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No. 17

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
CA309/02	Woolworths Supermarkets Distribution Centres (Townsville) Certified Agreement 2002	18/7/02	CA302/99
CA278/02	Just Jeans Group Limited Retail - Certified Agreement 2000	25/7/02	CA502/97
CA311/02	Flight Nurses (Royal Flying Doctor Service - Queensland) Certified Agreement 2002	1/8/02	CA775/97
CA315/02	Bendix Industries (Qld) Pty Ltd - Certified Agreement 2002	1/8/02	CA230/99
CA319/02	Printing Trade Queensland Daily Newspapers (Queensland Newspapers) - Certified Agreement 2002	1/8/02	
CA312/02	Netpro Employees Pty Ltd - Certified Agreement 2002	2/8/02	
CA324/02	Ken Whatman t/a Fire Sprinkler Installation and the PGEU – Certified Agreement 2001-2002	2/8/02	
CA325/02	Multi Service Group and the PGEU - Certified Agreement 2001 – 2002	2/8/02	
CA328/02	Maccon Pty Ltd - Certified Agreement	2/8/02	
CA317/02	Andergrove Tavern - Certified Agreement 2002	5/8/02	CA205/99

The following Agreement has been amended by the Commission:–

	Date amended
CA409/99 Australian Building Services Association - Queensland Division – Certified Agreement 1999	16/4/02

The following Agreement has been terminated by the Commission:–

	Date terminated
CA465/99 Seabreeze Tavern - Certified Agreement 1999	6/8/02

The following Agreement has been refused by the Commission:–

	Date refused
CA255/02 Pozzolanac North Queensland Maintenance - Certified Agreement 2002	2/8/02

E. EWALD
Industrial Registrar

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 287 – application for declaration of a general ruling
s. 288 – application for declaration of policy

Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B753 of 2002) AND The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B755 of 2002)

PRESIDENT HALL
VICE PRESIDENT LINNANE
COMMISSIONER EDWARDS

7 August 2002

Applications for Declaration of General Ruling – Submissions by Unions for flow on of wage increase decided by AIRC – Applications granted – *Industrial Relations Act 1999* ss. 287, 288.

DECISION

- [1] On 9 May, 2002 a Full Bench of the Australian Industrial Relations Commission (AIRC) released its decision in the matter of the *Safety Net Review – Wages May 2002* AIRC (PR002002) 9/05/2002 Giudice J, Ross VP, McIntyre VP, Watson SDP, Harrison SDP, Lewin C and Hoffman C. By that decision the Full Bench of the AIRC awarded a safety net adjustment of \$18 per week in award rates with the safety net adjustment being capable of absorption into overaward payments. The decision increased the federal minimum wage by \$18 per week and varied allowances that relate to work and service increments.
- [2] On 13 May, 2002 the Queensland Council of Unions (QCU) filed with the Industrial Registry an application (B753 of 2002) which, following amendment, seeks to flow on those aspects of the decision of the Full Bench of the AIRC. No change is sought, at this time, to the *Statement of Principles* (2001) 167 QGIG 353 except for consequential amendments resulting from the increase in award rates and the Queensland Minimum Wage.
- [3] On the same day The Australia Workers' Union of Employees, Queensland (AWU) filed a similar application (B755 of 2002).
- [4] Both the QCU and the AWU sought to have both matters joined. There was no opposition to that application and both matters were joined. Both organisations sought an operative date of 1 September, 2002. The applications essentially seek:
- an increase of \$18 per week in all award rates of pay by way of General Ruling;
 - an increase in allowances which relate to work or conditions and service increments of 3.5% by way of General Ruling;
 - an adjustment of the Queensland Minimum Wage for workers regulated by industrial instruments from \$413.40 per week to an amount of \$431.40 per week for full-time adult employees, and for junior, part-time and casual employees, proportionate amounts by way of Statement of Policy; and
 - the maintenance of the 2001 Declaration of Policy dealing with the *Statement of Principles* except for changes in operative dates and the quantum of wage adjustment resulting from these applications.
- [5] Both the QCU and the AWU foreshadowed a future application in respect of the *Statement of Principles*. For that reason we have left unchanged the title of the statute at Principle 9(c)(4).
- [6] On 22 July, 2002 we published a Declaration of Intent to satisfy the duty cast upon the Commission by s. 287(3) of the *Industrial Relations Act 1999*. The *Declaration of Intent* is now reported at (2002) 170 QGIG 404.
- [7] On 31 May, 2002 the New South Wales Industrial Relations Commission handed down its decision and awarded the \$18 per week increase: see *State Wage Case 2002* [2002] NSWIRComm 118. Similarly on 10 June, 2002 the Western Australian Industrial Relations Commission handed down its decision to flow-on the \$18 increase: see *State Wage Case 2002* WAIRC 05746. The South Australian Industrial Relations Commission on 28 June, 2002 released its decision and granted a flow on of the \$18 per week increase to employees regulated by South Australian State awards: see *State Wage Case June 2002* [2002] SAIRComm 38.
- [8] The State of Queensland supported the QCU and AWU applications. In so doing, they provided the Full Bench with material which indicated that the Queensland economy had the capacity to absorb the \$18 flow-on to State awards. Further, the State of Queensland contended that the granting of the applications would maintain consistency between the state and federal jurisdictions and ensure that there was no disadvantage for employees on award rates of pay in the Queensland jurisdiction. We have considered the detailed economic data relied upon by the State of Queensland.
- [9] The Australian Industry Group, Industrial Organisation of Employers (Queensland) (AIG) did not oppose the applications and supported the claim for an operative date of 1 September, 2002.
- [10] The Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI), in its submissions, did not support the granting of \$18 per week in award rates and the increase of 3.5% in work related allowances and increments. Rather it supported an increase of \$10 per week in award rates and an increase of 1.9% for work related allowances and service increments. Its alternative submission was a phasing in of the \$18 per week increase over two six (6) month periods contending that the impact would be less severe and more manageable by employers. The QCCI did not object to the operative date of 1 September, 2002. Essentially the QCCI's argument was that the AIRC, at the time of making its decision, depended upon economic considerations that were focused nationally. The QCCI drew the Full Bench's attention to certain economic indicators tending to highlight that the Queensland economy is not as strong as the national economy in respect of those indicators. The QCCI, and other organisations, also raised the potential impact of the applications by the QCU (B209 of 2002) and AWU (B308 of 2002) seeking a Statement of Policy in relation to termination, change and redundancy entitlements. These applications are currently before a Full Bench of this Commission.
- [11] The position adopted by the QCCI was supported by a number of organisations including:
- the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (QRTSA) who raised the concern of the change to Sunday trading hours and the impact that was likely to have on the competitiveness of smaller retail establishments. The QRTSA opposed the QCCI's position on the operative date of any increase. In so doing the QRTSA sought an operative date of 2

September, 2002 arguing that the pay periods of most small retailers commenced on a Monday and they would experience difficulties with a Sunday operative date;

- the Local Government Association of Queensland Incorporated; and
- the Queensland Hotels Association, Union of Employers (QHA) drew the Full Bench's attention to the combined effect of the terrorist attack of 11 September, 2002 and the collapse of Ansett Airlines on its members. It was submitted that these events had resulted in a significant economic downturn in the tourism industry in Queensland. It is noted however that employees in the hotel industry in South-East Queensland are employed pursuant to an award of the AIRC under which the \$18 per week award increase would flow (or perhaps be absorbed) whilst those in the remainder of the State are employed pursuant to an award of this Commission.

[12] The Australian Sugar Milling Association, Queensland, Union of Employers (ASMA) indicated opposition to the applications but conceded that the granting of the quantum sought by the QCU and AWU would not result in any direct increase in labour costs for the sugar milling industry (except for work related allowances). As all employees in the sugar milling industry are covered by certified agreements that have implemented net increases in wage rates since 1992 in excess of the total safety net adjustments arbitrated in the same period any increase resulting from these applications would be absorbed.

[13] The position adopted by The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers. (RCEAQ) was one of opposition to the \$18 increase. Rather than the \$10 sought by the QCCI the RCEAQ sought an increase of \$9 per week. In seeking the \$9 only, the RCEAQ relied upon circumstances peculiar to the industry. No evidence was called by the RCEAQ in support of its position. Whilst it did seek to rely upon extracts of documents that were attached to its written submission those documents were not properly proved. The submissions made by RCEAQ in respect of the industry generally appeared to be somewhat similar to those submissions made to the Full Bench of the AIRC by Restaurant and Catering Australia. It is apparent that the Full Bench of the AIRC considered those submissions for when looking at the particular industry sectors it concluded at p. 27 that:

"The restaurant and catering industry has experienced reasonable growth in turnover over the past year, although profits have declined as a result of new entrants into the industry."

[14] The arguments advanced by the RCEAQ are similar to those advanced in 2001 and we adopt the following comments of the Full Bench found at *The Australian Workers' Union of Employees, Queensland and Queensland Council of Unions v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Ors* (2001) 167 QGIG 350 at p. 350:

"No attempt was made to press an application for exemption...Granted the legislative opportunity to seek exemption, we are unable to accept that it is consistent with s. 3(a) and (f) or indeed, fair and equitable, to deny the benefit of a Declaration of General Ruling to all employees in order to protect the interests of some employers within a particular industry sector."

[15] The Retailers' Association of Queensland Limited, Industrial Union of Employers (RAQ) is also opposed to the applications submitting that the \$18 increase would represent an addition to most retailers' wages bill of approximately 4%.

[16] The Baking Industry Association of Queensland - Union of Employers (BIA) also opposed the application asserting that an \$18 increase could affect the viability of some operations. Whilst the BIA did not rely upon any evidence, it did submit that the viability of some baking industry operations are such that the operators are now having to work in their operations rather than employing casual staff.

[17] The Queensland Cane Growers' Association Union of Employers and the Queensland Mechanical Cane Harvesters Association, Union of Employers seek the exclusion of the classes of employers which they represent, or in the alternative, some of them from any Declaration of General Ruling which might be made. These applications were scheduled for hearing at the conclusion of the hearing of the QCU and AWU applications.

[18] An application for exemption from any Declaration of General Ruling was also foreshadowed by the QCCI in respect of parties bound by the *Nurses' Aged Care Interim Award - State*. Directions were issued for the conduct of this application and a hearing is scheduled for 13 August, 2002.

[19] The decision of the AIRC indicates that the material before the Full Bench showed some diversity of economic conditions between and within sectors of the Australian economy. Whilst recognising that to be the case the Full Bench of the AIRC concluded that "...the Australian economy can accommodate further reasonable improvements in the safety net of minimum wages of the level we determine in this decision".

[20] We concur with the statement of the Full Bench in *Queensland Council of Unions and The Australian Workers' Union of Employees, Queensland v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Ors* (2000) 164 QGIG 372 at p. 164 that:

"It cannot reasonably be expected that all state economies will at all times perform in the same way. The Australian Industrial Relations Commission takes account of circumstances in all states and is aware of a likelihood that its decision will flow into particular state industrial systems. It is obviously aware also that its awards may marginally impact differently in different states. There will be times when the Queensland economy outperforms other states and *vice versa*. As long as the discrepancies are not large and consistent, we consider that the proper course is to take the broad view and flow the Federal increase into the Queensland system."

[21] Having considered the submissions of all parties, we are of the view that the applications should be granted. We propose to make the Declaration of General Ruling that has been sought in the applications. The wage adjustment is subject to absorption.

[22] As to the operative date we have decided, after considering the submissions to the contrary, that it will be 1 September, 2002.

Dated 7 August 2002.

D.R. HALL, President.

D.M. LINNANE, Vice President.

K.L. EDWARDS, Commissioner.

Appearances:

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

Ms S. Davis for the Australian Industry Group, Industrial Organisation of Employers (Queensland).

Mr R. Beer for the Local Government Association of Queensland Incorporated.

Mr G. Trost for the Queensland Canegrowers' Association Union of Employers.

Mr K. Law for The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers.

Mr G. Roberts for The Baking Industry Association of Queensland - Union of Employers.

Ms D. Ralston for the Queensland Council of Unions.
 Ms K. Stephen and Dr S. Winocur for the Crown.
 Mr J. Dwyer and Ms S. Lindsay for the Queensland Chamber of
 Commerce and Industry Limited, Industrial Organisation of Employers.
 Ms L. Vanderstoep for the Retailers' Association of Queensland Limited,
 Union of Employers.
 Mr D. Matley for the Queensland Retail Traders and Shopkeepers
 Association (Industrial Organization of Employers).

Mr J. Moore for the Queensland Hotels Association, Union of Employers.
 Mr M. Proctor for the Australian Sugar Milling Association, Queensland,
 Union of Employers.
 Mr J. Powell for the Queensland Mechanical Cane Harvesters Association,
 Union of Employers.

Released: 7 August 2002

Hearing Details:

2002 30 May and 22 July.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 287 – application for declaration of a general ruling
 s. 288 – application for declaration of policy

**Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial
 Organisation of Employers and Others (No. B753 of 2002) AND The Australian Workers' Union
 of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited,
 Industrial Organisation of Employers and Others (No. B755 of 2002)**

PRESIDENT HALL
 VICE PRESIDENT LINNANE
 COMMISSIONER EDWARDS

7 August 2002

DECLARATION OF POLICY

STATEMENT OF PRINCIPLES

1. Role of Principles

The purpose of the principles is to provide guidance to the Commission constituted by a Commissioner sitting alone. Howsoever constituted the Commission will have regard to s. 3 of the *Industrial Relations Act 1999* and must have regard to s. 126.

2. When an award may be amended or another award made without the claim requiring consideration by a Full Bench.

In the following circumstances an award may, on application, be amended or another award made without the application requiring consideration by a Full Bench:

- (a) to adjust wages to provide for a total minimum rate in accordance with Principle 3(e);
- (b) to include previous State Wage Case increases in accordance with Principle 4;
- (c) to incorporate Statements of Policy and like decisions in accordance with Principle 5;
- (d) to adjust allowances and service increments in accordance with Principle 6;
- (e) to adjust wages pursuant to work value changes in accordance with Principle 7;
- (f) to reduce standard hours to 38 per week in accordance with Principle 8;
- (g) to include the Queensland Minimum Wage in accordance with Principle 9;
- (h) to adjust wages and employment conditions in accordance with Principle 10; and
- (i) to make orders under Chapter 3 Part 4 of the *Industrial Relations Act 1999*.

3. State Wage Case Adjustment

In accordance with the State Wage Case – August 2002 awards are to be amended by way of a Declaration of General Ruling in the following form:

- An \$18 per week increase in all award rates of pay,

subject to the following:

- (a) The operative date will be 1 September 2002;
- (b) There will be absorption of the State Wage Case adjustment to the extent of:
 - (i) any above award payments; and
 - (ii) award wage increases since 1 February 1992 other than safety net, State Wage Case, work value, minimum rates adjustments;
- (c) Above award payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award amendments to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.
- (d) The following clause is to be inserted into all awards that have been amended to give effect to the Declaration of General Ruling:

"The rates of pay in this Award are intended to include the arbitrated wage adjustment payable under the 1 September 2002 Declaration of General Ruling and earlier Safety Net Adjustments and arbitrated wage adjustments. [Disputed cases are to be referred to the President.] This arbitrated wage adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland

workplace agreements, award amendments to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Cases or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated wage adjustments.”.

The above clause will replace the offsetting clause inserted into awards pursuant to the Statement of Principles determined in the State Wage Case of 2001 (167 QGIG 375).

- (e) Where the minimum rates adjustment process in an award has been completed, the Commission may consider an application for the base rate, supplementary payment and State Wage Case adjustments to be combined so that the Award specifies only the total minimum rate for each classification.
- (f) *By consent* of all parties in an award, where the minimum rates adjustment has been completed, award rates may be expressed as hourly rates as well as weekly rates. In the absence of consent, a claim that award rates be so expressed may be determined by arbitration.

4. Previous State Wage Case Increases

Increases available under previous State Wage Case decisions such as structural efficiency adjustments, minimum rates adjustments and safety net adjustments will, on application, continue to be accessible. Such applications will be determined in accordance with the relevant Principles contained in those decisions, notwithstanding that all earlier Statements of Principle are otherwise set aside.

5. Statements of Policy and Like Decisions

Statements of Policy and like decisions established and/or revised by a Full Bench of the Commission may be incorporated into an award in accordance with the relevant provisions of the Act. Where disagreement exists as to whether a claim involves a Statement of Policy or a like decision, the Commission may refer the matter to the President for consideration by a Full Bench.

