 for the term of his employment, but for the purposes of this application sought payment as a CW4.

The difference between the two levels, on the basis of relativities, are that a CW3 receives 92.4% of the Tradesmen's rate of pay, whereas the CW4 rate is at 96% of that of a Tradesman.

There was not an opportunity for the Commission to inspect the actual work performed by Mr Grieve and, therefore, I have relied simply upon the reading of each classifications as they are documented in the award in addition to the evidence and submissions before the Commission.

It is my view that the CW3 classification that appears in the award is an accurate description on the evidence as to the tasks performed by Mr Grieve and do no accept that level CW4, in the circumstances, is applicable:

CW3

- "Employees not otherwise classified
- Other Kitchen Employees (Construction Projects)
- Driller (i/c or shift on Water Wells) over 300m
- Head Driller (Water Wells) Up to 300m/Diamond Drill – Runners Assistant
- Driller (i/c shift Sub-art Bores) 300m to 600m
- Land Reclamation etc Wall Builder (Panel 1.8m)
- Surveyors' Chainman Grade II
- Driller (i/c shift Sub-art Bores) over 600m
- Surveyors Labourers
- Cook's Offsider (Construction Projects)
- Driller (i/c of shift on Water Wells) up to 300m
- Driller (i/c shift Sub-are Bores) Up to 300m
- Head Driller (Water Wells) over 300m
- Head Driller (i/c shift Sub-art Bores) Up to 300m
- Land Reclamation etc Concrete Worker
- Surveyors' Cooks
- Head Driller (Sub-art Bores) over 600m
- Head Driller (i/c Sub-art Bores) 300 to 600m
- Mobile Concrete Pump Line Hand.".

Hours of Work

The award provision for the hours of work is by any standard flexible in that it allows implementation of the thirty-eight (38) hour week on the basis of what most suits a particular business.

There is inherent, however, an obligation upon the employer to consult and give reasonable consideration to the views of the employees in establishing what arrangement is put in place.

At clause 4.1(5) "Implementation", of the award, the requirements for implementation are set out:

"(5)*Implementation –*

(a) The 38 hour week shall be implemented on one of the following bases, most suitable to the particular business, after consultation with, and

giving reasonable consideration to the wishes of the employees concerned:

(i) by employees working less than eight ordinary hours each day; or

(ii) by employees working less than eight ordinary hours on one or more days each work cycle; or

(iii) by fixing one or more work days on which all employees will be off during a particular work cycle; or

(iv) by rostering employees off on various days of the week during a particular work cycle, so that each employee has one work day off during that cycle.

(b) Subject to the provisions of this clause, employees may agree that the ordinary hours of work are to exceed eight on any day, thus enabling more than one work day to be taken off during a particular work cycle.

(c) Notwithstanding any other provision in this clause, where the arrangement of ordinary hours of work provides for a rostered day off, the employer and the majority of employees concerned, may agree to accrue up to a maximum of five rostered days off. Where such agreement has been reached, the accrued rostered days off shall be taken within twelve calendar months of the date on which the first rostered day off was accrued. Consent to accrue rostered days off shall not be unreasonably withheld by either party.

(d) Different methods of implementation of the 38 hour week may apply to individual employees, groups or sections of employees in the business concerned.".

In respect of the number of ordinary hours that may be worked on any day, there is a requirement for hours in excess of eight (8) and not more than ten (10) to be subject to the agreement of the employer and a majority of employees concerned.

The applicant submitted that there was some evidence, particularly as it related to Mr Grieve, that a four (4) week cycle existed based on twenty-eight (28) days continuous work, followed by three (3) unpaid leave days taken each fourth Saturday, with eight (8) hours ordinary time paid on the fourth day.

The applicant further submitted that there was an absence of evidence to suggest that such an arrangement had the support of the majority of employees, and that the timesheets tendered in evidence provided inconsistencies with respect to when rostered days off were taken.

In evidence for the respondent, Ms Taylor was quite clear that for Mr Grieve, a 152 hour cycle was in operation.

There was certainly no evidence before the Commission, from the respondent, that there existed any arrangement or discussions between the parties around the hours of work and I am inclined to take the view that neither Mr Grieve or Mr Squires were ever consulted in respect of what arrangement would exist on their hours of work.

The position adopted by the respondent on the hours of work was to take, in retrospect, the most favourable of the arrangements, however that, in my opinion, does reflect accurately what occurred during the employment.

The applicant has satisfied the Commission that there was not an agreement in place to allow for the ordinary hours between eight (8) and ten (10) to be considered as ordinary time.

Meal Allowance – Meal breaks

The issue surrounding the non-payment of meal allowance breaks to Mr Grieve and Mr Squires was, in essence, around two separate issues and not exactly the same for each of the applicants.

In dealing with Mr Grieve, firstly he claimed that he was not allowed, on a regular basis, to take meal breaks, and was required to work through, often consuming food as he worked.

The award, at clause 4.3(1) states:

"(1) *Day Work* – All employees shall be entitled to a meal break of not less than one-half hour to be taken between the fourth and sixth hours from their ordinary starting time each day.

Except as hereinafter provided double time shall be paid for all work done during meal breaks and thereafter until a meal break is taken.

Employees performing ordinary work in excess of eight hours and up to ten hours per day shall be entitled to a meal break of not less than one-half hour and not more than one hour to be taken at or about the fifth hour from the ordinary starting time each day.

