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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999
Industrial Relations (Tribunals) Rules 2000*

NOTICE

The following Agreements have been certified by the Commission:

No/s	Title	Date certified	Cancelling
CA287/02	OBP Milling Pty Ltd - Certified Agreement 2002	5/7/02	CA226/00
CA323/02	Beaudesert Shire Council Enterprise Bargaining - Certified Agreement (Federal and State) 2002	7/8/02	CA343/00
CA331/02	Churches of Christ In Queensland - Churches of Christ Care Residential and Care Support Staff - Certified Agreement 2002	7/8/02	CA184/98
CA327/02	Administration Staff of The Electrical Trades Union of Employees of Australia Queensland Branch - Certified Agreement	8/8/02	
CA330/02	Uniting Care Linen Services (Salary Packaging) Certified Agreement 2002	13/8/02	
CA332/02	Armaguard Queensland Metropolitan Branch (Darra, Virginia and Gold Coast) Clerical - Certified Agreement 2002	13/8/02	CA584/99
CA333/02	The Palm Beach Currumbin Clinic - Administration Employees Certified Agreement 2002	13/8/02	

The following Agreement has been amended by the Commission:

No/s	Title	Date amended
CA484/98	Carers of Aged And Disabled, Centacare, C.Q. - Certified Agreement	2/8/02

The following Agreement has been terminated by the Commission:

No/s	Title	Date terminated
CA461/01	CMG Rockhampton Engineering - Certified Agreement 2001	9/8/02

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

WorkCover Queensland Act 1996 – s. 509 – appeal against decision of industrial magistrate**WorkCover Queensland AND Selina Joy Tomasich (No. C43 of 2002)**

PRESIDENT HALL

13 August 2002

DECISION

On 26 November 1991, in the District Court at Maroochydore, the respondent was convicted on some six counts of dishonest application of money. In September 2000 she secured employment as a secretary with Bret-Tech Pty Ltd. Her duties included the keeping of accounts and associated functions. At no time during the course of the negotiations for the engagement did the respondent disclose her previous convictions to Bret-Tech Pty Ltd. Neither did she disclose the convictions subsequently to her engagement.

Towards the end of March 2001 Bret-Tech Pty Ltd became concerned with inadequacies and discrepancies in the accounts. At or about the same time, Bret-Tech Pty Ltd became aware of the respondent's previous convictions. The respondent was called to a meeting of a number of senior staff members of Bret-Tech Pty Ltd, informed of the concern about the accounts, informed that Bret-Tech Pty Ltd was aware of her previous convictions, told that there was to be an audit of the accounts and suspended until such time as the audit was completed. The respondent de-compensated. She made a claim for benefits under the *WorkCover Queensland Act 1996*. It was rejected. She initiated a Statutory Review. The Review Unit confirmed the decision to reject her claim for benefits. From that decision the respondent appealed to the Industrial Magistrates Court. The Industrial Magistrate allowed her claim.

The Industrial Magistrate accepted that since the meeting with the senior staff members of Bret-Tech Pty Ltd on or about 2 April 2001 the appellant had suffered from an adjustment disorder with depressed and anxious mood. His Worship also accepted that the respondent's decompensation was not attributable to her employer's discovery of her previous convictions *simpliciter*, but was attributable to the whole of the circumstances of the meeting previously described and to the information and decisions communicated to her thereat. In those circumstances, His Worship found that the respondent's employment was a significant attributing factor to the development of the disorder. All of those findings are accepted upon the appeal.

To find in favour of the respondent it was necessary for the Industrial Magistrate to go a step further and to form a satisfaction that the respondent's condition was not attributable to reasonable management action taken in a reasonable way by Bret-Tech Pty Ltd in connection with her employment, see s. 34(5) of the *WorkCover Queensland Act 1996*. The Industrial Magistrate was so satisfied. Whilst His Worship accepted that the taking of an audit was "not only reasonable but prudent" His Worship was of the view that it was not reasonable management action to stand-down the respondent while the audit took place. It is that finding which is challenged on the appeal to this Court.