6. Adjustment of Allowances and Service Increments

- (a) Existing allowances that constitute a reimbursement of expenses incurred may be adjusted from time to time where appropriate to reflect relevant changes in the level of such expenses.
- (b) Adjustment of existing allowances which relate to work or conditions which have not changed, including shift allowances expressed as monetary amounts and service increments, may be adjusted by the percentage that each State Wage Case adjustment bears to the C10 total rate at the time that each State Wage Case adjustment is made available.
- (c) Existing allowances for which an increase is claimed because of the changes in the work or conditions will be determined in accordance with the relevant provisions of the Work Value Changes Principle of this Statement of Principles.
- (d) New allowances to compensate for the reimbursement of expenses incurred may be awarded where appropriate having regard to such expense.
- (e) Where changes in the work have occurred or new work and conditions have arisen, the question of a new allowance, if any, will be determined in accordance with the relevant principles of the Statement of Principles. The relevant Principles in this context may be the Work Value Changes or First Award and Extension to Existing Award.
- (f) New service increments may only be awarded to compensate for changes in the work and/or conditions and will be determined in accordance with the relevant parts of the Work Value Changes Principle of this Statement of Principles.

7. Work Value Changes

- (a) Changes in work value may arise from changes in the nature of the work, skill and responsibility required or the conditions under which work is performed. Changes in work by themselves may not lead to a change in wage rates. The strict test for an alteration in wage rates is that the change in the nature of the work should constitute such a significant net addition to work requirements as to warrant the creation of a new classification or upgrading to a higher classification.

In addition to meeting this test a party making a work value application will need to justify any change to wage relativities that might result not only within the relevant internal award structure but also against external classifications to which that structure is related. There must be no likelihood of wage leapfrogging arising out of changes in relative position.

These are the only circumstances in which rates may be altered on the ground of work value and the altered rates may be applied only to employees whose work has changed in accordance with this principle.

- (b) Where new or changed work justifying a higher rate is performed only from time to time by persons covered by a particular classification, or where it is performed only by some of the persons covered by the classification, such new or changed work should be compensated by a special allowance which is payable only when the new or changed work is performed by a particular employee and not by increasing the rate for the classification as a whole.
- (c) The time from which work value changes in an award should be measured is the date of operation of the second structural efficiency adjustment allowable under the *October 1989 State Wage Case Decision* [132 QGIG 1199].
- (d) Care should be exercised to ensure the changes which were or should have been taken into account in any previous work value adjustments or in a structural efficiency exercise are not included in any work evaluation under this Principle.
- (e) Where the tests specified in (a) are met, an assessment will have to be made as to how that alteration should be measured in monetary terms. Such an assessment will normally be based on the previous work requirements, the wage previously fixed for the work and the nature and extent of the change in work.
- (f) The expression “*the conditions under which the work is performed*” relates to the environment in which the work is done.
- (g) The Commission will guard against contrived classifications and over-classification of jobs.

- (h) Any changes in the nature of work, skill and responsibility required or the conditions under which the work is performed, taken into account in assessing an increase under any other Principle of this Statement of Principles, will not be taken into account under this Principle.

8. Standard Hours

In approving any application to reduce the standard hours to 38 hours per week, the Commission will satisfy itself that the cost impact is minimised.

9. Queensland Minimum Wage

In accordance with the State Wage Case decision operative from 1 September 2002, awards may be amended to include the clauses set forth at (c) and (e):

- (a) the operative date will be no earlier than the date of the amendment to the Award.
- (b) the Queensland Minimum Wage is to be provided for in a separate clause as contained in subclause (c) of the Principle. Where classification rates are below the Queensland Minimum Wage there should be an indication that the Queensland Minimum Wage applies to those classifications.
- (c) the separate clause referred to in (b) is as follows:

“Queensland Minimum Wage

(1) *The Queensland Minimum Wage*

No employee shall be paid less than the Queensland Minimum Wage.

(2) *Amount of Queensland Adult Minimum Wage*

(a) *The Queensland Minimum Wage for full-time adult employees not covered by subclause (4) is \$431.40 per week.*

(b) *Adults employed under the Supported Wage Award – State shall continue to be entitled to receive the wage rates determined under that Award:*

Provided that such employees shall not be paid less than the amount determined by applying the percentage in the Supported Wage Award – State applicable to the employee concerned to the amount of the minimum wage specified in subclause (2)(a).

(c) *Adults employed as part-time or casual employees shall continue to receive the wage rates determined under the casual and part-time clauses of the Award:*

Provided such employees shall not be paid less than pro rata the minimum wage specified in subclause 2(a) according to the number of hours worked.

(3) *How the Queensland Minimum Wage applies to Juniors*

The wage rates provided for juniors by this Award continue to apply unless the amount determined under subclause 3(a) is greater.

(a) *The Queensland Minimum Wage for an employee to whom a junior wage rates clause is determined by applying the percentage in the junior wage rates clause applicable to the employee concerned to the relevant amount in subclause (2).*

(4) *Application of Queensland Minimum Wage to Special Categories of Employees*

(a) *This clause has no application to a trainee or apprentice who is party to a training agreement registered under the Vocational Education, Training and Employment Act 1991.*

(b) *[Leave reserved for other special categories].*

(5) *Application for Queensland Minimum Wage to Award Rates Calculation*

The Queensland Minimum Wage:

(a) *applies to all work in ordinary hours;*

(b) *applies to the calculation of overtime and all other penalty rates, superannuation, payments during sick leave, long service leave and annual leave and for all other purposes of this Award; and*

(c) *is inclusive of the arbitrated State Wage Case Adjustment provided by the Declaration of General Ruling operative from 1 September 2002 and all previous Safety Net and State Wage Adjustments.*

Operative Date: The date a Queensland Minimum Wage clause is inserted into the Award.”

Note: Where the Award does not provide for one of the categories of employment in this subclause, the provisions relating to the category will need to be deleted.

- (d) At the time when the Award is to be varied to amend the Queensland Minimum Wage clause, each party to the Award will be required to give a specific commitment as to absorption of any increase arising from the insertion of the Queensland Minimum Wage clause to the extent of any equivalent amount in rates of pay which are above the wage rates prescribed in the Award. Such aboveaward payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award amendments to give effect to certified agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

(e) The following clause must be inserted into the Award:

“The rates of pay in this Award include the Queensland Minimum Wage payable under the Declaration of General Ruling operative from 1 September 2002. Any increase arising from the insertion of the Queensland Minimum Wage clause may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in this Award. Such above award payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, industrial agreements, Queensland workplace agreements, award amendments to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.”.

Note: In determining whether an increase is payable because of the introduction of the Queensland Minimum Wage, the arbitrated State Wage Case adjustment in this decision and all previous Safety Net and State Wage Adjustments are first to be taken into account.

10. Award Amendment to Give Effect to a Certified Agreement

Subject to s. 129 the Commission may include in an award provisions that are based on a certified agreement whether or not there be consent by all parties to be bound. Without limiting the matters to be taken into account by the Commission, the Commission should consider whether inclusion of the provision will act as a disincentive to enterprise bargaining. If the effect of grant of the application will be to increase wages payable under the Award, the Commission is to insist on submissions about how future state wage increases are (if at all) to be absorbed into the increase. Where such increases distort relativities, the Commission must ensure that the relativities and the wage increases are separately expressed. [The Commission is not restricted to hearing submissions about future state wage increases.]

11. First Award and Extension to an Existing Award

(1) Any first award or an extension to an existing award must be consistent with the Commission's obligations under Chapter 5 of the Act.

In determining the content of a first award the Commission will have particular regard to:

- (a) the existing wage rates and conditions of employment applicable to the employees to be covered by the proposed award;
 - (b) relevant Statements of Policy and like decisions;
 - (c) relevant wage rates in other awards; and
 - (d) the maintenance or establishment of appropriate relativities within and between awards and the need for skill based career paths.
- (2) In the extension of an existing award to new work or to award free work the rates applicable to such work will be assessed by reference to the value of the work already covered by the Award.
- (3) The proposed award or extension to award is not a device to circumvent the requirements which the parties would have to comply with in the event they had sought to have an existing certified agreement amended, or a new agreement certified or an award amended to give effect to a certified agreement.
- (4) The matter may be referred to a Full Bench with the approval of the President.

12. Equal Remuneration

Leave reserved.

13. Economic Incapacity

Any person, natural or artificial, bound by an award may apply to, temporarily or otherwise, reduce, postpone and/or phase-in the application of any increase in labour costs determined under this Statement of Policy on the ground of very serious or extreme economic adversity. The merits of such application will be determined in the light of the particular circumstances of each case and any material relating thereto shall be rigorously tested.

Any decision to temporarily reduce or postpone an increase will be subject to further review, the date of which will be determined by the Commission at the time it decides any application under this Principle.

14. Reference to Full Bench

An application to amend an award outside these principles may be referred to a Full Bench with the approval of the President. Commissioners are to monitor proceedings to ensure that referral occurs where it is appropriate.

15. Duration

This Statement of Principles will operate until reviewed.

Dated 7 August 2002.

D.R. HALL, President.

D.M. LINNANE, Vice President.

K.L. EDWARDS, Commissioner.

Released: 7 August 2002

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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PRESIDENT HALL
VICE PRESIDENT LINNANE
COMMISSIONER EDWARDS

7 August 2002

DECLARATION OF GENERAL RULING

This Commission declares by way of a General Ruling that all awards be amended to include the following provisions:

1. Arbitrated Wage Adjustment

(a) Except as otherwise provided herein the wages or salaries prescribed by all awards for full-time adult employees shall be increased from 1 September 2002 by an additional sum of the following amounts per week by way of wages:

- an \$18 per week increase in existing award rates.

(b) The rates for junior employees shall be increased by applying the percentage in the junior wage rates clause applicable to the employee concerned to the relevant minimum classification rate for a full-time adult employee.

(c) All part-time employees shall receive, on a *pro rata* basis, the additional sum appropriate to the minimum classification rate they are employed under.

(d) The rates for adult pieceworkers shall be adjusted by the Registrar in accordance with the practice previously followed in relation to General Rulings declared by this Commission.

(e) In the case of rates of wages or salaries for adult employees expressed as a wage or salary for a period other than a week, the increase consequent upon this Declaration shall be calculated as follows:

For: Annual Salaries		weekly adjustment multiplied by 52
Fortnightly Wage/Salary		weekly adjustment multiplied by 2
Daily Wage		weekly adjustment divided by 5
Hourly Wage	(40 hour week)	weekly adjustment divided by 40
	(38 hour week)	weekly adjustment divided by 38
Casual Rates*	(hourly)	hourly wage (as calculated above) plus 25%
	(daily)	daily wage (as calculated above) plus 25%

(*This would apply when the casual rate is stated as a money amount)

(f) Each award amended to include the rates of pay arising from this Declaration of General Ruling shall include a notation that:

“The rates of pay in this Award are intended to include the arbitrated wage adjustment payable under the 1 September 2002 Declaration of General Ruling and earlier Safety Net Adjustments and arbitrated wage adjustments. [Disputed cases are to be referred to the President.] This arbitrated wage adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award amendments to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Cases or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated wage adjustments.”

(g) Existing allowances in all awards that relate to work or to conditions which have not changed and service increments are to be increased as from 1 September 2002 by 3.5%. This is the percentage increase that the \$18 per week arbitrated wage adjustment bears to the C10 tradesperson's rate in the Engineering Award – State.

(h) Increases to wages or salaries and allowances shall be expressed as follows:

- (i) on annual salaries to the nearest \$1 (with 50c and above being taken upwards);
- (ii) on fortnightly and weekly wage rates to the nearest 10 cents (with 5c and above being taken upwards);
- (iii) on daily wage rates (including casual) to the nearest 1 cent (with 0.5c and above being taken upwards); and
- (iv) on hourly wage rates (including casual) to the nearest 0.05 of a cent (with 0.025c and above being taken upwards).

(i) In giving effect to this General Ruling, the Registrar shall have recourse to a Member of the Full Bench, as may be necessary, on the Registrar's own initiative or an application by a party to an award.

(j) Awards which prescribe or require alternative methods of adjustment shall be adjusted as follows:

Where a member of the Commission has approved a method of calculation of wage rates as agreed to by the parties to an award other than as expressed herein the Registrar may amend the Award concerned in the agreed manner which will be regarded as satisfying the requirements of this General Ruling.

This method shall also be applied to adjust the rates of wages or salaries for junior employees (other than juniors whose rates are expressed as a percentage or fraction of the rate prescribed for an adult employee or for an employee who is a senior).

2. Date of Operation

This Declaration shall apply from 1 September 2002.

Dated 7 August, 2002.

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

Operative date: 1 September 2002
Order – Safety Net Adjustment – Declaration of General Ruling
Released: 7 August 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 287 – application for declaration of a general ruling
s. 288 – application for declaration of policy

Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B753 of 2002) AND The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B755 of 2002)

PRESIDENT HALL
VICE PRESIDENT LINNANE
COMMISSIONER EDWARDS

7 August 2002

Application for Declaration of General Ruling – Application for partial exemption of Sugar Industry – Regard to economic circumstances and independent report – Application for exemption rejected – *Industrial Relations Act 1999* ss. 3 (f), 287 and 288.

DECISION

- [1] On 9 May, 2002 a Full Bench of the Australian Industrial Relations Commission (AIRC) released its decision in the matter of the *Safety Net Review – Wages May 2002* AIRC (PR002002) 9/05/2002 Giudice J, Ross VP, McIntyre VP, Watson SDP, Harrison SDP, Lewin C and Hoffman C. In that decision the Full Bench of the AIRC awarded a safety net adjustment of \$18 per week in award rates with the safety net adjustment being capable of absorption into overaward payments. The decision increased the federal minimum wage by \$18 per week and varied allowances that relate to work and service increments.
- [2] On 13 May, 2002 the Queensland Council of Unions (QCU) filed with the Industrial Registry an application (B753 of 2002) which, following amendment, seeks to flow on those aspects of the decision of the Full Bench of the AIRC. No change is sought, at this time, to the *Statement of Principles* (2001) 167 QGIG 353 except for consequential amendments resulting from the increase in award rates and the Queensland Minimum Wage.
- [3] On the same day the Australia Workers' Union of Employees, Queensland (AWU) filed a similar application (B755 of 2002).
- [4] The Queensland Mechanical Cane Harvesters Association, Union of Employers (QMCHA) and the Queensland Canegrowers' Association Union of Employers (QCGA) seek exemption from any Declaration of a General Ruling that we might make. These applications were heard at the conclusion of the hearing of the QCU and AWU applications.
- [5] The QMCHA's application seeks to exempt the classification of Cane Harvester and Cane Haulout Division 2, Field Sector provided for in the *Sugar Industry Award – State*. The QCGA seeks to exempt Division 2 – Field Sector of the *Sugar Industry Award – State* from the operation of any General Ruling.
- [6] The Full Bench was asked, by both organisations, to consider the economic position (past, present and future) of the Field Sector of the sugar industry including the forecasted low sugar price for the 2002 season. In this regard we were referred to the Report of the Independent Assessment of the Sugar Industry 2002 conducted by Clive Hildebrand (the Hildebrand Report).
- [7] In the application for exemption sought by the QMCHA in 2001 the Full Bench, having heard from Cane Harvesters in the Proserpine area, acknowledged the difficult economic circumstances being experienced by Cane Harvesters in the vicinity of Proserpine. The Hildebrand Report confirms that those circumstances continue to exist in that it concluded, *inter alia*, "[p]rices for contract harvesting in Queensland are in general today lower than cost". We also acknowledge that the Cane Growers have faced difficulties in recent seasons. The Hildebrand Report however identified a number of structural problems in the Queensland sugar industry which would lead us to the view that the difficulties that the industry has faced in recent years and is currently facing are difficulties likely to be experienced in future years. We are concerned that should the applications be successful similar applications in future years would result in an area of Queensland employment that would be treated differently to all other employees on a continuing basis. Similar views were expressed by the Full Benches in both the *2000 State Wage Case* 165 QGIG 25 and the *2001 State Wage Case* 168 QGIG 3.
- [8] On this occasion neither organisation called a witness in support of their application. We are therefore left with submissions from the Bar Table only.
- [9] The Full Bench in 2001 noted that the "employees for whom the application for partial exemption relates are amongst the poorest paid in Queensland". To deny such persons the benefit of any General Ruling would be to deprive such employees of the benefit of "fair standards in relation to living standards prevailing in the community": see s. 3(f) of the *Industrial Relations Act 1999*.
- [10] In the circumstances we reject the application for a partial exemption.

Dated 7 August 2002

D.R. HALL, President.

D.M. LINNANE, Vice President.

K.L. EDWARDS, Commissioner.

Hearing Details:

2002 22 July.