The duration of a meal break having been determined as the recognised meal break in accordance with this subclause may be altered by either the mutual agreement between the employer and the employees or by the employer in the case of a situation requiring continuity of the work on the project or program:

Provided that between the fourth and sixth hours from starting time:–

(a) the time of taking a scheduled meal break or rest pause by one or more employees may be altered by an employer if it is necessary to do so in order to meet a requirement for continuity of operations;

(b) an employer may stagger the time of taking a meal break and rest pause to meet operational requirements.

(2) *Shift Work* – Shift workers shall be allowed thirty minutes for crib without loss of pay to be taken in such a manner as not to interfere with the continuity of the work.".

I am inclined to accept the argument put forward by the respondent that the "team", for their own expediency, agreed at the worksite from time to time, to forgo the meal break, and I accept that Mr Biggs took appropriate steps in issuing instructions that meal breaks be taken in accordance with the Award provision, when he became aware of the "team's" actions.

The claim by Mr Grieve, in respect of this item, is denied.

On the payment of a meal allowance whilst working overtime, the Award, at clause 3.5(2) states:

> "(2) *Meal Allowance* – An employee, other than an employee living in camp, who is required to continue work after the usual ceasing time shall be supplied with a reasonable meal at the employer's expense or be paid $7.50 in lieu thereof, after more than 2 hours or after more than one hour if overtime continues beyond 6.00p.m. and subsequently at all paid breaks referred to in clause 4.3(3).".

For the great majority of his employment, Mr Grieve was on "work away from home" where, at the end of the day, he was provided with a meal or, at a later stage, a monetary allowance for such a meal.

It is not unreasonable for the Commission to accept that the arrangement for Mr Grieve was of a sufficient nature so as the respondent met their obligations under the Award.

The claim for the payment for meal allowance is denied.

Mr Squires' position was different, in respect, that his employment allowed him to return home at the completion of each days work.

On the issue of a meal break, the evidence before the Commission was, by and large, the same as it was for Mr Grieve, in that the "team", for expediency, at times forwent their break.

The instruction of Mr Biggs to take the meal breaks was as relevant to Mr Squires as it had been to Mr Grieve.

His claim for payment resulting from the meal break is denied.

On the issue of the payment of a meal allowance whilst working overtime, there is no evidence that Mr Squires ever received either a meal or a monetary amount.

His claim, in respect of the payment for meal allowance is accepted.

Crib break

The Award, at clause 4.3(3), clearly sets out the entitlement for crib breaks:

> "(3) *Overtime* – Any employees who are required to continue work after their normal or rostered ceasing time shall be entitled to a thirty minute crib break after two hours or after one hour if overtime continues beyond 6.00 p.m.
>
> After each further period of four hours the employee shall be allowed forty-five minutes for crib. No deduction in pay shall be made in respect of any such crib breaks.".

The evidence before the Commission was that both Mr Grieve and Mr Squires, upon working the relevant overtime, did not receive the thirty (30) minute break without loss of pay and, as such, their claims are collectively accepted as being areas of underpayment in line with the applications.

Overtime

The claims by Mr Grieve and Mr Squires, in respect of overtime, centres around what might be described as two (2) issues.

Firstly, was there appropriate authorisation for the overtime and, secondly, the non-payment of overtime rates for hours outside those of ordinary time, including weekend work.

Authorisation

Both employees were employed and paid as CW3 and worked directly under the control of the head driller in a team environment.

Neither were in a position to have any direct control over their duties or hours of work and it is clear to the Commission that all hours worked during the course of their employment were duly authorised by the respondent's "on-site" representative, that being the head driller.

Overtime rates

There is no ambiguity in clause 4.2(2) of the Award where the rates applicable for overtime are set out as below:

> "(2) Except as hereinafter provided all authorised work performed outside the normal starting and ceasing times as prescribed by roster established pursuant to clause 4.1, on any one day, shall be deemed to be overtime and shall be paid for at the rate of time and a-half for the first three (3) hours and double time thereafter:
>
> Provided that all authorised overtime performed on a Saturday or its equivalent shall be paid for at the rate of time and a-half for the first three (3) hours and double time thereafter with a minimum of three hours' payment at overtime rates:
>
> Provided further that all authorised overtime performed on a Sunday or its equivalent shall be paid for at the rate of double time with a minimum of three hours' pay at overtime rates.".

These are the rates that should have been paid to each employee as opposed to the flat hourly rates they received for the entirety of their employment.

All up hourly rate – meterage

In some respects, this issue was the key to the outcome of the application, particularly as it, in real terms, determined whether the employees had been underpaid or paid over and above their Award entitlements.

The respondent, in their calculations, relied upon the meterage amount paid to both Mr Grieve and Mr Squires as being part of a total package to compensate for all allowances that may be due, including that of overtime penalties.

The applicant argued that the respondent had paid a flat hourly rate for every hour worked and that the meterage was an incentive to encourage a high level of productivity and not substitute for Award entitlements or allowances.

The evidence before the Commission was that for both employees, they worked weeks where they received no meterage payment whatsoever, nor any payments for allowances or overtime hours in that period.

Each of the parties provided authorities supportive of their positions.

Having considered all of the evidence and the materials before the Commission, it is my firm view that the respondent entered into an employment arrangement with both Mr Grieve and Mr Squires to pay them a flat hourly rate which was designed to deliberately avoid the payment of overtime rates and other allowances.

The payment of meterage allowance was offered as a financial incentive to lift the productivity of each of the drilling teams.