It is important to stress that the respondent was stood down on full pay. This is not a case in which the Court is called upon to comment upon whether suspension without pay pending investigation is lawful or unlawful, and if unlawful necessarily unreasonable for the purposes of s. 34(5)(a). It is sufficient to note:

- (a) The right to suspend as a disciplinary measure is the subject of much authority and significant academic comment; see *Hanley v Pease and Partners Limited* [1915] 1 KB 698, *Re A Dispute at Metal Manufacturers Limited; Re Hutchinson* [1948] AR (NSW) 818; *Scharmann v Apia Club Limited* (1983) 6 IR 157 at 165; *Gregory v Phillip Morris Limited* (1988) 80 ALR 455 at 472; and *McCallum, RC, Exploring the Common Law; Lay Off, Suspension and the Contract of Employment* (1989) 2 AJLL 211. In the absence of express provision in a statute or statutory instrument, there is no such right; and
- (b) There is a paucity of authority upon the right to suspend without pay for the purposes of an investigation, though Gray J (the judge at first instance) in *Gregory v Phillip Morris Limited* (1987) 77 ALR 79 at 100, seemed to doubt the existence of such a right (in the absence of express provision by the contract of employment or an applicable statute or statutory instrument).

Those issues do not arise where the suspension is on full pay. Such a suspension is generally thought to be lawful, see *Gregory v Phillip Morris Limited* (1987) 77 ALR 79 at 100 per Gray J and McCallum, *op cit*, at 230, and as a matter of principle (at least for a short period) one would have thought that it was lawful to pay an employee ready, willing and able to perform work without requiring the performance of work. Why it should be thought unreasonable to suspend on full pay, I have difficulty in understanding. Where, as here, it is necessary to manage an ongoing employment relationship whilst an employee's stewardship of the accounts is scrutinised, suspension on full pay would seem to be an entirely appropriate course. So much indeed seems to have been recognised by Millane JR in *Cooke v Royal Melbourne Hospital*, unreported, IRCA, 2 August 1995 and *Mokdsi v Public Transport Corporation*, unreported, IRCA, 23 November 1995, though I reject the view at Macken, McCarry and Sappideen, *The Law of Employment*, 4th Ed, at 154 footnote 9, that in those cases suspension on full pay was held to be industry best practice.

Rejection of the proposition that the suspension rendered the employer's actions unreasonable makes it necessary to consider the implementation of the action upon which the employer had resolved.

It is difficult not to entertain sympathy for the respondent. There is clear medical evidence, not now disputed, that the respondent did de-compensate as a result of the meeting of about 2 April 2001. The investigation, then commenced and now complete, showed that there had been neither dishonesty nor neglect by the respondent. The convictions at Maroochydore were minor and the respondent had been placed upon a bond. But there is no basis for a conclusion that the respondent's employer had actual knowledge that the respondent had a fragile personality or that a reasonable person in the position of the employer's servants and agents would have foreseen the impact which the meeting, disclosures and suspension of 2 April 2001 had upon the respondent. Distress was, of course, foreseeable. But distress may be perfectly normal. Distress does not necessarily flow from or lead to psychiatric or psychological injury. Unenlightened by hindsight and conscious of the purpose of s. 34(5)(a), I should have thought that no reasonable observer would have characterised the employer's conduct as other than reasonable.

I allow the appeal. I set aside the decision of the Industrial Magistrate. In lieu thereof I order that the respondent's claim under the *WorkCover Queensland Act 1996* be dismissed. Lest the parties be unable to agree I reserve the matter of costs in the Industrial Magistrates Court. I reserve the question of costs of the appeal to this Court.

Dated 13 August 2002.

D.R. HALL, President

Released: 13 August 2002

Appearances:

Mr S.P. Sapsford of Counsel directly instructed for WorkCover Queensland.

Mr F.L. Lippett instructed by Swanston & Associates, Solicitors for the respondent.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – application for unpaid wages***Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees
AND Wilsons Parking Australia 1992 Pty Ltd (No. W50 of 2000)**

COMMISSIONER FISHER

13 August 2002

Application for unpaid wages – Long service leave – Transferred employee – Transfer of a calling – s. 68, 69 and Schedule 5 *Industrial Relations Act 1999* – s. 42 – Continuous service – Calling – s. 17(16) *Industrial Conciliation and Arbitration Act 1961* – Case law – s. 14B and s. 32 D (1) *Acts Interpretation Act 1954* – Report of Industrial Relations Taskforce 1998 – Recommendation 32 – Applicant not transferred employee – No entitlement to long service leave – Application dismissed.