Appearances:

Mr J. Powell for the Queensland Mechanical Cane Harvesters Association, Union of Employers.

Mr G. Trost for the Queensland Canegrowers' Association Union of Employers.

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

Ms D. Ralston for the Queensland Council of Unions.

Released: 7 August 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 427 – change of callings – s. 474 – approval for eligibility rule amendment

Queensland Police "Union of Employees" AND The Queensland Public Sector Union of Employees (Nos. U3 and U4 of 2000)

VICE PRESIDENT LINNANE

1 August 2002

Application to amend eligibility rule of a union – QPU granted leave to amend application – Commission satisfied application made in accordance with *Industrial Relations Act 1999* and *Regulations* and Rules of QPU – No objection to application – Requirements of s. 474 of the *Industrial Relations Act* met – Amendment approved – Application to change list of callings – Change approved – *Industrial Relations Act 1999* ss. 427, 474.

DECISION

- [1] I have before me two applications. The first is an application to amend the eligibility rule of the Queensland Police "Union of Employees" (QPU). The application first came before the Commission for hearing on 25 September 2000. At that time the application was opposed by The Queensland Public Sector Union of Employees (QPSU). In *Queensland Police "Union of Employees" AND The Queensland Public Sector Union of Employees* (2001) 167 QGIG 196 the QPU was found not to have complied with s. 474 (1)(a) of the *Industrial Relations Act 1999* in that the amendment to its eligibility rule had not been proposed under the organisation's rules.
- [2] As a result of that decision the QPU conducted a referendum of its members. I am satisfied that the process undertaken by the QPU on this occasion is in compliance with the rules of the organisation. As a result the QPU sought, and was granted, leave to amend their application to ensure compliance with their Rules.
- [3] I am now satisfied that the application has been made in accordance with the provisions of the *Industrial Relations Act 1999* and the *Industrial Relations Regulation 2000*. I am further satisfied that the proposed amendment to the eligibility rule has been made in accordance with the rules of the QPU.
- [4] The QPSU has also withdrawn its objection to the application and there is now no objection to the amended application.
- [5] There is now no material before me that would enable me to conclude that the persons who will become eligible to join the QPU, as a result of the proposed change, might conveniently belong to any other organisation. Nor is there any material before me that would enable me to conclude that any other organisation would effectively represent such persons in a way consistent with the objects of the *Industrial Relations Act 1999*.
- [6] In those circumstances, I am required by the provisions of the *Industrial Relations Act 1999* to approve the amendment to the QPU Rules and I so do. It should be noted that leave had been granted to the QPU on 12 June 2001 to amend Schedule 3 of its application to delete the term "Watchhouse Officers" and to replace it with the term "Assistant Watchhouse Officers" in the proposed new rule.
- [7] There is a further application by the QPU for a change in its list of callings. The change sought is to reflect the rules of the organisation as amended. This application is also made in accordance with the provisions of the *Industrial Relations Act 1999* and the *Regulations* made thereunder.
- [8] There is now no objection to this change. In those circumstances I approve the change to the QPU list of callings to include within the calling of Police Support Officer the following:

"without limiting the generality of this term, Police Support Officer shall include Assistant Watchhouse Officers".
- [9] I approve the change to the QPU's list of callings.
- [10] The amendment to the eligibility rule and the change to the list of callings takes effect as of Thursday, 1 August 2002.

Order Accordingly.

D.M. LINNANE, Vice President.

Hearing Details:

2000 25 September 2000

2001 16 March and 12-15 June 2001

2002 24 July and 30 July 2002

Appearances:

Mr G. Martin of Senior Counsel, instructed by Gilshenan and Luton, with Mr S. Mahoney and Mr P. Hocken for the Queensland Police "Union of Employees".

Mr D. Staindl of Counsel, instructed by Quinlan Miller and Treston for The Queensland Public Sector Union of Employees.

Released: 1 August 2002

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 74 – application for reinstatement**Bettina O'Connor AND Electroboard Administration Pty Ltd (No. B1836 of 2000)**

COMMISSIONER FISHER

6 August 2002

Application for Reinstatement – Previous decisions – Section 72 *Industrial Relations Act 1999* – Jurisdiction found – Applicant on probation – Witnesses and Credibility – No reason supplied for dismissal – Case law – Section 77 – Dismissal not harsh, unjust or unreasonable – Application refused – Costs refused.

DECISION

This is an application by Bettina (Tina) O'Connor seeking relief from her dismissal from Electroboard Administration Pty Ltd (Electroboard). Ms O'Connor commenced employment as an Account Manager with Electroboard on a six month probationary period on 15 May 2000. She was dismissed on 10 November 2000, several days short of the expiration of that probationary period. By decision dated 23 August 2001 (20002) 168 QGIG 4 the Commission as constituted determined that "the six month period of probation not to be reasonable having regard to the nature and the circumstances of Ms O'Connor's employment. Accordingly, the Commission finds that Ms O'Connor is not excluded by s. 72(1)(b) from s. 73(1) of the Act."

That decision dealt with one other jurisdictional issue, *viz.*, whether an award of the Australian Industrial Relations Commission covered Ms O'Connor's employment. The Commission found that one did not. The decision also set out a case stated to the Industrial Court about the meaning of the term "annual wages immediately before the dismissal" found in s. 72(1)(e)(iii) of the *Industrial Relations Act 1999* (the Act). The crux of the matter was whether commission payments were included in the calculation of wages. This was a necessary point to be determined as their inclusion impacted on whether Ms O'Connor was excluded from bringing an application for reinstatement because her wages exceeded the statutory threshold.

By decision dated 20 September 2001 (2001) 168 QGIG 53, Hall, P found that commission that is paid for sales made and paid pursuant to an employment agreement should not be included in the calculation of annual wages for the purposes of s. 72(1)(e)(iii) of the Act. The respondent sought further clarification of this issue and by decision dated 26 November 2001 (2001) 168 QGIG 358, the Commission as constituted found that it had jurisdiction to hear this application.

Conduct of Case

A hearing on the merits was listed to commence in December 2001. Due to the unavailability of the respondent's Counsel, the hearing was rescheduled to February 2002. The hearing was held over seven days, concluding on 29 April 2002. Written submissions were then filed. Most of the delay in concluding the hearing was caused by the parties' representatives having prior commitments as well as the applicant and Ms Bolton experiencing some important personal milestones.

The applicant has taken issue with the submissions in reply filed by the respondent arguing that they go beyond the directions given by the Commission and deal with matters of fact. The Commission's directions were that the submissions in reply from the respondent respond only to matters of law or jurisdiction as raised by the applicant in their submissions. It is the case that the respondent's submissions in reply go beyond the Commission's directions. To the extent that this is so, I have not considered those submissions in reaching this decision.

The hearing of this case has ventured down many a blind alley, up a few dry gullies and has had its fair share of red herrings. In my view the misadventure occurred because it was not a typical unfair dismissal case. Ms O'Connor was on a period of probation when she was dismissed. For this reason, the respondent did not provide her with a reason or reasons for her dismissal. Some of the other procedural requirements were also overlooked. These matters will be discussed in more detail later. The point is that when the Commission determined that the six month period of probation was not reasonable, for the first time the respondent was required to identify the reasons for the dismissal and any documentation that might support those reasons. As a consequence and given the applicant's onus of proof, the applicant was placed in a position that was more one of responding to and pursuing matters raised in cross-examination. During the course of proceedings Counsel for the applicant sought the production of documents from the respondent that were not originally sought in discovery. The applicant had her evidence interrupted to allow the newly produced material to be put to her. In all, the applicant gave evidence over three days.

The main witness for the respondent, Marie Bolton, a Director of the Electroboard, also spent a considerable time giving evidence both examination in chief, given the range of new matters that had been introduced when the applicant's case was being heard, and under cross examination.

As will be shown, little of the new material was relevant to my decision.

During the hearing:

- both parties made allegations of witness tampering;
- the respondent attempted to put allegations of theft from Electroboard to one of the applicant's witnesses; and
- the applicant attempted to put allegations to Ms Bolton of Company fraud by way of tampering with clocks on products and selling used products as new ones.

The allegation of witness tampering made by the applicant related to conduct by Ms Bolton where, while a passenger in a car driving to the Gold Coast, she saw a former employee of Electroboard in another vehicle. This employee had been dismissed from Electroboard by Ms Bolton and had given evidence in support of Ms O'Connor in the hearing of the preliminary matters. Ms Bolton claimed that in causing this employee to stop on the Gold Coast Highway was simply for the purpose of having a chat. Ms Bolton also telephoned this former employee in December 2001 to extend Christmas greetings. The applicant contended that in initiating this contact, Ms Bolton was attempting to influence the witness in terms of the evidence she might give about Electroboard and Ms Bolton. I am inclined to agree. The employee had left Electroboard under strained circumstances. Moreover, Ms Bolton was aware that she was likely to be called as a witness given her earlier appearance. Ms Bolton's attempt at a belated reconciliation, timed to coincide with proceedings in which the former employee was due to give evidence against her former employer, can only be construed as mischievous at best and attempting to influence the witness at worst.

The respondent made allegations against the applicant's Counsel as he had telephoned a witness who resides overseas and was to give evidence by telephone. The Commission is uncertain about the purpose of this contact, however, given that Counsel rather than the applicant made it directly, I see it in a less serious light than Ms Bolton's conduct described above.

The Commission did not permit the allegation of theft to be pursued with the witness concerned. The Commission is not the appropriate forum in which to pursue such matters and the allegation had no bearing on the matter I had to decide. With respect to the last allegation the Commission received an undertaking from the respondent that the concerns expressed by the applicant in her statement of evidence did not form any basis of the decision to dismiss the applicant. Accordingly, the Commission did not allow it to be pursued on the ground that it was not relevant to the matter the Commission had to determine, that is, whether the dismissal was harsh, unjust or unreasonable.

Witnesses and Credibility

The determination of this matter has not been assisted by the demeanour of the three key witnesses – Ms O'Connor, Ms Bolton and Graham Huggins, who was Branch Manager for the most part when Ms O'Connor was employed. Although this application was heard more than eighteen months after the dismissal occurred, the passage of time had not quelled their anger, frustration or quest for vengeance. Of course, the other difficulty that arises from the delay between the dismissal and the hearing is that the passage of time palls the freshness of memory and ability to recall conversations, meetings and where people were on particular dates and for what reason.

The Commission heard evidence from the following witnesses:

For the applicant:

Bettina O'Connor: applicant.
 Karen Slipais: Account Manager (until 25 August 2000).
 Irena Jansa: Account Manager (September – November 2000).
 Faiae Kepu: Receptionist.
 Christopher O'Connor: applicant's husband.

For the respondent:

Warren Bolton: Director of Electroboard.
 Marie Bolton: Director of Electroboard.
 Graham Huggins: Brisbane Branch Manager (1 July–2 November 2000).
 Brian Adams: Brisbane Branch Manager (until 25 May 2000).

Of these witnesses the critical evidence was given by the three key witnesses identified earlier: Ms O'Connor, Ms Bolton and Mr Huggins. The Commission had great difficulty with each of their credibility. I do not draw these conclusions lightly because I had the opportunity to observe and listen to their evidence over an extended period.

Tina O'Connor

During her time in the witness box Ms O'Connor was subjected to lengthy cross-examination and was required to respond to a range of allegations that purportedly were the basis of her dismissal or formed after acquired knowledge that further supported the decision to dismiss. Ms O'Connor was accused of theft and fraud as well as causing the dysfunction of and the fall in sales in the Brisbane Branch office in the period May to November 2000. Ms O'Connor stood up well to the pressure of dealing with such serious allegations and, unlike the key witnesses for the respondent, did not shout at the advocate or become non-responsive.

Ms O'Connor presented as an intelligent person who was assertive and unafraid to speak her mind, but bordered on being obdurate. At times, and especially in relation to the meeting of 3 November 2000, which is the critical incident in this employment relationship, Ms O'Connor was disingenuous and did not provide unequivocal responses. She tried to portray herself as being without fault or blame in any of the matters raised. This was particularly true in regards to the working relationships in the Brisbane Branch yet it was clear that she was a player in the disharmony. It was the characteristics of blamelessness and obduracy that contributed to the implosion that occurred. The credibility of her evidence was coloured by these factors.

Marie Bolton

Ms Bolton is one of two Directors of Electroboard. She has responsibility for fifty Account Managers employed by Electroboard across Australia and in addition has her own particular duties as well as her directorship responsibilities of the Company to perform.

I found Ms Bolton to be the most vitriolic witness I have encountered in my years on the Commission. Even allowing for the rancour that is usually present in dismissal proceedings, the lengths to which Ms Bolton went to personally denigrate Ms O'Connor were extraordinary. She was vicious and at times her descriptions of Ms O'Connor bordered on the abusive. For example, during the course of her evidence, Ms Bolton variously referred to Ms O'Connor as shrewd, clever, greedy, ambitious, pushy, calculating, manipulative and cunning. She accused Ms O'Connor of:

- stealing from her colleagues;
- starving (another Account Manager) out of her commission;
- poisoning (the minds of) people;
- undermining the Branch Manager; and
- whiteanting the whole operation.

These are just a sample taken from Ms Bolton's evidence. There were more accusations about Ms O'Connor's behaviour and unsavoury descriptions of her character. The difficulty I have with Ms Bolton's evidence is that her continual demeaning of Ms O'Connor was so excessive that it seriously damaged her credibility.

Graham Huggins

Mr Huggins was visibly upset about having to give evidence, or perhaps more accurately, having to recount his experiences in the Electroboard Brisbane Branch office during the period of Ms O'Connor's employment. He said that he had suffered a nervous breakdown and pointed the finger of blame for his ill health squarely at Ms O'Connor, yet he could not speak of any incident or event or series of events that could justify his contention. It can only remain as speculation.

Because of this belief, which was firmly entrenched in Mr Huggins' mind, he presented as emotional and petulant in the witness box. Indeed the Commission had to caution him on several occasions that his failure to respond to questions or his simple agreement to questions with which he obviously did not agree would not assist his credibility nor the respondent's case.

I found Mr Huggins to be so bitter that I can only conclude that much of his evidence was tailored so as to present Ms O'Connor in as poor a light as possible.

Reasons for Dismissal

Ms Bolton's evidence was that she looked for the characteristics of attitude, loyalty and honesty in her staff and that by the end of six months Ms O'Connor had failed on every count. There was simply no decision to be made.

Translating this into specific issues, both performance and conduct issues were raised as reasons for the dismissal. These can be captured under the following headings:

(i) Timekeeping Issues

- Not working the required hours and not attending the office.
- Falsely claiming to be at client meetings or regularly attending to clients near her home at the start or end of a day.

(ii) Account Matters

- Taking accounts from other Account Managers.
- Claiming false commissions as a result of working on accounts that had not been allocated to her.
- Not acting in accordance with Company policy in respect of a significant tender.

(iii) Working Relationships

- Undermining the Branch Manager, Graham Huggins and causing his resignation.
- Engendering low staff morale.
- The termination of one staff member and the non-performance of another.

A number of these matters were identified in Ms Bolton's witness statement but were not explained in any real detail. Many were not raised with Ms O'Connor during her employment at all or in a manner that would make her realise that her employment might be at risk. Some were argued to fall into the realm of after acquired knowledge and accordingly could not have been raised with her during her employment. Of all of the issues raised the most critical to the decision to dismiss Ms O'Connor was that of working relationships.

Both Mr Huggins and Ms Bolton attempted to paint Ms O'Connor as the driving force behind simmering office tensions and accused her of working to undermine Mr Huggins. Mr Huggins said he "gave up" trying to manage Ms O'Connor and Ms Bolton branded her as "unmanageable". The evidence does not support these views. Rather the evidence shows that Ms O'Connor was given greater responsibility within a short time of her appointment. This included being given responsibility for strategy and planning and the supervision of a new Account Manager. These are not duties that are usually allocated to significantly underperforming staff. In addition were Ms O'Connor to be as unmanageable as claimed then it was open to Electroboard to take a range of corrective action from informal feedback to more formal counselling processes and the issuing of warnings. As Ms O'Connor was on a probationary period of employment it would have also been open to the employer to dismiss her if this unmanageability manifested itself as early as Ms Bolton and Mr Huggins claimed. Given that no disciplinary steps were taken I am not satisfied that Ms Bolton's and Mr Huggins' portrayal of Ms O'Connor as being unmanageable is accurate.