In whether that payment (meterage) can be offset against overtime rates or other allowances in the Award, I have looked at the matter of *Poletti v Ecob* (No. 2) (1989) 31 IR 415 and, in particular, their reference to the principles discussed by Sheldon J in *Ray v Radano* (1967) AR (NSW) 471, and by the Industrial Commission in *Pacific Publications v Cantlon* (1983) 4 IR 415:

> "The principles discussed by Sheldon J in *Ray v Radano* and by the Industrial Commission in *Pacific Publications* do not appear to have been considered in terms in this Court. In *Lynch v Buckley Sawmills Pty Ltd* (1984) 9 IR 469; 3 FCR 503, the court considered whether amounts paid by an employer to employees in some pay periods, which were in excess of the amounts prescribed by the relevant award, could be treated as satisfying the obligations of the employer in respect of pay periods in which the amounts paid had been below those required by that award. At 474 (IR); 509 (FCR), Keely J said:
>
> > '. . . none of those payments which were in fact above the award rate were paid as amounts due under the award; they were paid as amounts due under an agreement which patently was not intended to fulfil the respondent's obligations to pay wages under the award. Mr Strahan (counsel for the respondent in that case) conceded – correctly in my opinion – that an employer who has paid, by agreement with an employee, an over-award payment cannot later use that over-award payment to offset a subsequent payment of an amount less than that prescribed by the award. In my opinion the present cases, where the payments were made pursuant to an agreement, are in the same position.' ".

I have accepted that the circumstances in this matter are not dissimilar to those mentioned in the above authority and it is my finding that it is not appropriate for the meterage payments to be considered as compensating for the overtime rates or other allowances.

Leading of Evidence

Mr Rodgers, on behalf of the respondent, in his final submission, raised issue with the leading of evidence, from the applicant, of witnesses (Mr Grieve and Mr Squires) and, as such, not only questioned the very substance of their evidence, but also, to some respects, the Commission's procedures.

In fairness to Mr Rodgers, he did raise the point in the proceedings, at page 54, line 35 of transcript:

"Rodgers: I must say I am allowing my friend a bit of latitude with regards to leading of witnesses.

Commissioner: So am I and you'll get the same - -

Rodgers: Because I understand that it is a technical area.

Commissioner: You'll get the same latitude when it comes particularly to Ms Taylor. I've sort of thought that through and just having had a look at all the material and just trying to work through even in the – of the figures having four lots in front of me, I mean I've – people have got more latitude than they'll get on any given day in the Commission but – I appreciate your comments on that, Mr Rodgers.

Rodgers: That's appreciated, thank you, Commissioner.

Prior: And, thank you, Commissioner, I mean it's noted in the circumstances again having four sets of things to look at at once certainly doesn't endear itself to a controlled process.".

The "leading" referred to by Mr Rodgers was, in particular, at a time where the witness (and the Commission) were with some difficulty dealing with questions that were being asked that involved up to four lots of papers, each containing figures relating to hours and payments.

In accessing the evidence, I have taken into account any advantage or disadvantage either party may have received as a result of the latitude given by the Commission.

Findings

I have found, on the evidence before the Commission, that, in the case of Mr Grieve and Mr Squires, they were both subjected to an underpayment of wages whilst in the employ of the respondent.

In determining the actual amount that, in effect, is owing to each of the former employees based on the information and evidence provided to the Commission during the proceedings is, to some extent, a "mine field".

The applicant provided a breakdown (on the Commission's request) of the claims during the hearing and, whilst identifying monetary amounts for meal allowances, crib break and overtime, the breakdown was not of a precise nature that would, with any certainty, allow the Commission to come up with an exact amount owing to each of the claimants.

It is on that basis that, where necessary I propose to adopt, in principle, the equitable approach of Bechly C in *Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees v Armstrong* (2000) 164 QGIG 248 and determine in all probability an amount of money that, in the circumstances, should be paid to each of the former employees.

Mr Grieve

The claim for Mr Grieve was, in the first instance, for an amount of $20,000 (the maximum amount available under the Act).

On the breakdown provided by Mr Prior during the hearing proper, it showed that the claim was for $19,114.61 based upon meal allowance ($3,690.00), crib break ($3,067.58) and overtime ($12,357.03).

As stated earlier, the meal allowance component shall not apply to Mr Grieve.

In respect of the crib break, I am awarding 50% of the amount claimed ($1,533.79).

Continuing to rely on the decision of Bechly C in approaching the issue of overtime, I believe it is reasonable that 70% ($8,649.92) of the amount sought be awarded.

In total, the underpayment for Mr Grieve is $10,183.71.

Mr Squires

The claim for Mr Squires was, at first, for an amount of $7,567.05.

On the breakdown provided by Mr Prior, it changed slightly to $7,548.37, based upon the meal allowance ($1,335.00), crib break ($1,092.32) and overtime ($5,121.05).

Mr Squires is to receive the full amount of $1,335.00 for meal allowance, as claimed.

In respect of the crib break, 50% of the amount claimed ($546.16) is to be paid.

In determining the quantum for overtime, 70% ($3,584.73) of the amount sought is to be awarded.

In total, the underpayment for Mr Squires is $5,465.89.

Accordingly, Trenchless Contracting Pty Ltd is ordered to pay Mr Steven Grieve a gross amount of $10,183.71, less the appropriate income tax, and Mr Robert Squires a gross amount of $5,465.89, less the appropriate income tax, within twenty-two (22) days of the release of this decision.