DECISION

The Australian Liquor Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU) has filed an application seeking an order that Wilson Parking Australia 1992 Pty Ltd (Wilson Parking) pay to Eamonn Burke the sum of \$4,518 80, such sum being payment of unpaid long service leave.

The matter is not straight forward. Mr Burke was employed as a Car Park Attendant in the same multistorey car park at 118 Charlotte Street, Brisbane for almost twelve years. That car park, and indeed most other multistorey car parks, operates in a similar way. The owner of the building in which the car park is situated, in this case National Mutual which became AXA, leases the car park to a car park operator. It is usual practice for the building owner to call for tenders to be submitted for the operation of the car park. The successful tenderer then enters into a lease for the operation of the car park facilities for a number of years. Towards the expiration of the lease, the building owner repeats the process. The effect is that the car park operator in one building may change with each new tender.

Set out below are the various operators of the car park in which Mr Burke worked and his periods of employment with each of those operators:

Kings Parking Company Queensland Pty Ltd – 9 June 1989 to 10 September 1992;
Wilson Parking Australia 1992 Pty Ltd – 11 September 1992 to 31 March 1993;
KC Melbourne Pty Ltd trading as KC Parksafe – 1 April 1993 to 6 November 1998;
Australian Car Parking Pty Ltd t/a Care Parking and then Care Park – 7 November 1998 to 30 June 1999; and
Wilson Parking Australia 1992 Pty Ltd – 1 July 1999 to 1 June 2001.

Evidence was given by Mr Burke and Barton Staines the State Manager of Wilson Parking. Reference will be made to their evidence throughout this decision.

The matter for determination is whether Mr Burke is a transferred employee within the meaning of s. 69 of the *Industrial Relations Act 1999* so as to establish continuity of service and hence an entitlement to long service leave.

Applicant's Case

The ALHMWU submitted there are four ways that Mr Burke's changing of employment between various employers can be seen as a transfer of a calling within s. 69 of the Act. These are:

- (i) there is some evidence of an agreement directly between the former employers and the new employer each time the car park operator changed.
- (ii) there has been an agreement effected by a third party, namely the landlord of the car park, in this case AXA.
- (iii) the calling in question is not just Mr Burke's occupation of car park attendant but is also the undertaking of the operation of the car park. In that way Mr Burke's re-employment was part of the transfer of the undertaking of the car park operations on that site.
- (iv) a transfer of a calling can happen by means other than by operation of a law or by agreement.

The ALHMWU submitted that it was not necessary for all of these contentions to be established to demonstrate an entitlement to long service leave. The establishment of any one of them would be sufficient to ensure that Mr Burke has an entitlement.

Each of these arguments is addressed in turn.

(i) Evidence of Agreements

Mr Crank, who appeared for the ALHMWU, took the Commission to the evidence about what happened each time a new car park operator secured the lease. He relied on a decision of the Industrial Court in *Glengair v Walsh* (1997) 156 QGIG 534 to argue that the burden of proof in establishing employment is not continuous rests with the employer.

In relation to the first "transfer" from Kings Parking to Wilson Parking, Mr Crank referred to Mr Burke's evidence that the manager of Kings Parking told him to go to work the day after his termination with Kings and he should keep his job. Mr Crank submitted that such advice would not have been given unless the former operator had made an agreement with the new operator about Mr Burke retaining employment. Mr Crank thus argued that this was evidence of an agreement between the former employer and the new employer to transfer the occupation of Mr Burke.

In terms of the second change from Wilson Parking to KC Park Safe, Mr Crank referred to Appendix 1 of Mr Burke's affidavit, which is a letter from Wilson Parking to Mr Burke. The relevant paragraph is:

"I have spoken to the directors of National Mutual Property Services and KC Parksafe and I am assured that all car parking staff will be considered for employment with KC. I will arrange a meeting as soon as possible to introduce you to KC's State manager where terms and conditions of employment can be discussed."