Certainly, disharmony and low morale were evident during the period of Ms O'Connor's employment. It is also the case that there was a significant turnover of staff from August to early November 2000. Approximately six people out of a small staff either resigned or were dismissed in this time. The proposition that Ms O'Connor was responsible for the dismissal of one staff member who had a reasonable period of service does not stand up on the evidence. Ms Bolton had responsibility for dismissing staff and to suggest that a new employee influenced such a strong minded woman defies logic. On Ms Bolton's evidence the employee concerned had received warnings about her performance that were independent of anything associated with Ms O'Connor. In this case all of the blame for the troubles being experienced in the Brisbane Branch were laid at the feet of Ms O'Connor. This was done as a retrospective reconstruction of events and in my view to scapegoat her.

I am satisfied that Ms O'Connor contributed in part to the poor working relationships being experienced in the Brisbane Branch office. Ms O'Connor has an abundance of self-confidence, self-assurance and assertiveness. These are each admirable traits but I am satisfied that on occasion they manifested as more negative qualities of an inability to accept criticism and persistence to ensure that her own view prevailed over that of her Branch Manager. Part of her reason for not accepting the decisions of the Branch Manager stemmed from her acknowledged lack of respect for him.

Her self-belief and inability to accept criticism was demonstrated by the tender incident. When Ms Bolton and Mr Huggins were overseas a significant tender arrived in the Brisbane Branch office. Rather than forwarding the tender to the tender department of Electroboard, otherwise consulting with head office or checking the Quality Manual about the correct procedure, Ms O'Connor rang the business offering the tender. She advised that Mr Huggins was overseas and was informed that the matter could wait until his return. Ms O'Connor then placed the tender documents on Mr Huggins's desk. The difficulty with the suggestion that the matter could wait is that it left very little time for the tender to be completed on Mr Huggins' return. When the matter was raised with Ms O'Connor she refused to recognise that her actions could have detrimentally affected Electroboard.

An example of attempting to ensure her view prevailed over that of her Branch Manager was when Ms O'Connor challenged the allocation of sales territories by Mr Huggins and put arguments forward to Ms Bolton about the reasons she should be allocated particular clients that would not have ordinarily fallen to her. Despite her being only a new employee, Ms O'Connor was prepared to pursue her beliefs about correct territory allocations at the expense of the decision of the Branch Manager and accepted practice. In addition she gave evidence that she made a "judgement call" not to hand over certain territory to a new Account Manager. Although she believed this was because the new employee did not have sufficient experience to deal with the account, the evidence showed that Ms O'Connor believed that she was about to make a significant sale to this client. Her belief about the new person's experience may have been correct but her actions were contrary to company practice and without authorisation from the Branch Manager.

In fairness to Ms O'Connor it also needs to be said that during the hearing both Ms Bolton and Mr Huggins argued that Ms O'Connor worked with many clients that were not in her territory. While some clients were shown not to have been allocated to her, in their haste to denigrate Ms O'Connor, other

accounts were shown to have been correctly within her territory. These errors further highlighted the lengths that Ms Bolton and Mr Huggins were prepared to go to paint her in a bad light. Their need to retract some of the allegations caused their credibility to be more damaged.

The contributions of senior staff to the tensions in the Brisbane office cannot be overlooked. When Ms O'Connor was first employed, Brian Adams was the Brisbane Branch Manager. He resigned from this position effective 25 May 2000 to go overseas. Mr Huggins was appointed as his replacement. Mr Huggins had been employed by Electroboard since 1996 and had been a family friend of Warren and Marie Bolton for many years prior to this. His previous experience had been in commercial sales and marketing. The bulk of his career had been with the Army and he had spent a significant amount of time involved with training. I am satisfied that Mr Huggins did not possess the necessary skills to be the Branch Manager especially of an office where the staff were predominantly women. All the female staff of Electroboard Brisbane office called to give evidence related events and incidents of Mr Huggins making unnecessary and demeaning personal comments about particular staff members. In addition, Mr Huggins' own evidence was that he was not a competent manager and he admitted to not being able to handle certain staff issues. In my view Mr Huggins' own management style contributed to the worsening situation in the office and he was unable to recognise that modification of his own behaviour could have rectified the problem.

I consider that Ms Bolton's management style did not assist the situation in the Brisbane office. For a period, relationships between Ms Bolton and staff members would be open and amiable and later tense and hostile for no real apparent reason. In light of Mr Huggins' long association with Ms Bolton, Mr Huggins gave the most telling evidence about her management style. He described Ms Bolton's management style as "divide and conquer". He said she was a "difficult woman" and had been sworn at by her. Mr Huggins also conceded that he might have said to Mr Bolton, that "Marie is impossible to work with and she is a bitch". Witnesses also gave evidence that at one point Mr Huggins became so frustrated with Ms Bolton after speaking to her on the telephone that he punched a wall. Karen Slipais, an Account Manager who had eighteen months' experience with Electroboard, described Ms Bolton as "erratic" and "running hot and cold". This evidence seems to support Mr Huggins' own perceptions.

It is also borne out by the experience of Ms O'Connor. Within a short time of commencing employment Ms O'Connor had been allocated strategy and planning issues on which she reported to Ms Bolton directly. Although Ms Bolton said that Ms O'Connor had been allocated these responsibilities because of the difficulties in the relationship between Ms O'Connor and Mr Huggins I believe this to be a reconstruction of events. The evidence supports the view that Ms O'Connor was allocated these responsibilities as a reward and not to more closely supervise her. There is also evidence that Ms Bolton believed Mr Huggins to have shortcomings as a manager and that she discussed this with Ms O'Connor, a new employee on probation. That she was given these responsibilities and participated in such sensitive discussions can only confirm Ms O'Connor's evidence that the working relationship between her and Ms Bolton was quite close and for the most part the relationship was friendly.

Many of the discussions between Ms Bolton and Ms O'Connor about Mr Huggins seemed to centre on his shortcomings as a manager. There is no evidence that on receipt of this information Ms Bolton acted to provide Mr Huggins with the necessary support and training to overcome his perceived deficiencies and to assist him to become an effective manager. Rather, the failure to act on staff dissatisfaction reinforces the divide and conquer description of Ms Bolton's management style. It also demonstrates the reason the Brisbane office continued to fester to a point where matters came to a head and resulted in Ms O'Connor's dismissal.

Although as I have already said Mr Huggins was unable to point to anything tangible by Ms O'Connor his evidence was that he was firmly of the view that Ms O'Connor was marshalling forces against him to have him removed as Branch Manager. Whether he held that view at the time or whether the events have subsequently been reconstructed will not be resolved here. Whatever the case, it is true that Mr Huggins was feeling the pressures of being Branch Manager. On one occasion earlier he had resigned as Branch Manager to Mr Bolton because of Ms Bolton's unreasonableness. His resignation did not stand. He also sought to tender his resignation to Ms Bolton on 12 October 2000. Mr Huggins said that the reasons on this occasion related to the division in the office and the fall in his personal sales as a result of assisting two new sales people. It is also the case that Mr Huggins was experiencing serious health issues. I am satisfied that it was a combination of all of these factors which made life in the Brisbane office difficult for staff and for Mr Huggins to realise that his position as Branch Manager was untenable.

Events of 2 to 10 November 2000

On 2 November 2000 Mr Huggins tendered his resignation as Branch Manager to Ms Bolton. Mr Huggins continued employment with Electroboard as an Account Manager. Mr Huggins' resignation and his re-employment were announced to staff in Brisbane office including Ms O'Connor that day.

Despite Mr Huggins' resignation, on the morning of 3 November 2000 Ms O'Connor confronted Ms Bolton and said to her that there were a number of matters that they needed to discuss. These related to Mr Huggins. As Ms O'Connor was proceeding to meet with a client a meeting was arranged for that afternoon.

On her return to the office Ms Bolton asked Ms O'Connor to come into the meeting room. Mr Huggins was already seated at the table. Ms Bolton commenced proceedings by saying loudly to Ms O'Connor words to the effect of "What's this about you starting gossip and lowering staff morale?". The meeting deteriorated with Ms Bolton making further accusations against Ms O'Connor and Ms O'Connor largely seeking clarification.

Ms O'Connor was taken aback both by Ms Bolton's agitated manner and the nature of accusations. Until that point their relationship had been friendly. I accept that during this meeting Ms Bolton shouted and became louder during the meeting. This is the same behaviour she displayed in the witness box under cross-examination. While she attempted to explain this as just part of her personality and hence should be accepted, Ms Bolton is one of the Company's directors and the employer. An approach of asking Ms O'Connor to outline her concerns would have been more conducive to a productive meeting. Instead, her provocative introduction set the tone for the meeting that degenerated into a shouting match between Ms Bolton and Ms O'Connor.

Ms O'Connor became distressed. Part of this I believe was attributable to Ms Bolton's manner and the nature of her accusations. The other reason for Ms O'Connor's distress was that Ms Bolton had turned on her. Whereas in the past Ms Bolton had encouraged her complaints about Mr Huggins, she was now supporting him and treating Ms O'Connor as she had treated Mr Huggins on occasion in the past. Ms O'Connor stood up from the table and said to Mr Huggins, who had remained silent during the meeting, "You're a pathetic individual". To Ms Bolton she said words that have been highly contentious in these proceedings. Ms O'Connor's evidence was that she said, "You either believe him or me" compared with both Ms Bolton's and Mr Huggins' evidence which was that Ms O'Connor said "It's either him or me."

While I have had difficulty accepting much of the evidence of Ms Bolton and Mr Huggins with respect to this matter I have concluded, on balance, that the words that Ms O'Connor said were "It's either him or me." I have reached that view for the following reasons. It is evident that Ms O'Connor was distressed and under some pressure at the meeting. In such circumstances it is more probable that a person would issue a common ultimatum such as "It's either him or me" rather than make the statement Ms O'Connor claims she made. Moreover, under cross-examination Ms O'Connor conceded that it is possible that she said "It's either him or me."

Although the dismissal did not take place until a week later I am satisfied that Ms Bolton acted on the ultimatum that had been given to her by Ms O'Connor. Ms Bolton was faced with a situation where there was ongoing tension in the Brisbane office despite Mr Huggins' resignation on 2 November 2000. It would have been reasonable to believe that Mr Huggins' resignation was the catalyst to restoring harmony in the Brisbane office.

After Ms O'Connor issued her ultimatum she cancelled a client appointment, left the office and went home. She worked on 6, 7 and 8 November 2000. On 6 November Ms O'Connor received a telephone call from Ms Bolton saying that she was going "to turn the Branch around or turn it over". By this she meant the situation in Brisbane had to improve or new staff would be recruited. During that conversation Ms O'Connor identified those staff that she believed were performing but did not include Mr Huggins in the list. This further reinforced to Ms Bolton that action needed to be taken to restore harmony to the Brisbane Branch. After Ms O'Connor's outburst on 3 November 2000 Ms Bolton concluded that Ms O'Connor was "a very damaging influence on the whole Brisbane operation."

Ms Bolton also said that on 6 November 2000 she examined the commission claims for the preceding month and realised that Ms O'Connor had claimed sales from clients that were not allocated to her territory. This was the last straw as far as Ms Bolton was concerned.

Over the next couple of days the issues about time keeping arose with Ms Bolton questioning Ms O'Connor and other staff in the office as to her whereabouts.

On 8 November 2000 Ms O'Connor asked Ms Bolton to provide her with further training on a particular product as Ms O'Connor believed a particular client could make a substantial purchase. This request was angrily denied by Ms Bolton who apparently believed that the client concerned was the one Ms O'Connor was seeing that afternoon and there would be insufficient time to train her on the product.

Ms O'Connor did not attend for work on 9 and 10 November 2000 due to a migraine. On 10 November 2000, Warren Bolton, in the company of Brian Adams, a former Brisbane Branch Manager of Electroboard, went to Ms O'Connor's home where he handed her the letter of dismissal. Ms O'Connor asked him the reason for the dismissal and he replied that "We don't have to give you a reason.". This response was given in light of their belief that as Ms O'Connor was still on her probationary period of employment, no reason for dismissal was required.

Approach to Determining this Application

The respondent submitted that the Commission should consider the circumstances of the applicant and the respondent at the time of the dismissal and not at the time of the hearing. The justification for that submission is that at the time of the dismissal both parties were of the belief that the applicant was still engaged on probation and thus the respondent was entitled to take the action that it did without the need to provide reasons. I accept Ms Bolton's evidence that before dismissing Ms O'Connor she checked the employment agreement and confirmed that the probationary period had almost ended.

The applicant rejected the above submission and argued that "the applicant was entitled to expect the respondent would not dismiss her harshly, unjustly or unreasonably even bearing in mind that under her contract of employment she was still within her probationary period.". The applicant further submitted that because the probationary period was due to expire in a few days, the dismissal was particularly harsh, unjust or unreasonable.

Both parties cited various cases dealing with dismissals during probationary periods of employment. The cases cited by the applicant are primarily ones where the Commission had jurisdiction under legislation that existed at the time to deal with dismissals of employees who were serving periods of probation when they were dismissed. The Commission certainly supports and encourages the notion that probationary employment is a time for each of the parties to the employment contract to trial and test the other to determine suitability. Additionally and more importantly, during a period of probation any reasonable employer should provide to the employee concerned training, assistance, monitor and provide feedback on performance and articulate reasonable expectations of performance and conduct. In this jurisdiction, the Commission no longer has the power to intervene in cases of employees who have been dismissed within a three month period of probation (except where an invalid reason is alleged) or where a longer period is agreed in writing in advance and is reasonable. The difficulty in this case is that the Commission determined the six month period of probation to be not reasonable in circumstances where the employment had long since ceased.

The approach to the determination of this application is whether the dismissal of Ms O'Connor was harsh, unjust or unreasonable. In considering the case of a teacher who had been dismissed while serving a period of probation, Hall, P said:

"However, the issue before the Commission was not whether Mr Alamzeb was fairly treated as a probationary employee but whether he was unfairly dismissed.". (*Alamzeb and Education Queensland* [2002] 170 QGIG 190)

A Full Bench of the Industrial Relations Commission of New South Wales on an appeal from a single Commissioner considered the legal principles applying to employees dismissed while serving periods of probation. (*Buckman and Anor v Burdekin Resources NL* (1998) 85 IR 415). In that decision the Full Bench said at p.417:

"Apart from the provisions in the Regulation which extend the categories of probationers excluded from making such applications, there is no basis upon which it properly could be concluded that any general principles apply to applications made by dismissed probationers which differ from principles applicable to applications from other categories of dismissed employees. An applicant who was a probationer at the time of dismissal must establish to the satisfaction of the Commission that the dismissal was harsh, unreasonable or unjust. There are no additional requirements contained in the Act, or otherwise, such as would require a dismissed probationer to establish that the employer's decision to terminate the employment relationship was made mala fides."

And later at p.418:

"The onus to be discharged by an applicant in unfair dismissal proceedings is to establish, to the satisfaction of the Commission according to the civil standard on probabilities, that the dismissal was harsh, unreasonable or unjust...an applicant's probationary status is a matter which may properly be taken into consideration in assessing whether a dismissal was harsh, unreasonable or unjust ...".

These principles were confirmed in another appeal decision by a Full Bench of the Industrial Relations Commission of New South Wales in *Price v Box Valley Pty Ltd* (1999) 90 IR 480. It follows then that the proper approach to deciding the application is to determine whether the dismissal was harsh, unjust or unreasonable. In reaching this view a factor that can be considered is the applicant's probationary period of employment that existed at the time of her dismissal, notwithstanding the Commission has subsequently found that period of employment to be not reasonable.

Was the Dismissal Harsh, Unjust or Unreasonable?

Section 77 of the Act lists the matters the Commission must take into account in determining whether a dismissal was harsh, unjust or unreasonable. The first of those is whether the employee was notified of the reason for the dismissal. The evidence from both Mr Bolton and Ms O'Connor was that a reason was not given. This was because Electroboard did not believe a reason was necessary when dismissing an employee during a probationary period.

An employer is not normally required to provide a reason in such circumstances. However, as this case has amply demonstrated, the absence of a reason creates confusion and disbelief in addition to the normal upset that an employee experiences on being dismissed. It would be sound management practice

whenever an employee is being dismissed, whether that is during a probationary period or not, for an employer to provide a reason. This enables the employee to better understand the situation and, hopefully, to learn from their mistakes.

The Act also requires the Commission to consider whether the reason related to the employee's conduct, capacity or performance or the operational requirements of the business. Where the reason relates to conduct, capacity or performance, then the Commission must consider whether the employee was warned about or given the opportunity to respond to the allegation about the conduct, capacity or performance.