I order accordingly.

J.M. THOMPSON, Commissioner.

Released: 16 July 2002

Appearances:
Mr D. Prior, of the Transport Workers' Union of Australia, Union of Employees (Queensland Branch), Applicant.
Mr M. Rodgers, of Livingstones Australia, on behalf of Trenchless Contracting Pty Ltd, Respondent.

##

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Phillip Brown AND Melinda Investments Pty Ltd t/a
Dalby Hourglass Jewellers (No. B767 of 2002)

COMMISSIONER THOMPSON 11 July 2002

Application for extension of time – Fifty-three (53) days outside the statutory period – Witness evidence – Key factors in considering extension of time – Application dismissed.

DECISION

Background

In this matter, Mr Phillip Brown (applicant) sought an extension of time for the lodgement of an application for reinstatement relating to the termination of his employment by Melinda Investments Pty Ltd t/a Dalby Hourglass Jewellers (respondent).

The applicant's employment was terminated on 2 March 2002, with his application for reinstatement being lodged with the Industrial Registrar on 14 May 2002, some fifty-three (53) days outside the twenty-one (21) day statutory period provided for in accordance with s. 74(2) of the *Industrial Relations Act 1999* (the Act).

Applicant

The applicant was represented by Mr Dominic Murphy, of Counsel, and relied upon evidence given to the Commission, supportive of his application, by Dr Timothy Smith, Ms Doris Neate, and himself.

Mr Brown, in his evidence, stated that on 28 February 2002, he absented himself from work due to a stress related illness arising out of derogative comments that had been made in respect of his work activities.

On 1 March 2002, he arranged to meet with Mr Glen Hay, a director of the respondent company, where further allegations were raised relating to his conduct at work.

Later that day he attended an appointment with Dr Smith where he was issued with a medical certificate from 1 to 4 March 2002 (inclusive) and, at the same time, commenced a course of medication.

On 2 March 2002, he was informed by Mr Hay of the termination of his employment, which was confirmed, by letter, on 3 March 2002.

Mr Brown, upon informing his solicitors on 4 March 2002 of his dismissal, was advised that, if any application for reinstatement was to be lodged, it must be within twenty-one (21) days from the date of dismissal, that being by 22 [23] March 2002.

As a result of his dismissal, his anxiety and stress levels increased, requiring a further attendance to Dr Smith, where he was issued with a further medical certificate rendering him unfit to work until 1 April 2002 due to his suffering from an adjustment disorder.

On 5 March 2002, Mr Brown attended the first appointment with Ms Neate, a Mental Health Worker, employed by Dalby Community Services, which was to be the forerunner to a number of counselling sessions over the coming months.

During this period of time, he had difficulty coping with what might be regarded as "normal family pressures", and did not have the ability to deal with the issues surrounding his dismissal.

He gave evidence of contacting the Industrial Relations Commission (in fact, it would have been the Office of the Industrial Registrar) on or around 19 March 2002 and being advised that if he did not have the capacity or ability to deal with his dismissal at that time and was receiving counselling, then there would be adequate reasons for the granting of an extension of time if his application was late.

Mr Brown, on 9 April 2002, commenced employment as a bread delivery driver and, at the same time, ceased the taking of antidepressant tablets that had been prescribed by Dr Smith on 1 March 2002.

A letter was received by Mr Brown on 22 April 2002 from solicitors acting on behalf of the respondent demanding payment of $1,721.20 for a lay-by he had with the company.

Feeling compelled to seek legal advice at paragraph 20 of his affidavit of evidence, he stated:

> "I contacted my solicitors on 23 April 2002 to seek advice regarding the money owed for the lay-by. It was on this occasion that my solicitors advised that I should be submitting an application for reinstatement as soon as possible.".

A letter was sent by his solicitor to the respondent's solicitors on 29 April 2002, putting them on notice that he would be pursuing an application for reinstatement.

In that letter in penultimate paragraph, it stated:

> "Finally, as you would be aware our client is entitled to apply for an extension of time in which to lodge an unfair dismissal claim. One of the considerations that the Commission will take into account is whether the extension will in any way prejudice your clients. At this stage, given our client's medical condition, he is not in a position to pursue his statutory right. Should our client at a later date choose to pursue a claim against your clients then this letter will be used as evidence of prior notification to your clients.".

In the cross-examination of Mr Brown, Mr James Hall, on behalf of the respondent, raised a number of issues including:

- Consultations with Dr Smith.
- Advice from his solicitor on 4 March 2002 Re: obligation to file application for reinstatement (page 6, line 30 of transcript):

  "Hall: When you saw your solicitors on the 4th you say in your affidavit that Mr Donaldson, your solicitor, stressed the urgency of filing your claim and told you that you had 21 days in which to do it?

  Brown: That's correct.

  Hall: You understood that?

  Brown: I did.

  Hall: Was there any aspect of Mr Donaldson's advice whatsoever in relation to that time limit, or what – what your obligations were in relation to filing an application that you didn't understand?

  Brown: No.

  Hall: So every – all the advice you – I just want to be clear on this and I'm not trying – all the advice he gave you about those particular aspects, that is the 21 day time limit and the urgency of filing that application, you understood?

  Brown: I did.".

- Financial position at time of dismissal.
- Seeking and commencement of new employment.
- Contemplating opening own business – discussion with prospective suppliers (page 11, line 5 of transcript):

  "Hall: Would it be a significant undertaking two weeks after your dismissal to get to a point of operating – of thinking or planning the operation of a business to ring supplies? Like, that – that's down the track sort of thing is it usually? Would you agree?