Mr Crank submitted that this letter was evidence of an agreement between the former and new operators to employ Mr Burke. As the employment occurred without Mr Burke being interviewed or otherwise assessing his suitability, there must have been some agreement in place.

The third change in car park operator was from KC Parksafe to Care Park. Mr Crank referred to Mr Burke's evidence that the Manager of KC Parksafe told him that he had discussed Mr Burke's continuing employment with Care Park and that "everything would be ok.". Mr Crank said that such advice would not have been given unless there was an agreement between the former and incoming operators. Again, this was said to be evidence that the calling transferred.

The last change of car park operator was from Care Park to Wilson Parking. The evidence from Mr Burke about this change was that Knight Frank, representing the landlord AXA, wrote to the State Manager of Care Park advising that "Wilson Parking are prepared to interview staff for employment and would appoint suitably qualified staff on the basis of a maximum of three months probationary period...".

Mr Crank pointed out that the interview did not occur and that Mr Burke simply commenced with Wilson Parking. He said this was indicative of an agreement between the former and new employer.

In summary, Mr Crank's submission was that each time there had been a change of car park operator, there had been agreement between the former and new operator to employ Mr Burke. This agreement may not have been in writing or formally disclosed to Mr Burke but his commencement of employment immediately the new operator started, without interview or job application, is strongly suggestive of an agreement to employ him. Accordingly, in the applicant's submission, a transfer of a calling within the meaning of s. 69 and the definition of "transfer" occurred therefore establishing Mr Burke's entitlement to long service leave.

(ii) Third Party Agreement

The definition of "transfer" of a calling in Schedule 5 of the Act includes reference to "agreement, including an agreement effected by a third person". In this respect, Mr Crank argued that the "third person" was the lessor. Reliance was placed on clause 8.18 of the lease agreement made between Permanent Trustee Australia Limited (as trustee for the National Mutual Property Trust) and Wilson Parking Australia 1992 Pty Ltd (Attachment 2 to the affidavit of Barton Staines). Subclause (b) of clause 8.18 requires that the Tenant (Wilson Parking) ensure:

"(b) that an adequate number of employees who have been satisfactorily trained and are competent to operate the business are employed."

Mr Crank said that Mr Burke's employment by Wilson Parking was in fulfilment of the lease agreement. Consequently, the transfer of Mr Burke's occupation was effected by way of an agreement by a third person.

Mr Crank noted that the words "including an agreement effected by a third person" were new to the *Industrial Relations Act 1999* and neither the Minister's Second Reading Speech nor the Explanatory Memorandum assisted with an understanding of what is meant by this clause. Reference was made in the Second Reading Speech to a "business changing hands". This was interpreted by Mr Crank to include the situation of car park operators entering into a lease.

Mr Crank also submitted that it was Parliament's intention in adding the new clause to ensure that employees engaged in contracting industries are not denied the benefits of long service leave.

(iii) Transfer of Undertaking

Mr Crank submitted that the calling that was transferred was not just the occupation of Car Park Attendant but was also the undertaking of the operation of the car park. In this respect the Union again referred to clause 8.18 of the lease which required the lessee to ensure that the business of a commercial car park operator is carried out competently. According to the Union Mr Burke's employment with Wilson Parking was in fulfilment of this term of the lease. Mr Crank said there was no reason to believe that this term of the lease would have varied from lessee to lessee given that AXA was at all times the lessor.

To support his argument, Mr Crank relied on the decision in *Glengair*. He said that decision was authority for the proposition that where employment continues on the transfer of an undertaking, there has been a transfer of an occupation.

(iv) Agreement not Required

The fourth submission put by the Union went to the definition of "transfer" in Schedule 5 of the Act. Reference was made to the fact that the definition does not state that a transfer of callings means such things as transmission etc. but states that it includes those circumstances. The word "includes" should be read as meaning "is not limited to" thus the construction of the definition on s. 69 allows for transfers of occupations or undertakings to occur by means other than by operation of law or by agreement. The Commission was urged to adopt an ordinary meaning of the word "transfer".