Throughout the proceedings the employer identified a number of reasons justifying the dismissal. They have been listed above under the headings of timekeeping issues, account matters and working relationships. Were all these to be true, then the respondent did not issue any warnings, hold counselling sessions or issue other corrective advice to the applicant in relation to these matters. While these issues surfaced during the employment of Ms O'Connor I am not satisfied that they were of such moment as to warrant corrective action being taken. In reality, most only surfaced during the last week of Ms O'Connor's employment and by that time Ms O'Connor had issued her ultimatum. Consequently, I am of the view that these reasons only became significant when the Commission found the probationary period to be not reasonable. The effect was that the respondent then had to elevate and magnify any concerns it had with the applicant's performance and conduct. The venom that was unleashed by Ms Bolton towards the applicant during the hearing was in part a product of her having to find and articulate justifiable reasons for the dismissal when until that point her decision had been unable to be challenged.

Having listened at considerable length and in tawdry detail to the reasons for the dismissal, I am satisfied that there were compelling reasons that can withstand scrutiny. These reasons related to Ms O'Connor's conduct and especially to the operational requirements of the business that existed at the time. All of the evidence pointed to disharmony in the Brisbane Branch office. It was apparent to all employees and eventually to Ms Bolton. It was affecting working relationships and impacting on the efficiency of the business. There were a variety of contributing factors to that situation including Mr Huggins' own inadequacies in the position, Ms O'Connor's obduracy and Ms Bolton's erratic and divisive management style.

Mr Huggins' resignation on 2 November 2000 should have been the turning point for the Brisbane Branch. Those who had perceived him as unsatisfactory, specifically Ms O'Connor, should have had the grace to accept the situation, which was after all, to their satisfaction. For reasons not fully disclosed Ms O'Connor could not let the matter rest. She wanted to continue to voice her concerns about Mr Huggins on 3 November 2000 despite his no longer holding a supervisory position. Ms O'Connor's request for a meeting and the meeting of 3 November 2000 were clearly the critical events, which turned the tide against Ms O'Connor. In her evidence she admitted that at that meeting she recognised "the writing was on the wall" as regards to her employment.

It is unarguable that Ms Bolton conducted the meeting of 3 November 2000 poorly and unprofessionally. Had Ms Bolton genuinely wished to try to resolve the tensions between Mr Huggins and Ms O'Connor she could not have selected a worse way. Ms O'Connor's distress was not an unreasonable response. However, she acted unwisely and irrationally in putting an ultimatum to Ms Bolton. Ms O'Connor would surely have witnessed enough of Ms Bolton to realise that Ms Bolton would no doubt rise to the challenge. There really was no choice: an employee of four years' service and a long standing family friend or an employee with six months' service, who was still serving a period of probation and by that point considered to be a troublemaker.

The evidence was that Ms Bolton effectively made up her mind to dismiss Ms O'Connor over the weekend of 4 and 5 November 2000 after her conduct of issuing the ultimatum on 3 November. The events of the first three days of the following week were really just a sideshow. The matter of Ms O'Connor claiming commission that was not hers was a consideration but in my view reinforced the decision that had essentially been taken in principle. The critical incidents were those of 3 November 2000. It was the conduct of issuing the ultimatum that had a significant bearing on the decision to dismiss the applicant. In the context of a dysfunctional Brisbane office, the operational requirements of the business dictated that such conduct could not be tolerated. A cause of that dysfunction had to be removed. The decision was made easier by Ms O'Connor's ultimatum and the fact that she was still on probation.

At 3 November 2000 the applicant would have known she was still serving a period of probation and surely would have realised within a short space of time after the meeting that her impetuous and rash behaviour would jeopardise her further employment. A warning about the conduct was not appropriate given it was the employee's ultimatum to the employer to make a choice between employees. In this case Ms O'Connor did not seek to recant from her ultimatum nor did she make any conciliatory overtures to Ms Bolton. In circumstances where an employee gives their employer an ultimatum and the employer decides to act on that, then unless mitigating circumstances exist, dismissal would not generally be found to be harsh, unjust or unreasonable. I expect that any conciliatory approach to Ms Bolton by Ms O'Connor might have been in vain but it would be the type of mitigating circumstance that would have influenced an employer to reconsider their position. Clearly, the applicant's probationary employment was a persuasive factor in Ms Bolton's decision. It is a reasonable and relevant matter to be considered in determining whether the dismissal was harsh, unjust or unreasonable.

For the foregoing reasons the Commission finds that the dismissal of Ms O'Connor was not harsh, unjust or unreasonable. The application is refused.

Costs

Although briefly touching on the issue of costs, both parties reserved their positions to address the Commission further.

This case has caused considerable costs to be incurred by each of the parties. In the interests of minimising further costs, the Commission has decided to deal with the matter in the absence of submissions.

The Commission is not prepared to award costs. That Ms O'Connor was dismissed without any reason was grounds for her to pursue her application. In the absence of any reason being disclosed Ms O'Connor was entitled to believe that her dismissal was unfair.

Earlier in this decision I referred to the length of this hearing and the reasons for that. Each party contributed to the need for the production of a substantial volume of material, protracted examination and cross examination of witnesses. From the certificate that was issued after the conferences it is clear this application could have been settled cheaply in comparison to the costs that have been incurred by both parties. In all of these circumstances I consider the awarding of costs against the applicant to be inappropriate and unreasonable.

Order accordingly.

G.K. FISHER, Commissioner.

Appearances:

Mr A. C. Harding (Barrister) instructed by Ms E. Vogler of Gilshenan and Luton for the applicant.

Mr L. Moloney (Livingstones Australia) and with him Ms M. Bolton on behalf of the respondent.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement***Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees
and Australasian Correctional Management (No. B300 of 2002)**

COMMISSIONER FISHER

5 August 2002

Application for Reinstatement – Death in Custody – Inmate allegations – Investigation – Applicant to be transferred – Verbal abuse of inmates by applicant – Incident in Airlock – CERT called – Applicant suspended on full pay – Breach of Code of Conduct – Disciplinary hearing – Applicant dismissed – Gross Misconduct – 4 weeks in lieu – Decision appealed – Dismissal upheld – Procedural Fairness found – Alleged inmate conspiracy – Previous warning – Dismissal warranted – s. 77 *Industrial Relations Act 1999* – Applicant found to have provoked a serious and potentially dangerous incident – Applicant found to have breached Code of Conduct – Application refused.

DECISION

On 3 January 2002 an inmate of the Arthur Gorrie Correctional Centre died while in custody. This inmate was resident, until his death, in the unit where Corrective Services Officer Mervyn Ngatai worked.

Deaths in custody are the subject of a police investigation as well as an internal prison investigation. On 8 January 2002, when the police were present at Arthur Gorrie investigating the inmate's death, three other inmates housed in Mr Ngatai's unit made allegations to the police that Mr Ngatai had made insensitive and demeaning comments to the inmate shortly before his death.

The police reported the allegations to the Correctional Manager, Intelligence, Larry McGregor, who relayed the information to Acting Operations Manager, Steve Murray. Together, Mr McGregor and Mr Murray interviewed the three inmates who made the allegations to the police. Mr Ngatai was present in the unit when the interviews occurred. As a result of the allegations made by the inmates Mr Murray discussed with Mr McGregor a change of units for Mr Ngatai until the allegations were dealt with.

Mr Murray met with Mr Ngatai at about 2 p.m. on the afternoon of 3 January 2002. He advised Mr Ngatai that allegations had been made against him. Sufficient detail of the allegations was given by Mr Murray for Mr Ngatai to identify the inmates making the allegations without the names of the inmates being revealed. Mr Murray informed Mr Ngatai of the decision to move him to another unit for the start of his shift on 9 January 2002 pending the outcome of the investigation into the allegations.

After meeting with Mr Murray, Mr Ngatai did not immediately return to his unit. On his way out of the staff dining room where the meeting had been held, Mr Ngatai encountered Reginald Whitmore, another correctional officer who had been Mr Ngatai's partner in certain units and his supervisor for a period of time. On 8 January 2002 Mr Whitmore was acting as Correctional Manager. Mr Ngatai told Mr Whitmore of the complaints inmates had made. Mr Whitmore was unaware that complaints had been formally made and assumed it was an off hand remark made to another officer. He suggested to Mr Ngatai that he talk to the inmates in his unit and see whether they had any "whinges". Mr Whitmore and Mr Ngatai agreed in evidence that it was their practice to discuss any complaints an inmate had about an officer with that inmate before the formal process commenced.

Mr Ngatai said that Mr Whitmore gave him a piece of paper to record the whinges of inmates. Mr Whitmore cannot recall doing so.

After speaking with Mr Whitmore Mr Ngatai did not return immediately to his unit but went to complete the balance of lock down training in which he had been participating.

Mr Ngatai returned to his unit at about 2.30 p.m. In an interview on 10 January 2002 Mr Ngatai said that he had returned "fuming" as he was angry about the complaints made by the inmates. Mr Ngatai told another Corrective Services Officer, Peter Hughey, and a Counsellor, Sally Anne Upton, who were both present in the officer's station at the unit, that he was angry about the complaints.

When Mr Ngatai saw one of the inmates who made the complaint walk past the officers' station, colloquially known as the fish bowl, Mr Ngatai called him by the derogatory term of "dog". According to Mr Hughey and Ms Upton, Mr Ngatai then escalated his verbal abuse. He went out on the floor where all the inmates were and continued to rant. The language used by Mr Ngatai was foul and offensive.

Not surprisingly one of the inmates took offence at Mr Ngatai's vile abuse and took his shirt off and offered to sort the matter out in the yard. In reply, Mr Ngatai called the three inmates who had made the allegations into the airlock to have the matter sorted out there. While in the airlock, Miss Upton said the abusive language from Mr Ngatai continued. She said Mr Ngatai was standing in close proximity to one of the inmates and was concerned that the verbal altercation would escalate into physical violence.

Meanwhile a number of inmates had gathered around the fishbowl and door to the unit and were shouting for the incident to end. Some were banging on the glass and door. Mr Hughey was concerned for the safety of Mr Ngatai and Miss Upton and was also concerned that a riot might ensue. He called for back up. When the back up did not arrive within a short time, a critical emergency response team (CERT) was called. When officers arrived in response to the CERT call, the incident was quickly defused.

The incident took only a few minutes in total and did not result in any physical violence.

The next day Mr Ngatai was suspended from duty with pay pending an investigation into the incident. Richard Laws, Manager, Investigations, conducted the investigation. Mr Laws interviewed Mr Ngatai, Mr Hughey, Miss Upton, two of the inmates involved as well as Mr Murray and Mr McGregor. As a result of his investigation Mr Laws recommended that Mr Ngatai appear before a disciplinary hearing in relation to an alleged breach of the Code of Conduct, that is, "that staff be courteous and fair in their dealings with all prisoners, inmates, detainees, colleagues and members of the public, irrespective of race, religion, gender, disability, sexual orientation or any other factors."

A disciplinary hearing was conducted by Kevin White, General Manager of the Arthur Gorrie Correctional Centre on 1 February 2002. Mr Ngatai was able to have a support person present at the hearing as an observer. He was given access to all relevant material and had the opportunity to comment on the reports. Mr Ngatai was also able to call witnesses and to supply any written material prior to the hearing. After considering all that had been put before him Mr White decided to dismiss Mr Ngatai from the employment of Australasian Correctional Management Pty Ltd (ACM), the operator of the Arthur Gorrie Correctional Centre.

Mr Ngatai was dismissed for gross misconduct for breaching the Code of Conduct in the following ways:

- “
- Unprofessional conduct in that you made a threat consistent with intent to be partial in the exercise of your official functions in direct response to a complaint made against you by prisoners.
 - Malicious harassment of prisoners in that you repeatedly shouted at the inmates calling them ‘fucking dogs’.
 - Any other act which by its nature and impact severely limits the employee’s ability to perform the essential elements of the job. It is fundamental that persons are permitted to complain and that they do not suffer and are not seen to suffer any vilification for doing so.
 - Any action which may bring the activities of ACM into disrepute.”.

Despite the dismissal being for reasons of gross misconduct, Mr Ngatai was paid four weeks’ pay in lieu of notice.

The letter of dismissal also advised Mr Ngatai that he had the right to appeal the decision to dismiss him to the Managing Director of ACM within ten days of receiving the letter. Mr Ngatai elected to appeal the decision. A panel of three senior managers from ACM, independent of the case, was constituted to hear the appeal. The panel examined all of the material, conducted some further interviews in the presence of Mr Ngatai and his support person and allowed Mr Ngatai the opportunity to present his case. The decision unanimously upheld the decision made by Mr White.

The Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU), which represented Mr Ngatai in the proceedings before the Commission, did not take any issue with the procedural aspects of the dismissal. Bearing this in mind and on the basis of the information provided to me about the investigation and the two hearings, I am satisfied that Mr Ngatai was afforded procedural fairness.

The Union argued that the dismissal was harsh, unjust and unreasonable and in support of that argument raised the following matters:

- Mr Ngatai was suffering from stress related to the death in custody at the time of the incident on 8 January 2002. The stress contributed to Mr Ngatai’s actions that day.
- Management of the Arthur Gorrie Correctional Centre contributed to Mr Ngatai’s actions on 8 January 2002 by returning Mr Ngatai to the unit for the balance of his shift and not moving the inmates who made the allegations. Secondly, Mr Whitmore’s advice to talk to the inmates about their whinges also contributed to the incident.
- There was evidence that inmates were intending to conspire against Mr Ngatai as they were upset about the death in custody and blamed Mr Ngatai for that.
- Mr Ngatai was a long serving officer with a good record. He ought not to be dismissed, essentially for swearing, when there were no previous warnings. The incident did not lead to violence. Mr Ngatai had not received adequate training in the management of his anger nor in effective communication techniques with inmates.
- The punishment was too severe given the nature of the incident and the penalty was inconsistent with penalties imposed for graver incidents.

The respondent denied each of these contentions. In determining whether the decision to dismiss Mr Ngatai was harsh, unjust or unreasonable I intend to address each of the matters raised by the Union as well as other relevant considerations.

1. Stress

Mr Ngatai argued that he was suffering stress as a result of the death in custody of an inmate from his unit. The death in custody is being separately investigated and it is not my role to deal with that matter here.

After a death in custody occurs, officers are debriefed and are offered counselling. Mr Ngatai participated in the debrief but did not avail himself of the counselling until after the incident on 8 January 2002. Evidence from the counsellor was not provided.

Mr Ngatai consulted his medical practitioner on 10 January 2002, two days after the incident and the day after his suspension. Tendered to the Commission was a letter to the Union advocate from the medical practitioner summarising Mr Ngatai’s consultations from January 2002. The respondent did not object to the letter being tendered and did not require the author to attend for cross-examination.

The summary of the consultation on 10 January 2002 shows that Mr Ngatai was upset by the death in custody and had been sleeping poorly since that time. However, a number of other stressors were identified. These included work and family issues. Mr Ngatai was referred to and subsequently consulted a psychologist.

The letter from the medical practitioner is the only “evidence” of Mr Ngatai’s stress arising from the death in custody. As mentioned, the doctor was not subjected to cross-examination nor was evidence called from the counsellor or psychologist. At best, the “evidence” shows that Mr Ngatai was upset about the death in custody. There is insufficient material before me to be reasonably satisfied that Mr Ngatai was suffering from stress as a result of the death in custody and consequently was so impaired as to trigger his behaviour on 8 January 2002.

It is also important to note that medical evidence of stress was not put before the disciplinary hearing held before Mr White.

2. Contributions by Management

Two events are said by the Union to have contributed to Mr Ngatai’s outburst on 8 January 2002. These are:

- (i) the decision to return Mr Ngatai to his unit after being informed of the allegations against him, and;
- (ii) Mr Whitmore’s advice to talk to inmates.

Mr Murray’s evidence was that Mr Ngatai took the news of his relocation to another unit with good grace. Mr Ngatai rejected Mr Murray’s evidence claiming that he had said “that’s crap” when told of the move. In addition he gave evidence of his discontent with the proposition that officers should be moved pending investigations into matters concerning them rather than inmates being moved.

It is more likely in my view that Mr Ngatai said “that’s crap” when told of the allegations made against him. In his evidence Mr Ngatai denied making the comments at the time the inmates alleged. I am satisfied that Mr Ngatai did not express any concern to Mr Murray about being returned to his unit

after being informed of the allegations. I am satisfied that Mr Ngatai expressed displeasure about the allegations having been made and the nature of them. I am further satisfied that during the remainder of the lock down training Mr Ngatai stewed on the fact that inmates had made allegations against him, in his eyes, unfairly, and hence that is the reason he was fuming when he eventually returned to his unit. Miss Upton and Mr Hughey confirmed Mr Ngatai was angry that complaints had been made about him.

Further, had Mr Ngatai objected to the move, then given his reasonable working relationship with Mr Murray, I consider Mr Ngatai would have told him of this. It was also Mr Murray's evidence, which I accept, that in the event Mr Ngatai objected to the move occurring on 9 January 2002, he would not have allowed Mr Ngatai to return to his usual unit for the completion of his shift.