  Brown: Oh, we were just making inquiries. Being unemployed you haven't got an income so you start looking at opportunities to hopefully remedy the situation.

  Hall: And would it be fair to say that that – at that time, two weeks after your dismissal, is on or about the 16th of March?

  Brown: Yeah, possibly.".

- Contact with Industrial Registry on or around 19 March 2002.
- Ceasing the taking of medication on 9 April 2002.
- Letter of demand from respondent's solicitors (page 13, line 22, of transcript):

"Hall: Do you remember that letter?

Brown: Yes, I do.

Hall: They demanded that you pay them $1,721.20?

Brown: That's right.

Hall: It must have come as quite a shock?

Brown: Yes, it did, actually.

Hall: Did it make you angry?

Brown: A little bit and I – yeah, it did.

Hall: Angry enough to overnight determine that you should go and see a solicitor the next day?

Brown: I wanted to see what my rights were about paying the bill, yes.

Hall: Because you already knew what your rights were in relation to applying for – an application into this jurisdiction with respect to your dismissal?

Brown: That's right.

Hall: Yes. Was the advice you received on that day from your solicitors in you Dalby any different to that you received on the 4th of March?

Brown: No. He – no.

Hall: Was it – was the issue of the time limitation discussed at that meeting in relation to the unfair dismissal?

Brown: I believe it was, yes.

Hall: It was. And no doubt your solicitor reiterated to you that, you know, that these things were urgent?

Brown: Yes, he did.".

The evidence (given via telephone) of Dr Smith, a licensed General Practitioner in Queensland and holder of Degrees in Medicine and Surgery, related to the treatment of the applicant who had been a patient of his since April 1996.

Provided to the Commission, as attachments to his affidavit, were signed medical reports dated 17 May and 4 June 2002.

Quoting from the 17 May 2002 report, at points 1, 2, and 3:

"1. I saw Mr Brown on 1/03/02. He present with insomnia, anxiety, stress, depressed mood following conflict at work. He was diagnosed as suffering from an adjustment disorder with depressed mood; which was of such a nature that it interfered in his daily functioning (at work, and personally).

2. He was commenced on antidepressants (Efexor) and counselling given (by myself).

3. He was seen again on 4/03/02, at which time his symptoms have rapidly worsened. He was severely depressed, and found it difficult to cope. A sickness certificate was issued. My last consultation with him was on 4/06/02, and I have not seen him since.".

In the latter report of 4 June 2002, further statements were provided:

"This is to certify that I have known Phillip Brown as a patient for 5 years.

I have seen Mr Brown with depressive illness and adjustment disorder on:

01/03/02
04/03/02
04/06/02

He continues to have symptoms of anxiety, depression agitation, and social withdrawal. His change in behaviour is affecting his interaction with his family. He had attended a counsellor who had confirmed this.

1) At the time in question he certainly was not capable (emotionally and psychologically) to deal with legal matters, or any other issues.

2) He still suffers from depression, and difficulties coping in daily life.
Diagnosis # Adjustment disorder
Reactive depression

3) His current psychological issues are addressed by his Mental Health counsellor.".

Under cross-examination from Mr Hall, Dr Smith was confronted with a range of issues including:

- Medical certificates issued to the applicant.
- Medical reports (attached to the affidavit – page 21, line 18 of transcript):

"Hall: In relation to what information was before you when you prepared these two letters - ?

Smith: Okay. From what I recall, first of all from my notes and from the letter from the mental health team - -

Hall: Just – so it was the letter – you didn't see any clinical notes from the mental health team?

Smith: Sorry?

Hall: You didn't see – you didn't have an opportunity to review the clinical notes made by the mental health team?

Smith: No, no, no. I viewed the notes from the mental health team I think before I wrote the second statement that I've made on the 4th of June. But at the time that I made the second on the 17th of May I hadn't reviewed that – those notes yet.".

- Condition of applicant between 4 March and 4 June 2002 (page 24, line 26 of transcript):

"Smith: I mean what I can say is that on the consultation date the statement that I've made on the 4th of June really applies to my impression that I formed on those consultation dates and – I mean in all fairness to Mr Brown and everybody else involved, I probably technically can't sort of speculate about his mental state in between those consultation dates. Although it's more than likely that this is sort of an ongoing thing, obviously since March. But I mean, obviously, if you were – if you wanted sort of a technical answer I mean I can't speculate what has happened in April and in May with his mental state because I haven't seen him on those days.".

- Applicant's contact with Industrial Registry.
- Applicant seeking to commence own business.
- Applicant's capacity to make decisions (beginning at page 32, line 12 of transcript):

"Hall: With respect to this issue of capacity where you say he's not capable emotionally or psychologically to deal with legal matters, do – are you saying that he was deprived? Deprived of capacity?

Smith: No, I just think that he – when you are depressed you lose motivation. You lose focus and that is one of the cornerstones of the diagnosis of the patient and you make – you may make judgment or decisions which are actually detrimental to your own well-being, financial well-being and your – your home well-being. You lose perspective of what it is that you want. People who are depressed very often shouldn't be making sort of very important decisions and – and certainly that perspective, you could certainly say that, yes, he was to a certain state deprived.

Hall: So your – your evidence is that he's deprived of capacity to make those decisions?

Smith: Yes. . .

Hall: But I'm talking about going – going to the solicitor, the person on his side?