Given that Mr Burke had been employed in the same physical premises, performing the same duties in the same kind of business for twelve years, and the only thing that had changed was his employer because of tenders won and lost, Mr Crank submitted that Mr Burke's re-employment by successive employers should be seen as a transfer of a calling within the ordinary meaning of the word "transfer".

To support this argument Mr Crank relied on a decision of the Industrial Court in *Rose v Robert John Mckillop and Thelma Mckillop* (1960) 45 QGIG 911 as authority that the services of an employee were transmitted from each employer to the next employer in circumstances where each of these employers continued to employ the employee without any interruption in his service.

Finally, the Union argued that s. 69 of the Act is beneficial legislation and should be construed beneficially. Mr Crank submitted that the Union had established that Mr Burke had an entitlement to long service leave and accordingly, the Commission should grant its application.

Respondent's Case

In summary, the respondent argued that for Mr Burke to have been a transferred employee of Wilson Parking within the meaning of s. 69 of the Act, he must have become an employee because of the transfer of a calling to Wilson Parking from Care Park. Wilson Parking submitted that Mr Burke was not a transferred employee because:

- (i) there was no transfer of a calling, within the meaning of the Act, to Wilson Parking from Care Park; and
- (ii) Mr Burke did not "become" an employee because of a transfer of a calling.

Mr Muir, who appeared for the respondent, in referring to the Union's claim that a "calling" was transferred from Care Park to Wilson Parking, said that the "calling" can only mean the undertaking of Care Park, that is, its business of operating car parks, or a section of that business, being its business of operating the car park located in the premises situated at 118 Charlotte Street, Brisbane. Mr Muir said that s. 69(1) of the Act refers to the transfer of a calling "from" one employer "to" another with the implication that the calling is something of the employer, not the employee. Section 69(2) of the Act was said to indicate that a calling may be transferred independently of the employee, that is while the employee is not employed by the former employer.

Relying on the Report of the Industrial Relations Taskforce, December 1998, the Minister's Second Reading Speech and the Explanatory Memorandum that accompanied the Industrial Relations Bill, Mr Muir said that the intention of s. 69 is to afford protection to employees "on transfer of a business" and "when a business changes hands".

He submitted that nowhere in any of those three sources is it apparent that the intention of the new s. 69 was to preserve an employee's continuity of service generally where that employee ceased employment with one employer and then began employment with another employer, where both employers conducted the same kind of business, and the employee performed the same kind of duties for both employers. The intention of the legislation, as expressed in the Taskforce Report, the Second Reading Speech and the Explanatory Memorandum, it was said, was to afford protection to employees upon a particular event, that event being where the business of the employee's employer was transferred or changed hands.

Mr Muir argued that a transfer of a calling within the meaning of s. 69 of the Act occurs by operation of law or by agreement, including an agreement effected by a third party. None of those circumstances were said to apply in the present matter. The decision of the Industrial Court in *Tinniswood v Martin* (1958)43 QGIG 1019 explained that the term "by operation law" means that the transmission occurred by force of law and without any agreement. The phrase could refer to a transmission or succession on intestacy or by reason of bankruptcy law. There is no argument in this case about whether a transfer occurred by operation law.

The respondent also disputed the existence of any agreement, including an agreement by a third person, that effected a transfer of a calling. In this regard, Mr Muir said there was no agreement of any kind between Care Park and Wilson Parking. The only agreement that was in existence was that between Wilson Parking and Permanent Trustee Australia Limited in the form of the lease on the car park premises. The lease granted to Wilson Parking rights over property i.e. the car park. Although the lease was granted on the condition that the premises would be used only for the operation of the car park, in executing the lease with Wilson Parking, the lessor was not transferring to the lessee:

- (i) the undertaking of the Care Park, or a part of it;
- (ii) any car parking business; or
- (iii) any calling i.e. the lessor did not transfer any craft, manufacture, occupation, trade, undertaking or vocation, or part thereof.