It was Mr Ngatai's view that he should have been moved immediately to another unit or, better still, that the inmates making the complaints should be removed from the unit. This would allow the officer to continue to work as usual while ensuring the officer against whom the complaint was made does not treat the inmate(s) concerned unfairly.

Evidence was heard from both witnesses called by the applicant and witnesses called by the respondent about the usual practice when a complaint is made by an inmate about an officer. On the evidence before me it seems that the usual practice in such circumstances is to return the officer to his or her unit for the balance of the shift and then move the officer to another unit at the commencement of their next shift pending the outcome of the investigation. This is done in order to not reward the complaining inmate with an immediate victory over an officer's removal. There are exceptions to this policy, including where an officer expresses concern about a return to the unit or where the allegations are considered to be so serious that a return, even for the balance of the shift, would not be in the best interests of all concerned.

In this case Mr Ngatai did not express any concern to Mr Murray at their meeting about returning to his unit for a short time and then moving to another unit for the start of his next shift. Neither did Mr Ngatai return to express his anger to Mr Murray after he had stewed on the complaints. Had that occurred it is unlikely Mr Murray would have sent Mr Ngatai back to his unit. This was also not a case where the allegations were considered to be in the category where it would be unsound to return Mr Ngatai to his unit.

The second contributing factor on that part of management was said to be Mr Whitmore's advice to Mr Ngatai to discuss the complaint with inmates. It was Mr Whitmore's evidence, which I accept, that he was unaware that official complaints had been made about Mr Ngatai and he was offering advice as to how to deal with informal complaints. Such advice was consistent with the practice usually engaged in by Mr Ngatai and himself.

The other aspect to the Union's contention was that Mr Whitmore had given Mr Ngatai a piece of paper on which to record inmate complaints. I think this was unlikely as the meeting between Mr Whitmore and Mr Ngatai was a chance encounter and it was not usual practice for Corrective Services Officers to be given cell record sheets and asked to record inmate complaints. In the circumstances I am not satisfied that Mr Whitmore can be held accountable for either Mr Ngatai's conduct or the incident.

3. Conspiracy

Tammy Jacobsen, a Registered Nurse employed full-time at the Arthur Gorrie Correctional Centre, gave evidence that, after the death in custody but before the incident of 8 January 2002, one inmate told her that he blamed Mr Ngatai for the death of the inmate in custody. She said the inmate told her that inmates planned to provoke Mr Ngatai so that he would react in a manner that would cause him to be dismissed or at least removed from the unit. Ms Jacobsen also gave evidence this inmate said that inmates would cause CERTs to be called all the time and that Mr Ngatai would be blamed for this and inmates would refuse to follow Mr Ngatai's directions.

Ms Jacobsen gave evidence that two other inmates also told her of plans to "go after" Mr Ngatai.

Ms Jacobsen said that she told Jenny Matulaitis, Acting Correctional Manager, that threats had been made against Mr Ngatai. She was not asked in cross-examination whether she had provided any detail of the threats to Ms Matulaitis. According to Ms Jacobsen, Ms Matulaitis said that Mr Ngatai would be removed from his unit while the situation settled down and that other actions to manage the situation might also be put in train.

Because Mr Ngatai reacted in the manner described earlier to the complaints lodged by inmates, the Union contended that Ms Jacobsen's information was correct and that inmates had conspired against Mr Ngatai in order to have him removed from the unit.

At first blush the Union's argument has its attractions. Mr Ngatai behaved in a manner on 8 January 2002 that ultimately caused his dismissal. However, it was not the case, as Ms Jacobsen reported, that Mr Ngatai reacted because inmates were "in Mr Ngatai's face all day every day". As Mr Bryce said in his closing submissions, "the inmates would have to be greater strategists than Rommel" to believe that their complaint to the police would result in a violently abusive outburst by Mr Ngatai. They would have to believe that the police would report it to senior management who would relay the information to Mr Ngatai. The inmates would have to also believe, for their plan to succeed, that Mr Ngatai would become so angry that he would be provoked into an abusive response. Such a scenario is not impossible but is unlikely given that all links in the chain reaction would need to occur for their strategy to succeed.

Ms Matulaitis was not called by the respondent to give evidence in response to Ms Jacobsen's statement. I do not consider that this is a case where the rule in *Jones v Dunkel* (1959) 101 CLR 298 should apply and an adverse inference drawn. Mr Murray's evidence was that had Ms Matulaitis received such information it would have been reported. To his knowledge it was not. Moreover, it was not recorded in the statement of the Intelligence Officer, Mr McGregor. While Mr McGregor provided a statement to the Commission he was not required for cross-examination. It could be reasonably thought that such information, if received, would have been appropriately handled.

For these reasons I am not prepared to accept that the inmates conspired to provoke a reaction from Mr Ngatai in order to have him removed from the unit or dismissed from his employment.

4. Service and Training

The Union contended that Mr Ngatai should not be dismissed for conduct that essentially amounted to swearing at inmates. They pointed to Mr Ngatai's seven years of service with ACM and submitted that his service was largely unblemished. In addition, the Union argued that Mr Ngatai had not received training in managing his anger and refuted the respondent's contention that Mr Ngatai had been trained and received refresher training in communication techniques.

Mr Ngatai has not worked exclusively at the Arthur Gorrie Correctional Centre but has also worked at detention centres. While stationed at the Curtin detention centre Mr Ngatai received a warning for acting in an inappropriate manner towards a member of the public who was operating a canteen. Mr Ngatai was to undertake training in interpersonal and supervision skills but according to his evidence, lack of funds precluded him from doing this. Mr White took the warning into account in deciding the disciplinary penalty to apply to Mr Ngatai.

In 2001 Mr Ngatai verbally abused another officer at the Arthur Gorrie centre. It is alleged that Mr Ngatai used the same foul swear words to that officer as he used to the inmates on 8 January 2002. As the matter was resolved between Mr Ngatai and the other officer, disciplinary action did not ensue against Mr Ngatai. Mr White took into account in deciding the disciplinary penalty against Mr Ngatai the fact that the language used on 8 January 2002 was consistent with that used in the earlier incident. Mr Ngatai had denied using the words "cunt" or "cunting" on 8 January 2002 saying he did not use that language. The word "cunt" was reported to have been used by Mr Ngatai in the earlier incident.

Mr Ngatai received six weeks' induction training on commencing employment. Although he could not recall receiving training on communication techniques, I am prepared to accept that such training was provided. The Union was prepared to concede this point.

The Union disagreed with Mr White's evidence that Mr Ngatai had received refresher training on this subject. It is the case that no specific training on communication techniques was included in the units Mr Ngatai had undertaken. Mr White's evidence seems reasonable that the topic would have been addressed in several of the units.

One of the arguments of the Union was that Mr Ngatai had not been trained in managing his anger. Had such training been provided then the incident of 8 January 2002 may not have occurred. Mr Ngatai has apologised to his colleagues for his outburst. It was said that it is not common for Mr Ngatai to behave in this manner.

Had Mr Ngatai abused the inmates from his location in the fishbowl, it is unlikely that any disciplinary process would have occurred. The same might be true had Mr Ngatai continued his abuse on to the floor and concluded the argument there. The gravity of the incident arose by his going on to the floor, continuing the foul abuse and then inviting the inmates into the airlock to sort the matter out. I reject Mr Ngatai's evidence that he intended to simply continue the discussion there, away from the other inmates. Although it is true that only verbal abuse was engaged in, on the evidence of Mr Hughey and Miss Upton, the matter could have easily escalated to a much more serious situation. It is not as the Union contended that because no riot eventuated or there was no physical violence the matter should be construed as not being serious.

It is also not the case that Mr Ngatai was dismissed simply for swearing at inmates. Prisons are robust places and the language used by officers and inmates alike can also be robust. I accept that the inmates in the unit concerned are difficult. They are protection prisoners, are considered to be predatory and are therefore kept in isolation from other inmates. Mr Ngatai was selected to work in the unit because it was considered he had the necessary skills and experience to deal with such inmates. His actions on 8 January 2002 were contrary to his training, were provocative, abusive, and intimidatory and placed a unit in a prison on the brink of major upset.

The Commission cannot proffer an opinion about whether anger management training would have prevented Mr Ngatai from commencing or continuing his foul and abusive outburst. I do not think however that the cause of the incident can be laid at the feet of ACM for the reason that it did not provide the training.

5. Severity and Consistency of Punishment

In his evidence Mr Ngatai acknowledged that he had acted inappropriately and that his actions were contrary to his training. He admitted to being aggressive and to using language such as "fucking dogs". He would not accept that he placed himself or anyone else in jeopardy by his actions, that he had provoked a situation that was dangerous or that the situation could have led to physical violence.

Mr Ngatai conceded that he deserved some disciplinary penalty but said that dismissal was too severe in the circumstances. Evidence was called from Terrence Hodges, the head Union delegate, about disciplinary penalties that had been imposed on other officers for seemingly lesser or equivalent incidents.

The Commission does not have before it all of the relevant information about those cases on which to make a judgement on the consistency of disciplinary penalties. The most I can do is to decide whether Mr Ngatai's dismissal in the circumstances of 8 January 2002 was harsh, unjust or unreasonable. In my view dismissal was warranted. In terms of s. 77 of the *Industrial Relations Act 1999* Mr Ngatai was notified of the reason for his dismissal. The reasons related to his conduct and the operational requirements of the business. Mr Ngatai was given the opportunity to defend against the allegations before the decision to dismiss was made. Mr Ngatai was afforded procedural fairness.

Despite Mr Ngatai not accepting that his actions put himself and others at risk, I am firmly of the view that he did precisely that. The evidence from Mr Hughey and Miss Upton was that they were concerned for Mr Ngatai's safety and their own at the time. The evidence also supports a conclusion that Mr Ngatai provoked the incident, it was serious and potentially dangerous. Mr Ngatai was reeling off abuse and being intimidatory in the airlock. Inmates were banging on the door and the glass of the fishbowl. The situation was volatile but fortunately assistance arrived before it escalated into physical violence or potentially a riot.

In the circumstances I am satisfied Mr Ngatai breached the code of conduct as determined by Mr White. While I consider the earlier warning and the incident of 2001 ought not to have been taken into account by Mr White in determining the outcome of the disciplinary hearing. I am satisfied that given the nature of the incident, dismissal was the appropriate penalty. Mr Ngatai's actions can only be described as extremely serious.

The Commission acknowledges that Mr Ngatai's fellow officers support his reinstatement. From the evidence before me it seems that his colleagues may not be in possession of all the facts and circumstances surrounding this incident. Blame for the dismissal seems to be unfairly attributed to Mr Hughey who called for assistance. He stands accused of being inexperienced and calling for a CERT when none was required thus prompting the investigation that led to Mr Ngatai's dismissal.

The evidence quite plainly is that Mr Hughey did not initially call a CERT but only for backup as he was concerned that by calling a CERT, Mr Ngatai could get into trouble. Only when assistance did not arrive in a short time was a CERT called. Mr Hughey said he did not call it but it was called by movement control. Ms Wosgian who was stationed at movement control claimed Mr Hughey called it. In my view it does not matter who called the CERT. The fact was the situation was dangerous and assistance was required from other officers to defuse it. Mr Hughey may not have had much experience in a correctional centre but his significant experience in detention centres, which are often places of tension, led him to believe that the situation was dangerous and assistance was necessary. Having considered all of the evidence I believe his assessment of the situation was correct.

While I can appreciate the solidarity of Mr Ngatai's colleagues, by his own admission he acted contrary to his training. Prisons can be volatile places. Arthur Gorrie is a high security prison. It experiences a transient population. Given the seriousness of Mr Ngatai's actions, the fact that he put himself and others at risk in what is in any event a volatile place, I think that dismissal was warranted. To contemplate overturning the respondent's decision and reinstating Mr Ngatai, particularly after the concessions he made in his evidence, would have the effect of disregarding the safety of other officers. The Commission is not prepared to take that step when in the first instance Mr Ngatai's own intimidatory actions provoked a serious situation.

The application is dismissed.

Order accordingly.

G.K. FISHER, Commissioner.

Appearances:

Mr K. Crank of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees for the applicant.

Released: 5 August 2002

Mr R.M. Bryce (Roger Bryce & Assoc) and with him Mr J. Peter for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – unpaid wages

**Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch,
Union of Employees AND Ralph Soutar (Nos. W15, W16 and W17 of 2002)**

COMMISSIONER ASBURY

5 August 2002

Industrial Relations Act 1999 s. 278 – Underpayment of wages – Hearing in absence of respondent – Central issue whether claimants were employees or independent contractors – Status of unsworn statements received from respondent – No weight to be placed on statements from respondent in light of failure to attend hearing – Consideration of requirement for Commission to perform functions in a way that avoids unnecessary technicalities – Provisions do not extend to admission into evidence of unsworn statements in the absence of respondent – Consideration of whether claimants were employees or independent contractors – Consideration of tests established in case law as to whether relationship is one of employment or independent contract – Application of tests established in case law to facts establishes relationship of employment – Applications granted.

DECISION

Overview

On 31 January 2002, the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (the ALHMWU) made applications on behalf of David Alexander Cole (W15 of 2002); Adam James Kemp (W16 of 2002) and Kenneth James Chancellor (W17 of 2002) seeking in each case, orders for payment of unpaid wages, under s. 278 of the *Industrial Relations Act 1999* (the Act). The orders are sought against Ralph Soutar trading as Efficient Reliable Security (the respondent). The applications in each case state that the wages are payable under the terms of the *Security Industry (Contractors) Award – State*, and that each of the persons on behalf of whom the applications are made (the claimants), was employed under that Award. The applications were heard concurrently.

The amounts claimed in each of the applications are as follows:

- David Alexander Cole (W15 of 2002) – \$10,689.26;
- Adam James Kemp (W16 of 2002) – \$2,230.09 (following leave to amend amount claimed to reduce it from \$8,882.50); and
- Kenneth James Chancellor (W17 of 2002) – \$10,689.26.

A copy of a Queensland Business Names Extract for Organisation Number BN7093690 tendered by the ALHMWU (Exhibit A4) names Ralph John Soutar and Beverley Myrtle Soutar as persons carrying on the business Efficient Reliable Security, and provides a Strathpine address as the principle place of business. The applications were heard on 24 April 2002. The applications were re-listed for further hearing on 19 July 2002, when the Commission became aware that documentation provided to the claimants by the respondent contained reference to ERS Guards Patrols ABN 70 406 659 926. In response to a question from the Commission, Mr Crank for the applicant advised that the order was sought against Efficient Reliable Security BN7093690, as the ALHMWU believed that ABN 70 406 659 926 related to the same entity.

Hearing in the absence of the Respondent

The ALHMWU filed an affidavit of service, deposing to the service of the applications upon the respondent at a post office box address in Dalby. It is apparent from documentation on the file that previous attempts by both the ALHMWU and the Industrial Registrar to correspond with the respondent at the registered business address for Efficient Reliable Security, have been unsuccessful. However, correspondence was received by the Industrial Registrar from the respondent on 28 March 2002 attaching "brief" statements in relation to each application, and advising that more detailed statements would be provided after consultation with a solicitor, "in the next week."

The applications had been listed for hearing on 2 April, following a directions hearing on 20 February 2002. The respondent did not appear at either hearing. However, given correspondence from the respondent referred to above, the matter was adjourned with the agreement of the ALHMWU, to 24 April 2002, to ensure that the respondent was given every opportunity to appear and defend the applications. The respondent failed to appear at the hearing on 24 April 2002, and the matter was dealt with in the respondent's absence, pursuant to Rule 62 of the *Industrial Relations (Tribunals) Rules 2000*.

In relation to Rule 62(a) each of the applications contained a warning in bold typeface that failure by the respondent to attend the hearing may result in a decision being given against the respondent without further reference. A similar warning was contained in two directions orders issued in the proceedings, one of which was covering the application as served on the respondent. In relation to Rule 62(b) the ALHMWU provided service on the respondent and deposed to that service at a post office box address in Dalby, by way of an affidavit of service which I have previously referred to. That post office box address in Dalby is the same address as appears on correspondence covering the unsworn statements forwarded to the Industrial Registrar by the respondent.

I am also of the view that the application in each case, contains sufficient particulars relied on in support of the application. Each application contains detailed calculations of the wages said to be underpaid, and a statement of material facts setting out the case against the respondent in summary form.

The Issues for Determination

An application for unpaid wages under s. 278 of the Act, may be made in respect of an employee, an apprentice, a trainee or an eligible employee (in respect of superannuation contributions). In each case, the applications state that the persons on whose behalf the claims are made, are not apprentices or trainees. Further, none of the applications seeks payment of superannuation contributions.