Smith: Yes. No, I don't think he would have deprived – been deprived to go to a solicitor. . .

Hall: To be deprived of capacity I would have thought would be a – and I'm putting this to you. Is it – would it be a situation where someone could make telephone calls about suppliers, make telephone calls to the Industrial Relations Commission. Go and – eventually go and see his solicitor about this issue to get it sorted out. You see, what I'm putting to you, doctor, is that he's at best impaired, not deprived?

Smith: Yes. Well, I would certainly use the – impaired rather than deprived. I mean he had impaired functioning in his normal life which affected his ability to make decisions and I mean the – you know, I don't know.".

The final witness for the applicant, Ms Neate, like Dr Smith, gave her evidence by telephone.

The evidence commenced with details of her employment history having become a registered nurse in 1969, working as a case manager at Community Mental Health, and having some eight (8) years working experience in the area of mental health.

In terms of her consultations with Mr Brown, her evidence was that the applicant attended sessions on: 5 March, 12 March, 19 March, 26 March, 2 April, 9 April, 24 April and 30 April.

In an attachment to her affidavit dated 3 June 2002, Ms Neate made the following observations in respect of Mr Brown's abilities to cope under stress following his dismissal:

"As per our phone conversation and secondary to the report already submitted by me regarding this gentleman. In my opinion he was not mentally capable of coping with the stress caused by his dismissal from his job. When I first saw him he was acutely depressed and wept for most of the first interview. He could not concentrate well enough to answer questions or even understand what was being said to him. I was at that time quite concerned about his mental state.

Graham's mood is now very much improved but I feel he will need further counselling in the weeks to come to cope with the impending legal issues he is facing. As a normal law abiding family man he is unused to dealing with legal issues and this in itself has caused him severe anxiety.".

Cross-examination of Ms Neate was limited and included questions relating to:

- The counselling sessions.
- Applicant's ability to seek legal advice.
- Level of distress following applicant's dismissal.
- Witness experience in counselling persons who have lost employment (page 39, line 50 of transcript):

"Hall: Do you counsel a lot of people who lose their job?

Neate: No, not really.

Hall: Not really?

Neate: No.

Hall: But you'd agree that it's a stressful period?

Neate: Oh, look. It's a very stressful thing. I mean, I'm aware that Mr Brown had been a jeweller for 17 years which is a very long time and you, I know he was very distressed at losing his job.".

Respondent

Evidence in this matter, on behalf of the respondent, was provided by Mr Hay and Mr Robert Menzies in affidavit form, with the applicant's counsel waiving the right to cross-examine each of the witnesses.

Mr Hay's evidence, in the first instance, identified four (4) occasions where he had found it necessary to raise, with the applicant, allegations relating to inappropriate behaviour from various staff members.

These meetings occurred in November 1999, March 2000, June 2001 and March 2002.

At each meeting, the applicant was given the opportunity to provide his version of events in respect of each allegation, with Mr Hay providing notes taken at the meeting to the applicant shortly thereafter.

Mr Hay, in paragraph 5 of his affidavit, stated:

> "During the meeting of June 2001 I made it clear to the applicant that his employment would be terminated if he was again involved in certain types of behaviour or activity.".

In May 2002, on a date Mr Hay was unable to particularise, he recalled a telephone discussion with a jewellery supplier representative in which he was advised that the applicant, in late March 2002, had sought the supply of goods (on approval) with the intention to operate a business, firstly from home, and to open a shop within the next two years.

In evidence, at paragraph 8 of his affidavit, Mr Hay provided details of the applicant's right to take action as a result of his dismissal:

> "I am aware that it is possible for an employee to take proceedings arising out of a dismissal. As a result of advice taken from my Solicitors I believed that any application was to be made within twenty-one (21) days of the date of dismissal. As a result of that advice I did not take any steps to replace the Applicant until the relevant time had expired. However, once the time had expired I made arrangements to fill the vacancy left by the dismissal of the Applicant. I have filled that vacancy by the internal promotion of staff.".

Finally, Mr Hay stated that he would be prejudiced if he was required to reinstate the applicant, as he would have a surplus of staff due to the new arrangements in place.

Mr Menzies, a director of Rolma Industries, a company that supplies watches to retail outlets, gave evidence that the applicant, in March 2002, had contacted him by phone in which he was seeking to be supplied with watches "as he was presently considering operating a jewellery business from his home with the intention of establishing a shop within the next two years".

Submissions

Each of the parties provided detailed outlines of their submissions to the Commission.

Applicant

Mr Murphy, for the applicant, firstly addressed what now appear to the be accepted considerations in matters of applications for extension of time:

"(i) the length of the delay;
(ii) the explanation for the delay;
(iii) the prejudice to the Applicant if the extension of time is not granted;
(iv) the prejudice to the Respondent if the extension of time is granted; and
(v) any relevant conduct of the Respondent.". per Chief Industrial Commissioner Hall (as he was then) in *Breust v Qantas Airways Limited* (1995) 149 QGIG 777.

On the length of the delay, it was acknowledged that the application was late by fifty-three (53) days, however, by giving notice to the respondent on 29 April 2002 of the possibility of pursing such an application, it was only thirty-nine (39) days outside the time limit.

Supportive of the explanation for the delay, Mr Murphy relied upon the evidence of Dr Smith and Ms Neate, in particular, as it related to the mental health of the applicant at the time.