The evidence of Mr Staines showed that the terms and conditions of the lease were agreed on the basis of a proposal by Wilson Parking about the way it intended to conduct the car park. This proposal was different to the way Care Park operated the car park, for example, it included reduced hours of operation. In this way, Mr Muir submitted, Care Park's right to occupy premises and conduct business in those premises was not transmitted, assured, conveyed or assigned to Wilson Parking. Further, it was submitted, Wilson Parking did not succeed to Care Park's right.

Mr Muir also took issue with the contention that Care Park's calling was transferred to Wilson Parking. He said that upon the expiration of its lease, Care Park's business in the car park premises terminated. Consistent with usual practice, Care Park had to vacate the premises, terminate the employment of its staff and remove its property from the premises. Although the business of Care Park continued at other premises, its business did not continue at 118 Charlotte Street, Brisbane.

According to Mr Muir, all of this shows that there was no transfer of the business of Care Park to either the lessor or to Wilson Parking. In addition, there was no act by Wilson Parking that amounted to an acceptance of the business of Care Park. In accepting the lease it commenced operation of its own business in accordance with its own established operating procedures, under its own brand, at its own direction and by employing staff of its choice. Wilson Parking did not acquire the business of Care Park, its assets, liabilities or employees. Nor did it acquire Care Park's lease over the premises. Finally, Mr Muir said that the transfer could not have occurred by means of the lessor because it did not have the business of Care Park to transfer as Care Park had not transferred its business to the lessor.

The respondent submitted that because Wilson Parking conducted the same kind of business as Care Park and did so in the same location is insufficient to show that there was a transfer of a calling from Care Park to Wilson Parking. *Minister of State for Employment, Workplace Relations and Small Business v Community & Public Sector Union* (2001) FCA 316 (2001) 109 FCR 303. That Mr Burke worked for Care Park and Wilson Parking without any break between those distinct periods of employment, and performed the same kind of work (i.e. that of a car park attendant) was also not enough to show that there was a transfer of a calling from Care Park to Wilson Parking. *Stellar Call Centres Pty Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union* (2001) FCA 106 FCR 302. The "substantial identity of activities" test is not of itself a sufficient test to determine if there has been a succession, transmission or assignment of a business. *Australian Rail Tram & bus Industry Union v Torres Transit Services Pty Ltd* (2000) FCA 1683 .

The respondent placed detailed submissions about the federal approach to determining whether there has been a transmission of business. The Commission's attention was drawn to the cases cited above together with the High Court decision in *PP Consultants Pty Ltd v Finance Sector Union of Australia* (2000) HCA 59 (2000) 201 CLR 648. These authorities were relied on and distinguished from the recent decision of Gray, J in *Health Services Union of Australia v Gribbles Radiology Pty Ltd* (2000) FCA 856.

The second major plank to the respondent's submissions was that Mr Burke did not become an employee of Wilson Parking because of the transfer of a calling. To be a transferred employee within the meaning of s. 69, Mr Burke must have "become" a transferred employee "because of" the transfer of a calling from Care Park to Wilson Park. Even if there was a transfer of a calling from Care Park to Wilson Parking, which the respondent denied, Mr Burke did not "become" a transferred employee because of any transfer of calling. The lease did not transfer to Wilson Parking the employment of any of the Care Park employees (including Mr Burke) nor did it oblige Wilson Parking to employ them. Mr Burke became an employee of Wilson Parking because Wilson Parking offered him employment and he accepted that offer of employment.

The respondent also highlighted concerns about the effects of granting the application. These were:

- (1) Wilson Parking had no opportunity to set off the value of Mr Burke's accrued entitlement to long service leave with Care Park, because it had no dealings with Care Park;
- (2) Mr Burke's former employers gained the benefit of Mr Burke's service over the following periods of time, without having to make any payment towards Mr Burke's long service leave;
- (3) Mr Burke's recent employment with Wilson Parking was for the period of 1 year and 11 months. Despite this, from Wilson Parking he would gain the benefit of almost 12 years worth of long service leave.
- (4) whilst Mr Burke will gain the benefit of continuity of service, usually enjoyed by employees who serve the same employer or the same "business", Wilson Parking will not have received:

- (a) the benefits of an employer who had engaged Mr Burke for 12 years, that is continuity and stability of service; and
- (b) the benefits usually taken by the transferee of a business.