In determining the claims for unpaid wages, the first arising is whether each of the persons on whose behalf the applications are made, was an employee for the entire period covered by the claims. This issue arises because the evidence called by the ALHMWU is that two of the claimants, Mr Cole and Mr Chancellor, were told by Mr Soutar, when they commenced to perform work for the respondent, that they were independent contractors. Further, the evidence is that both Mr Cole and Mr Chancellor were told by Mr Soutar that upon the introduction of the Goods and Services Tax (GST) in mid 2002, they would become employees.

Evidence called by the ALHMWU

Evidence was put before the Commission by the ALHMWU in the form of affidavits from each of the claimants. Mr Chancellor and Mr Kemp were available at the Commission on the day of the hearing into the applications and gave evidence. Mr Cole was not available. The affidavits of Mr Cole and Mr Chancellor stated that when they commenced to work for the respondent, they were told that they were sub-contractors, and would be paid at a flat hourly rate. Further, Mr Cole and Mr Chancellor were told that they would be required to invoice the respondent for hours worked, and that they would be responsible for their own tax. In the case of Mr Cole the flat hourly rate was initially \$12.00 per hour, with an increase to \$12.50 per hour in November 1999. Mr Chancellor commenced with an hourly rate of \$12.50 per hour.

Mr Kemp, on the other hand, stated in his affidavit that he had been told by Mrs Soutar that he was a casual employee, and later that he was a permanent part-time employee. Mr Kemp said that he had never received paid holidays, penalty payments, allowances or overtime payments. Mr Kemp said that he had been paid an hourly rate of \$12.50 per hour for all hours worked. Mr Kemp also said that he had worked on nights, weekends and public holidays and had been paid at the rate of \$12.50 per hour for all time worked.

The affidavits contained the following common details:

- No document or contract concerning the terms of work for the respondent had been signed;
- Time sheets for every day on which work was performed were required to be completed;
- Detailed instructions on how to do the job had been given on a daily basis by Mr Soutar; and
- Weekly roster times when work was required to be performed were provided by the respondent, and in each case, were attached to the affidavits.

Evidence of Mr Cole

Mr Cole stated in his affidavit that he had been employed by the respondent from January 1999, until March 2001. Mr Cole said that Mr Soutar did not ask him if he agreed to be a sub-contractor, but simply told him that if he wanted to work for him then "being a sub-contractor is the way it works.". Further, Mr Cole said that "Bev Soutar" who had performed most of the administration work for the respondent had told him that he was required to apply for an Australian Business Number to be able to submit invoices. Mr Cole had complied with this request, but had not advertised his services or printed business cards. Mr Cole also said that he could not make any profit or loss because he had no expenses related to his job apart from union membership and the minor things he was required to supply.

Mr Cole had performed duties, mostly at Westfield Strathpine Shopping Centre, including internal and external patrols; locking and unlocking of doors at opening and closing times; removing persons who were disturbing the peace from premises; securing shops which were being refitted and writing reports to police about shop-lifting, fighting and other criminal acts on-site. Mr Cole also said that he provided his own torches, baton, radio ear-pieces and radio belt clip. Mr Soutar provided Mr Cole with shirts bearing the ERS and Westfield logos; radio; mobile phone; loudspeaker; mops and buckets and cards for placing in doors which he had checked. Mr Cole said in his affidavit that he had used his vehicle for mobile patrols and on occasion had also used Mr Soutar's vehicle.

Further, Mr Cole said that he had not arranged any superannuation or insurance for himself and believed that he would have been covered by WorkCover if he was injured at work. During the time he had worked for ERS, Mr Cole said that he had not worked for anyone else or received any other income, with the exception of a second job he had held with Playtime within Westfield Strathpine for about six months, involving the working of one or two shifts each week.

Mr Cole said that he had not delegated his work to anyone else and did not believe that he could do so. On occasions when Mr Cole was sick, he had telephoned the respondent, and the respondent had arranged a replacement guard. Further, when Mr Cole had been unable to attend work, his hours in the following week had been reduced to the minimum of sixteen in the following week.

At some time in mid 2000, Mr Cole said that he had attended a function at the home of Mr Soutar with other guards. Mr Soutar had advised the attendees at the function that now that "GST" was in, they would be employees, and tax would be deducted from their pay. Thereafter, Mr Cole received payslips from the Respondent each fortnight, and these were attached to his affidavit.

Evidence of Mr Kemp

Mr Kemp stated in his affidavit that he was employed by the respondent from 26 June 2000 until 1 March 2001. Mr Kemp had secured his employment through Mr Cole, who he was living with at the time. Mr Kemp's duties in addition to those outlined in the affidavit of Mr Cole, had also included crowd control at movie marathons; monitoring closed circuit television and collecting and delivering cash to a bank. While Mr Kemp had signed time sheets as required by the respondent on each day he had worked he had copied the starting and finishing times onto a spread sheet for an ALHMWU official. The time sheets were not attached to Mr Kemp's affidavit, but rosters which he said showed the times he had been required to work were attached to his affidavit.

Mr Kemp said that as he started working for the respondent around the time of the introduction of the "GST" he had gone straight on to wages and had not been told at any time that he was an independent contractor. Mr Kemp had been provided with a document by the respondent, entitled "PAGY Summary – Individual Non Business" indicating that tax had been withheld and the gross amount paid to him, for the year ending 30 June 2001. This document was attached to Mr Kemp's Affidavit (Exhibit A2).

Evidence of Mr Chancellor

Mr Chancellor said that in the earlier part of the time he had worked for the respondent, he had been told that he was a sub-contractor, and was required to submit invoices to be paid. Mr Chancellor also said that if he could not work a shift, he was not responsible for finding a replacement to do the work. Rather, Mr Chancellor had been required to advise the respondent, and the respondent had arranged a replacement guard to work the shift. Invoices submitted by Mr Chancellor were attached to his affidavit. The invoices are headed F.A.T.S. and are typed and numbered. The time sheets submitted by Mr Chancellor which were also attached to his affidavit are designated "Ken – F.A.T.S.".

In his evidence, Mr Chancellor said that F.A.T.S. was a business that he had conducted prior to supposedly contracting his services to Mr Soutar. F.A.T.S. was a registered business name, derived from the abbreviation of Fire Associated Training Services. During the period when he had invoiced the respondent, Mr Chancellor said that he had paid his own tax. Mr Chancellor said that his business known as F.A.T.S. had conducted fire training, but had not been very profitable, due to loss of contracts. The business had last provided service to a client in the area of fire training, at the end of November 2000. Mr Chancellor agreed that in about July 2000, he had been told by Mr Soutar that he would start to be paid as an employee instead of an independent contractor.

Submissions of the ALHMWU

Mr Crank for the ALHMWU, submitted that the evidence before the Commission clearly established that the claimants were at all times, employees of the respondent. Mr Cole and Mr Chancellor had been referred to by the respondent as contractors in the early part of their work, but were subsequently referred to as employees due to the introduction of the GST. Mr Kemp was always treated as an employee by the respondent and had received a group certificate for the entire period of his employment.

It was submitted that none of the claimants had agreed to become sub-contractors and did not sign any contract to this effect. Further, it was not the intention of any of the claimants to become sub-contractors, although they were aware that the respondent referred to them as such.

Mr Crank cited *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 in support of the proposition that the right to exercise control is an important factor in determining whether a person is an employee or a sub-contractor. It was submitted that the evidence of the claimants indicated that the respondent exercised the right to control by directing the claimants with respect to the manner in which their work would be performed. Mr Crank also cited *Hollis v Vabu Pty Ltd* [2001] HCA 44 as authority for the proposition that the imposition of work practices by the principal indicates an employment relationship. Further, Mr Crank pointed to the following factors considered in *Hollis v Vabu* to be indicia of an employment relationship between the bicycle couriers subject of that case, and *Vabu Pty Ltd*:

- they (the bicycle couriers) were not supplying skilled labour;
- they had little control over the manner of performance of their work;
- they were required to be at work at a certain time and to work in accordance with a roster;
- they were presented to the public and those using the courier service as emanations of *Vabu*;
- they were required to wear uniforms bearing *Vabu's* logo and were subject to dress and appearance requirements imposed by *Vabu*; and
- there was no scope for them to bargain with respect to their rate of remuneration.

It was contended by Mr Crank that the evidence in this case, disclosed the existence of the same factors. The claimants were security guards and were not supplying skilled labour. They had little control over the manner of the performance of their work, and were subject to daily direction by the respondent as to the duties to be performed and the timing of their performance. The evidence of the claimants also indicated that they were subject to a roster, and were required to work in accordance with that roster, at sites designated by the respondent. Mr Crank said that the claimants wore uniforms displaying the respondent's logo, and it was clear that they were presented to the public and the clients of the respondent as emanations of the respondent. The evidence also disclosed that there was no capacity for the claimants to bargain with respect to their rate of remuneration, as it was set and adjusted by the respondent.

It was also submitted by Mr Crank that the respondent would arrange replacement guards in the event of the inability of one of the claimants to work on a particular day. The items provided by the claimants were said to be of lesser value to the bicycles supplied by the couriers in *Vabu* and conversely, the items supplied by the respondent in this case, were said to be of greater value than those supplied by *Vabu* in that case. The entire business of the respondent in this case was the provision of security services, and this was the work carried out by the claimants. The fact that no payments were made for annual leave, sick leave and superannuation, was not determinative of the claimant's being found to be contractors.

The claimants had no other source of income during the period they were working for the respondent, other than in the case of Mr Cole who had a second job, as an employee, during six months of the time he was performing work for the respondent. Further, Mr Crank submitted that none of the claimants had arranged any form of superannuation or insurance, as would be expected of independent contractors. None of the claimants had made a profit or loss working for the respondent, and had taken no risks beyond those which a casual employee would take.

Statements Received from the Respondent

As previously stated, statements purporting to be made by Mr Soutar on behalf of the respondent, were received by the Industrial Registrar on 28 March 2002. The statements were not made under oath and were not in affidavit form. It is also far from clear whether the statements were provided to the ALHMWU. It appears to be the contention for the respondent, that Mr Cole, Mr Kemp and Mr Chancellor were told that the respondent only had casual work and that the hourly rate would be \$12.50. Further, it appears that the respondent contends that Mr Cole, Mr Kemp and Mr Chancellor were also told that they would be sub-contractors, responsible for their own tax.

The following paragraph appears in each of the three statements:

"In the advent of GST I spoke with our accountant and he told me that I would need to put everyone on to wages as by the year 2002 we would not be able to sub-contract. I advised all of my staff of this. But also told them, as they were aware of our \$16.50 per hour contract with Westfield I still would only be able to pay the \$12.50 per hour flat rate they all agreed. I also told them at the same meeting that our contract was due the following February and that we would definitely quote much higher and then we would be able to pay penalty's exc. (sic) They agreed."

The Commission is not strictly bound by the rules of evidence, but rather must perform its functions in a way that furthers the objects of the Act and avoids unnecessary technicalities and facilitates the conduct of proceedings (s. 173(2)). However, I think that it would stretch the limits of this provision to accept unsworn statements as evidence in proceedings, when the person who purportedly made the statement is not available to be cross-examined or to even give evidence as to the correctness or veracity of the statement. I am also of the view that such an approach could not properly be taken using any of the powers incidental to the exercise of jurisdiction under s. 329 of the Act.

Accordingly, I do not propose to place any weight on the statements forwarded to the Industrial Registrar on 28 March 2002, purporting to be made on behalf of the respondent. In putting no weight on the statements, I also consider that any disadvantage to the respondent is neutralised by the fact that the statements *prima facie* are corroborative of the claimants' versions of events in several significant areas, and may have assisted their cases.

The High Court Decision in *Hollis v Vabu*

The central issue considered by the High Court in *Hollis v Vabu* was whether *Vabu Pty Ltd* trading as *Crisis Couriers (Vabu)*, was vicariously liable for the actions of a bicycle courier, who during the course of carrying out duties for *Vabu*, injured the plaintiff, Mr *Hollis*. As part of the consideration of this

issue, the question of whether the relationship between Vabu and the bicycle courier was one of employment or independent contract, was also considered. The High Court decision in *Hollis v Vabu* dealt only with bicycle couriers. However, the issue of the nature of the relationship between Vabu and all of its couriers has been the subject of other litigation, which was also considered by the High Court in *Hollis v Vabu*.

At first instance, in the District Court of New South Wales, Wright ADCJ found that the bicycle couriers were independent contractors, notwithstanding findings of fact identifying indicia of a relationship of employment between Vabu and the couriers. A significant factor influencing the decision at first instance, was that Wright ADCJ considered that he was bound by an earlier decision of the New South Wales Court of Appeal (Meagher, Sheller and Beazley JJA in *Vabu Pty Ltd v Federal Commissioner of Taxation* [(1996) 33 ATR 537] which held on substantially similar evidence to that before Wright ADCJ, that the bicycle couriers were independent contractors. This decision is referred to in the majority decision in *Hollis v Vabu* as “the taxation decision”.

The taxation decision was the result of an appeal by Vabu from a decision of Ireland J in the Supreme Court of New South Wales, declining to make a declaration sought by Vabu, to the effect that it was not an employer. Ireland J had declined to make the declaration because he decided at common law, that the relationship between Vabu and all of its couriers was one of employment. In the taxation decision cited above, the Court of Appeal allowed Vabu’s appeal against the decision of Ireland J, finding that the relationship between Vabu and the couriers was one of employment.

In the decision of the majority in *Hollis v Vabu* (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ) findings of fact made in that other litigation were canvassed. To understand the majority decision it is necessary to examine those findings.

The findings of fact made by Wright ADCJ at first instance, identified in the decision of the majority of the High Court in *Hollis v Vabu* were as follows:

- Vabu set the rates of remuneration of its bicycle couriers and there was no scope for negotiation of those rates between the parties;
- Vabu allocated the work with no scope for bidding for individual jobs by the riders;
- couriers would call in each morning to indicate readiness for work;
- work was allocated by Vabu’s fleet controller;
- Vabu assumed responsibility for direction, training (if any), discipline and attire of couriers;
- couriers were required to wear Vabu’s livery at all times;
- Vabu provided couriers with numerous items of equipment which remained Vabu’s property and which included the only means of communication between Vabu and the couriers;
- requirements such as insurance and deductions from pay were imposed on couriers without opportunity for negotiation.
- couriers were in a “take it or leave it” situation, which was highlighted and exemplified by the fact that rates for courier jobs had not been altered for some time; and
- couriers had signed a document headed “Contract for Service” which set out terms and conditions under which they were to perform work for Vabu.

The taxation decision involved a refusal by Ireland J in the Supreme Court of New South Wales, to make a declaration that Vabu was not an employer for the purposes of the *Superannuation Guarantee (Administration Act) 1992* (Cth). Ireland J decided that at common law the relationship between Vabu and all of its couriers was properly to be characterised as employment. The taxation decision considered all of Vabu’s couriers, including motor vehicle, motorcycle and bicycle couriers, however, no evidence was lead from bicycle couriers. The majority of the High Court in *Hollis v Vabu*, highlighted the following findings of Ireland J:

- couriers had purchased their own transportation which included light commercial or domestic type vehicles;
- couriers had to bear the expense of providing for and maintaining those vehicles, making payments for repairs and insurance, which were considerable;
- couriers had to provide themselves with street directories, telephone books, ropes, blankets and tarpaulins;
- Vabu was providing a system of work by presenting its image through uniforms and signage and imposing work practices;
- it was the extent to which those work practices were imposed upon the daily routine of couriers as opposed to permitting a discretionary use of the system of work by couriers that was in part determinative of an employment relationship;
- the rules imposed by Vabu demonstrated a significant degree of constraint on the discretion and flexibility of the courier in the performance of tasks; and
- the notion of flexibility which forms a significant part of the underlying rationale of the relationship between principal and independent contractor, could not be said to feature with any prominence in the relationship between Vabu and its couriers.

The Court of Appeal allowed an appeal by Vabu against the decision of Ireland J. Some of the findings on appeal were also highlighted in the majority decision of the High Court in *Hollis v Vabu*. Meagher JA held that a person may supervise others without becoming their employer and that couriers being paid a prescribed rate for the number of successful deliveries made rather than a monthly, weekly or daily amount, supported a conclusion that the couriers were not employees. Meagher JA considered that the couriers supplied their own vehicles, and had to bear the considerable expense of maintaining, repairing and insuring those vehicles. It was also held by Meagher JA that:

“... each courier conducts his own operation, permitting himself for his own economic advantage to be supervised by the company. If this were not so, why would the documents anticipate that the courier may use a business name or a corporate name if he so wishes? A company does not usually have employee corporations.”.