At paragraphs 5.5.1 and 5.5.2 of the submissions, it was stated:

"5.5.1 Dr Smith considered that at the time when he first attended on Brown (the same time when he attended his solicitor) that Brown *'certainly was not capable (emotionally and psychologically) to deal with legal matters, or any other issues'.*

5.5.2 Ms Neate opined *'In my opinion he was not mentally capable of coping with the stress caused by his dismissal from his job'* and further that *'he could not concentrate well enough to answer questions or even understand what was being said to him'*.".

On the matters of prejudice, it was submitted that for the extension not to be granted, the applicant's rights are completely extinguished whilst the applicant is not aware of any prejudice which would be suffered by the respondent if the extension was granted.

In reference to the merits of the case, Mr Murphy did not overly detail an assessment, suffice to say that in the applicant's view it has clearly disclosed a case for reinstatement.

In summary, reliance was placed heavily upon the medical condition of the applicant at the time, and it was submitted that, in the circumstances, it was proper for the Commission to exercise its discretion in granting the extension of time.

Respondent

The submissions put by Mr Hall, for the respondent, by and large, dealt with the same criteria as that addressed by the applicant, albeit from an obvious different perspective.

In terms of the length of the delay, it was submitted that, whilst the applicant relied upon his solicitor's letter dated 29 April 2002 as giving the respondent notice of the possibility of an application being made, it did not clearly give express notice that an application would be filed.

According to the respondent, that notice would have been more effective if it were an express notice that an application was to be made and was given within the statutory period.

On the reasons behind the delay in filing the application, Mr Hall stated that much had been made of Mr Brown's medical condition, however the Commission should look closely at the presence of mind and capacity of the applicant after the termination.

At paragraph 7 of the submission, in addressing the abovementioned issues, it was stated:

"Much has been made of the Applicant's medical condition. It is important to consider that whatever his medical condition was, the Applicant, after the termination of his employment had the presence of mind and capacity to be able to:

(a) On the Monday following the termination, 4th March 2002 take advice from his Solicitors which included advice as to the relevant statutory time limit. (See Affidavit Brown Paragraph 10);

(b) Attended upon Dr Smith on 4th March 2002 and subsequently;

(c) Attended on Ms Neate on 5th March 2002 and on at least seven (7) subsequent occasions;

(d) On 19th March 2002 (whish is prior to the expiration of the statutory time limit) telephoned the Industrial Relations Commission, take advice from them and seemingly have no difficulty in understanding that advice despite the suggestion that he was medically incapable of doing so. (See Affidavit Brown Paragraph 15);

(e) Is seemingly so capable of understanding the advice from the Industrial Relations Commission that he is able to make a conscious choice based on that advice to 'focus on dealing with my emotional issues and on getting another job'. (See Affidavit Brown Paragraph 16);

(f) Undertake the not insignificant tasks of seeking employment which on 9th April 2002 culminates in the Applicant obtaining employment. (See Affidavit Brown Paragraph 17);

(g) On 22nd April 2002 following receipt of the letter from Hede Byrne & Hall Solicitors the Applicant is able to take legal advice and, it would seem, is at least at that time, some 21 days before the Application was ultimately made, of giving proper instructions to his Solicitors. (See Affidavit Brown Paragraphs 19 – 21);

(h) Considers operating a jewellery business to such an extent that the Applicant makes inquiry of suppliers. (See Affidavit Menzies and Affidavit Hay Paragraph 7).".

It would be open to the Commission to find that the applicant, despite whatever medical condition he may have been suffering, had not diligently pursued his application.

The respondent, in reliance upon the expiration of the statutory period, filled the vacancy left by the applicant's termination and would clearly be prejudiced if reinstatement was, at some time, ordered.

On the merits of the case, the respondent did not concede that the applicant has a *prima facie* case which would warrant a hearing.

On summation, it was put that it was open to the Commission to find that the applicant had made a choice not to pursue an application for reinstatement until such time as a letter of demand from the respondent's solicitors was received which, in effect, acted as motivation for the lodgement of the application.

It was not an appropriate case for the Commission to exercise its discretion to extend the time.

Conclusion

In the determination of this matter, I have considered the evidence before the Commission, in addition to the submissions put on behalf of both the applicant and the respondent.

Additionally, a number of authorities were relied upon during the proceedings, with these also being closely scrutinized in the decision making process.

In applying the now accepted criteria in *Breust v Qantas Airways Limited* (1995) 149 QGIG 777, I make the following comments:

Length of the Delay

The legislators, in setting a twenty-one (21) day statutory period from the effective date of termination in which an application for reinstatement must be lodged, did so, one would presume, for the benefit of both applicants and respondents, in that decisions emanating as a consequence of the termination can be made with the full awareness of any litigation that may occur as a result of the termination.

In this matter, the period of fifty-three (53) days, in my view, is an excessive amount of time outside of the statutory period provided for in the Act.

Explanation for the Delay

The medical evidence of Dr Smith and Ms Neate, relied upon by the applicant, was in real terms not challenged by the respondent as to whether a condition existed or not, as to do so would, in my view, have required the adducement of evidence of an alternate nature from medical practitioners of the like of the applicant's witnesses.

The questions raised by the respondent, however, were pointed towards the time period for which the applicant may have been impaired in his capacity to issue instructions for the application for reinstatement to be lodged.

It was uncontested that the applicant, in the time that the twenty-one (21) day statutory period was "live", contacted his solicitors regarding his termination, contacted suppliers of merchandise for a proposed business venture, and contacted the Industrial Registrar's Office to discuss the filing of the application.