Sheller JA agreed that the matters referred to by Meagher JA indicated that there was not an employment relationship between Vabu and the couriers it engaged, and that the relationship did not answer the relevant description in the *Superannuation Guarantee (Administration Act) 1992* (Cth). Beazley JA agreed with both judgments.

In reaching the decision that bicycle couriers engaged by Vabu were employees, the majority of the High Court commented on findings and evidence in the litigation summarised above. In relation to the decision of Meagher JA, the majority observed that the purchase and maintenance of a bicycle could hardly be termed a “very considerable expense” and that in the taxation decision a different result might have properly been reached respecting Vabu’s bicycle couriers, from that which was reached with respect to its other couriers.

The majority decision then went on to consider the evidence in the present litigation, noting the following matters:

- couriers starting work with Vabu were given a modicum of instruction and filled out “employment forms” headed “contract for service”;
- matters canvassed in the documents provided by Vabu to the couriers included reporting of accidents and injuries; dress standards; requirements for insurance premiums; return of uniforms and equipment on termination of the driver’s last contract of carriage and standards for vehicles;
- some of the documentation given to drivers did not record important aspects of the contract such as rate of remuneration;

- some of the documentation provided to the couriers referred to annual leave and sick leave, although no payments of these were made by Vabu; and
- Vabu did not make superannuation contributions on behalf of couriers.

The majority of the High Court in *Hollis v Vabu* noted that the relationship of the parties was to be found not merely from contractual terms, both oral and written. Rather, the system which was operated under the contracts, and the work practices imposed by Vabu went to establishing the totality of the relationship. The statement of Dixon J in *Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-operative Assurance Co of Australia Ltd* (1931) 46 CLR 41 at 48 explaining that an independent contractor carries out work not as a representative but as a principal, was considered to warrant close attention. The majority went on to state:

“... employees and independent contractors perform work for the benefit of their employers and principals respectively. Thus by itself, the circumstance that the business enterprise of a party said to be an employer is benefited by the activities of the person in question cannot be a sufficient indication that this person is an employee. However, Dixon J fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor. These notions were later expressed positively by Windeyer J in *Marshall v Whittaker's Building Supply Co* [(1963) 109 CLR 210 at 217]. His Honour said that the distinction between an employee and an independent contractor is ‘rooted fundamentally in the difference between a person who serves his employer in his, the employer’s business, and a person who carries on a trade or business of his own.’”

The majority in *Hollis v Vabu* then considered the notion of control as a means of distinguishing between a relationship of employment and one of independent contract, noting that the Court had adjusted the notion to circumstances of contemporary life in *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, and had continued the developments in *Zuijs v Wirth Brothers Pty Ltd* (1955) 93 CLR 561 and *Humberstone v Northern Timber Mills* (1949) 79 CLR 389. The statement of Mason J in *Brodribb* (at 29) that control is not the only relevant factor and that the totality of the relationship must be considered, was also cited with approval by the majority in *Hollis v Vabu*.

In determining that bicycle couriers considered in *Hollis v Vabu* were employees, the majority said:

“In classifying the bicycle couriers as independent contractors, the Court of Appeal fell into error in making too much of the circumstances that the bicycle couriers owned their own bicycles, bore the expenses of running them and supplied many of their own accessories. Viewed as a practical matter, the bicycle couriers were not running their own business or enterprise, nor did they have independence in the conduct of their operations. A different conclusion might, for example, be appropriate where the investment in capital equipment was more significant, and greater skill and training were required to operate it.”

The majority decision goes on to consider the nature of the engagement of bicycle couriers by Vabu, noting the following:

- they were not providing skilled labour or labour which required special qualifications;
- they were unable to make an independent career as a free-lancer or go generate any “goodwill” as a bicycle courier;
- the notion that they were running their own enterprise was intuitively unsound and denied the facts disclosed in the record;
- there was little control by the couriers in the manner of performing their work. They were required to be at work at certain times and were assigned to a roster;
- the evidence did not disclose whether couriers could delegate their work or whether they could have worked for another courier operator in addition to Vabu during the day, although it might be thought unlikely that Vabu would have allowed them to do so;
- stipulations in writing by Vabu to the couriers about leave, suggested that their engagement by Vabu left couriers with limited scope for the pursuit of any real business enterprise on their own account;
- couriers were presented to the public and those using the courier service, as emanations of Vabu, with direction being provided as to the wearing of uniforms and personal appearance;
- Vabu superintended the courier’s finances, to the extent that it produced pay summaries, and couriers were required to dispute errors by a specified time each week. Couriers were also told that “unjustified or unsubstantiated” claims for additional charges could result in total deduction of that particular job payment;
- there was no scope for couriers to bargain for their rate of remuneration, and the rate had remained unchanged between 1994 and 1998;
- Vabu was entitled to withhold the pay of a courier for six weeks in certain circumstances, and final cheques would not be processed until all Vabu’s property was returned. Washing costs or costs associated with the repair of damage to equipment, could also be deducted from final payments;
- the method of payment per delivery and not per time period engaged, is a natural means to remunerate employees whose sole duty is to perform deliveries;
- there is nothing contrary to a relationship of employment in the requirement for couriers to provide and maintain their own bicycles and to bear the costs of replacing any equipment of Vabu that was lost or damaged; and
- this is all the more so given the relatively small capital outlay associated with bicycles and because they are not capable of use only for courier work but provide a means of personal transport or even of recreation, outside of work time.

The majority also held that this was not a case where there was only the right to exercise control in incidental or collateral matters, but rather, one where there was considerable scope for the actual exercise of control, stating that:

“Vabu’s whole business consisted of the delivery of documents and parcels by means of couriers. Vabu retained control of the allocation and direction or the various deliveries. The couriers had little latitude. Their work was allocated by Vabu’s fleet controller. They were to deliver goods in the manner in which Vabu Directed. In this way, Vabu’s business involved the marshalling and direction of the labour of couriers, whose efforts comprised the very essence of the public manifestation of Vabu’s business. It was not a case that the couriers supplemented or performed part of the work undertaken by Vabu or aided from time to time; rather, as the two documents relating to work practices suggest, to its customers they *were* Vabu and effectively performed all of Vabu’s operations in the outside world. It would be unrealistic to describe the courier other than as employees.”

Were the Claimants in this Case Employees or Independent Contractors?

Because of the failure on the part of the respondent to attend the hearing into these applications, or to put evidence before the Commission in a manner which would render it admissible, the evidence called by the ALHMWU is essentially uncontested. In relation to Mr Kemp, on consideration of that evidence I can see no basis for any finding other than that Mr Kemp was an employee of the respondent at all relevant times.

With respect to Mr Chancellor and Mr Cole, there are a number of indicia, which point to the relationship being that of independent contract, and a number which point to the relationship of employment. Commenting on the approach in determining whether a relationship is one of employment or

independent contract, a Full Bench of the Industrial Relations Commission of South Australia, in *Belcaro (T/as Breakaway Security) v Sheahan* [2002] SAIRComm 29 File No 2553 of 2001, noted that the decision in *Hollis v Vabu* had not altered the law, in that it was not suggested by the High Court that a more prominent emphasis must be given to issues such as the provision of tools, equipment and uniforms, without an assessment as to the context of the supply of the same. With this view, I respectfully agree. It remains the case that in order to determine whether a relationship is that of employment or independent contract, it is necessary to weigh up the various competing indicia and to consider the totality of the relationship between the parties: *Hollis v Vabu* [2001] HCA 44 at par 29; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29.

The indicia of a relationship of independent contract in the cases of Mr Chancellor and Mr Cole, can be summarised as follows. Both Mr Chancellor and Mr Cole concede that at the point they commenced to perform the work of security guards for the respondent, they were told that they were sub-contractors, and would be required to submit invoices in order to be paid for work performed. Both complied with this requirement and submitted invoices to the respondent in order to be paid. Further, Mr Cole applied for and obtained an Australian Business Number in order to be able to submit invoices. Both were told that they would be responsible for their own taxation arrangements. Mr Chancellor utilised a business he had previously registered for the purposes of conducting fire training, to invoice the respondent for his services as a security guard. Mr Chancellor paid tax on his earnings from the respondent on the basis of that business, an entity known as F.A.T.S. In evidence Mr Chancellor said that he had viewed the security work performed for the respondent as a source of other income, due to a decline in fire training work.

Mr Cole said that he had provided his own torches, baton, earpieces for the radio and radio belt clip. On occasions, Mr Cole also used his own vehicle to undertake patrols for the respondent.

The indicia of an employment relationship in the cases of Mr Chancellor and Mr Cole can be summarised as follows: There is no evidence to suggest that Mr Chancellor or Mr Cole expressed any intention to form a relationship of independent contract with the respondent. Rather, the evidence is that this arrangement was instigated by the respondent, with the acquiescence of both claimants. No contract or documentation detailing the intended relationship was signed by the claimants.

While both Mr Chancellor and Mr Cole utilised registered businesses to invoice the respondent for hours worked, the evidence demonstrates that this was at the instigation of the respondent rather than either claimant. Mr Cole's evidence was that Mr Soutar told him that if he wanted to work for the respondent, then being a sub-contractor "is the way it works". Further, Mr Cole's evidence was that Mrs Soutar told him that he would have to apply for an ABN in order to be paid by the respondent. Mr Cole also stated that no profit or loss was made through the business which he established at the request of the respondent.

Mr Chancellor stated that a business he had set up for the purpose of undertaking fire training was utilised by him, to comply with the request of Mr Soutar that payment for Mr Chancellor's services be made to a registered business. Mr Chancellor said that the business was not set up for the purpose of undertaking security services. Further, the business had made no profit either from fire training or the provision of security services, and had ceased to perform fire training in November 2000.

Further, the evidence is that Mr Chancellor and Mr Cole were subject to daily direction by Mr Soutar as to the manner in which work was to be performed. Both were required to work in accordance with a roster which specified starting and finishing times, and the locations at which work was to be performed. In the event of being unavailable to work in accordance with the roster, both were required to advise the respondent and the respondent found a replacement guard for that shift. Mr Cole's evidence was that Mr Soutar had provided him with various pieces of equipment including shirts with both ERS and Westfield logos. On occasion, Mr Cole had used Mr Soutar's vehicle, to undertake mobile patrols. While Mr Cole had provided some of his own equipment, there was no change regarding provision of that equipment, after Mr Cole was told by the respondent that he would cease to be a sub-contractor and be treated as an employee, from some point in mid 2000. There is no evidence before me as to whether Mr Chancellor provided any of his own equipment.

After weighing the evidence, I have concluded that both Mr Chancellor and Mr Cole were employees of the respondent for the entire period covered by their claims. It has long been established that the words defining a particular relationship, whether written or oral, are not decisive of whether the relationship is one of employment or independent contract. The comprehensive discussion of the definition of employee in *Industrial Laws of Queensland Second Edition* (Government Printer Queensland 1988) includes the following statement at p. 18:

"The question is one for the court. It is open to the parties to decide whether or not they wish to enter into the relationship. It is not open to them to convert a contract which in the eye of the law is one of service into a contract for services merely by so describing it in the contract: *Thiel v The Mutual Life and Citizens Assurance Co Ltd* (1919) 14 QJPR 5; *Binding v G.T. Yarmouth and Port Hoven Commissioners* (1923) 16 BWCC 28."

The evidence of Mr Chancellor and Mr Cole that there was an express statement from the respondent that the relationship was one of independent contract, is not determinative of this matter. While an express statement will be given weight, that weight will be greater where there is no reason to think that the provision is a sham or that the provision is not a genuine statement of the parties' intentions: *Australian Mutual Provident Society of Australia v Allan* (1978) 52 ALJR 407 at 409 where the decision of Lord Denning MR in *Massey v Crown Life Insurance Co* (4 November 1977, unreported) is cited. It should be noted that both cases were in relation to a written contract.

In this case, the evidence shows that Mr Cole and Mr Chancellor were in a "take it or leave it" situation when the respondent told them that if they wanted to work for him they would be required to do so as independent contractors. Further, it is open on the evidence to find that the arrangement was more about an attempt by the respondent to legitimise the payment of a flat hourly rate, than it was about establishing a relationship of independent contract. I am also of the view that the express oral statement that the relationship between the respondent and Mr Cole and Mr Chancellor is outweighed by other indicia, which clearly establish that the true relationship was one of employment.

I am also of the view that it is not fatal to the claim of Mr Cole that he established a registered business for the purposes of being paid by the respondent. The evidence shows that Mr Cole took this step at the instigation of the respondent, and because he had been told that this was the only way in which he would be paid for work performed. Similarly, that Mr Chancellor chose to use a business name that he had established for other purposes, does not alter the fact that the respondent had indicated that payment would only be made to a registered business, and is not determinative of Mr Chancellor's status.

This is also consistent with the decision of the majority of the High Court in *Hollis v Vabu*, where bicycle couriers were held to be employees, notwithstanding a finding by the New South Wales Court of Appeal in what was termed "the taxation decision" that documentation recording the arrangements between Vabu Pty Ltd and its couriers, anticipated that the courier might use a business name or a corporate name if the courier so wished. In *Hollis v Vabu*, the courier who struck the plaintiff was not identified, and it follows that it was not known whether the courier in question had used a business name. There is nothing in the decision in *Hollis v Vabu* to indicate that had the courier in question been identified, and used a business name, that the outcome would have been different. Clearly, the use of a business name is simply one of the indicia that may be considered in determining whether relationship is one of employment or independent contract, and is not in itself, determinative of that question. The circumstances of Mr Chancellor and Mr Cole are not those discussed by the South Australian Industrial Relations Commission in *Breakaway Security*, where there was:

“...expressed intention of the parties, being two independent persons who expressly and deliberately furthered their respective business interests through what they intended to be an independent contractual relationship.”.

I accept the submission of Mr Crank, that the facts in this case are similar to those considered by the High Court in *Hollis v Vabu*, and the application of those facts to the law as stated in that decision, leads to the same outcome. Without denigrating the important work performed by security guards, there is nothing in this case to suggest that the work was skilled or required special qualifications. The rosters which the respondent required Mr Cole and Mr Chancellor to work, would have made an independent career as a free-lancer difficult if not impossible to establish. There was little control by either claimant over the manner of performing their work and they were required to work in accordance with a roster, stipulating the starting and ceasing times of work.

Neither of the claimants was able to delegate their work, and the evidence showed that if they were unable to perform work, the respondent would arrange a replacement guard. Shirts bearing the respondent’s logo were provided to Mr Chancellor and Mr Cole and they were presented to customers and the public as emanations of the respondent. There was no scope for either Mr Chancellor or Mr Cole to bargain for their remuneration, and the evidence showed that the remuneration was adjusted at the sole discretion of the respondent. The equipment provided by Mr Chancellor and Mr Cole was of a relatively low value, and was certainly below the value of the bicycles provided the couriers in *Hollis v Vabu*.

It is also apparent from the evidence, including the respondent’s letterhead, that the respondent’s whole business consisted of the provision of security services in the form of guards and patrols. The respondent rostered and directed guards to provide security services. Thus, the respondent’s business involved the marshalling and direction of guards whose efforts comprised the very essence of the public manifestation of it business. The guards did not supplement or perform part of the work of the respondent, or perform part of the respondent’s work from time to time. Rather, the guards were Efficient Reliable Security, and performed all of the respondent’s operations in the outside world.

It is also significant that there was no change to the manner in which Mr Cole or Mr Chancellor performed work after mid 2000 when the GST was introduced, and the respondent purported to transform their relationship to one of employment. For the reasons outlined above, this action on the part of the respondent had no effect, because the claimants were employees at all times.

Accordingly, I order that the respondent, Efficient Reliable Security BN7093690 pay:

- to David Alexander Cole the amount of \$10,689.26;
 - to Adam James Kemp the amount of \$2,230.09; and
 - to Kenneth James Chancellor the amount of \$10,689.26.
- Such amounts are to be paid within 21 days of the date of release of this decision.

I.C. ASBURY, Commissioner.

Appearances:-

Released: 5 August 2002

Mr K. Crank of the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application for amendment

Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (No. B1029 of 2002)

ENGINEERING AWARD – STATE

COMMISSIONER BLADES

1 August 2002

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 10 July and 1 August 2002, this Commission orders that the Award be amended as follows as from 1 August 2002:

By deleting from clause 1 of Schedule 20 the words “CSR Wood Panels” and inserting “Australian Hardboards Limited and Hume Masterpanel Pty Ltd” in lieu thereof.

Dated 1 August 2002.

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

Operative Date: 1 August 2002
Amendment – Schedule 20
Released: 2 August 2002

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