On 9 April 2002, the applicant, on commencement of new employment, ceased taking his medication and, for all intents and purposes, appeared to be in the process of getting his life back "on track".

It was only upon receipt of a letter, initiated by the respondent demanding payment of $1,721.20 from the applicant for goods purchased that it would appear that Mr Brown had reason to, once again, consider his options in respect of an application for reinstatement.

I accept the argument put forward by the respondent that the correspondence, on behalf of the applicant (dated 29 April 2002) did not clearly flag an intention for an application to be filed, only the possibility of such an action.

On the medical and other evidence before the Commission, I would have little difficulty, on the balance of probabilities, in accepting the applicant's reasons for the out of time lodgement up until 9 April 2002. It is, however, not the same position for the thirty-five (35) days past that point.

I can find no reason, given in the proceedings, that would suggest that the applicant could not have given the not so complex directions for the application for reinstatement to be filed after 9 April 2002, and believe that the ultimate direction was more likely in retaliation, or at least response, to the letter of demand for outstanding monies allegedly owed to the respondent.

Prejudice to the applicant if the extension of time is not granted

It is clear that not to grant an extension would extinguish the applicant's right to contest his termination in the Commission.

Prejudice to the respondent if the extension of time is granted

The granting of an extension of time would, in my view, unfairly impact upon the respondent, who, on the evidence before the Commission, "waited out" the twenty-one (21) day statutory period before putting in place formal arrangements to fill the position held by the applicant.

The prejudice to the respondent is, in my opinion, further compounded by the excessive period of fifty-three (53) days outside the statutory period.

Any relevant conduct of the respondent

In terms of the argument over the extension of time, I cannot find any fault in the behaviour of the respondent.

Merits of the case

The details of the substantive matter were not canvassed by either party to any great lengths, however I did form the impression that the respondent had been most patient in the handling of allegations levelled against the applicant over a period of some twenty-eight (28) months prior to the decision to terminate the employment arrangement.

Accordingly, it is my decision that I will not exercise the discretionary power, as provided in s. 74(2)(b) of the Act to grant an extension of time.

Therefore, the application is dismissed.

I order accordingly.

J.M. THOMPSON, Commissioner.

Released: 11 July 2002

Mr D. Murphy, of Counsel, instructed by Ms T. Summerland of Shannon Donaldson Lawyers, for the applicant.
Mr J. Hall, of Biggs and Biggs Solicitors, instructed by Mr B. Foley of Hede Byrne and Hall, Solicitors, for the respondent.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 473 – approval for other name amendment

Australian Building Services Association – Queensland Division, Industrial Organisation of Employers (No. U10 of 2002)

COMMISSIONER BLOOMFIELD 15 July 2002

Application for change of name – Application not opposed – Statutory requirements met – Application approved.

REPORT ON DECISION (as edited)

In giving his decision from the Bench on 15 July 2002, Commissioner Bloomfield stated:

> "This is an application by the Australian Building Services Association – Queensland Division, Industrial Organisation of Employers to change its name to the Building Service Contractors' Association of Australia – Queensland Division, Industrial Organisation of Employers.
>
> The application has been made in accordance with the rules of the organization and in accordance with the relevant provisions of the *Industrial Relations Act 1999*. The application has not been opposed. The proposed new name is not the name of another industrial organization and it is not so similar to the name of another industrial organization such as would be likely to cause confusion.
>
> In those circumstances I consent to the alteration of the name, effective as of today.".

Order Accordingly.

By the Commission,
[L.S.] E. EWALD,
Industrial Registrar.
Released: 17 July 2002

Appearances:
Mr C. Pollard for the Australian Building Services Association – Queensland Division, Industrial Organisation of Employers.

##

QUEENSLAND INDUSTRIAL REGISTRAR

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

The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees (No. Q25 of 2002)

REGISTRAR EWALD 16 July 2002

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

DECISION

On 15 July 2002 The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* in relation to its request for the conduct of an election by the Electoral Commission of Queensland for the following Offices:

Office	Number of Positions	Method of Election
President	1	collegiate
Vice-President	2	collegiate
Secretary	1	collegiate
Treasurer	1	collegiate
Committee of Management	12	direct voting system

Rule 17(a) of the Industrial Organisation's Rules states *inter alia* "A Committee of Management consisting of twelve Committee members elected by the Members as hereunder provided shall take office on the first day of February in each year".

Nominations for the Offices of Committee Members are required by Rule 18(b) to be called "after the seventeenth day of September and before the first day of October.... in each year ...".

Therefore, for the purposes of determining the prescribed day under section 36(4) of the Industrial Relations Regulation 2000 i.e. 2 months before the first day on which a person may become a candidate in the election, under the organisation's or branch's rules, the prescribed information should be filed on 18 July 2002. The prescribed information was filed before the prescribed day.

Method of Election

The Executive Officers as stated under rules 19 and 22 are elected by a collegiate voting system from the members of the 12 Committee of Management. The 12 members of the Committee of Management are firstly elected by a direct voting system.

Conduct of Election

I am satisfied under section 482 of the Act that an election for the above named positions of office is required to be held under the Rules of the Industrial Organisation. The Organisation's Rules are affected by s.458 of the Industrial Relations Act 1999. By virtue of this section the Organisation's Rules are taken to contain the Model Election Rules.

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

Dated 16 July 2002.

E. EWALD
Industrial Registrar.

Released: 16 July 2002

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