According to the respondent the success of this application would result in a major change to employment practices in the car parking industry and probably other industries based on contracts and tenders (e.g. cleaning industry, security industry). Operators who successfully tender for leases will be unwilling to engage employees of incumbent lessees if this means taking the existing employees with the burden of their accrued entitlements. At the very least, only existing employees with minimal service with their former employer will be considered for new employment.

In addition, should this application succeed and Mr Burke's service with all of his previous employers be considered continuous with his employment with Wilson Parking for the purpose of calculating a long service leave entitlement, such a decision would amount to a recognition of some form of long service leave portability. This is outside the purpose and intent of s. 69.

In summary, the respondent submitted Mr Burke was not a transferred employee within the meaning of s. 69. There was no transfer of calling from Care Park to Wilson Parking. Mr Burke did not become an employee of Wilson Parking because of any transfer of calling. Wilson Parking is therefore not liable to pay Mr Burke any accrued long service leave entitlement because no such entitlement arose as a result of his employment with Wilson Parking.

Conclusion

An employee's entitlement to long service leave derives from Chapter 2 Part 3 of the *Industrial Relations Act 1999*. Section 42 of the Act defines continuous service of an employee, other than employees in the sugar industry and meat works, to mean "the employee's continuous service with the same employer (whether wholly in the State, or partly in and partly outside the State). In terms of the present matter, the employment history of Mr Burke shows that four employers had employed him. His employment was continuous in that he had ceased employment with one employer on one day and commenced employment with a new employer on the next. While Mr Burke's employment was continuous it was not continuous with the same employer.

Part 6 of Chapter 2 provides continuity of service and employment provisions. Section 68 of the Act, which comes within Part 6, describes how the part applies and relevantly in subsection (1) provides:

"(1) This part applies when working out an employee's rights and entitlements under this Act or an industrial instrument by prescribing when the employee's continuity of service is not broken."

Section 69 of the Act deals with an employee's continuity of service where there has been a transfer of a calling. Thus, although s. 42(b) refers to "continuous service with the same employer", ss. 68 and 69 enable an entitlement to long service leave to be established for a transferred employee. That is, these sections meet the cases where service is continuous but the service is not with the same employer. (*Tinniswood v Martin* supra).

As mentioned s. 69 deals with the situation of an employee who is transferred as a result of a transfer of a calling. The term "transfer" of a calling is defined in Schedule 5 of the Act. It is useful to set out both s. 69 and the definition of "transfer".

"69 Continuity of service – transfer of calling

(1) A '**transferred employee**' is a person who becomes an employee of an employer (the '**new employer**') because of the transfer of a calling to the new employer from another employer (the '**former employer**').

(2) Even if a person is dismissed by the former employer before the transfer of calling, the person is taken to be a transferred employee if –

- (a) the person is employed by the new employer after the transfer; and
- (b) the employee –
 - (i) was dismissed by the former employer within 1 month immediately before the transfer; and
 - (ii) is re-employed by the new employer within 3 months after the dismissal.

(3) The transfer of the calling is taken not to break the transferred employee's continuity of service.

(4) A period of service with the former employer (including service before the commencement of this section) is taken to be a period of service with the new employer.

(5) In this section –

'**dismissed**' includes stood-down."

"SCHEDULE 5

...

'**transfer**' of a calling includes the transmission, assurance, conveyance, assignment or succession of the calling –

- (a) either by –
 - (i) operation of law; or
 - (ii) agreement, including an agreement effected by a third person; and
- (b) either before or after the commencement of this Act."

The questions for consideration in the present matter are:

- (i) whether there has been a transfer of a calling to a new employer from another employer as a result of an agreement, including an agreement effected by a third party; and
- (ii) whether Mr Burke became an employee of Wilson Parking because of the transfer of a calling to it from another employer.

“Calling” is defined in Schedule 5 of the Act to mean –

- “(a) a craft, manufacture, occupation, trade, undertaking or vocation; or
- (b) a section of something mentioned in paragraph (a).”.

Section 69(1) of the Act refers to the transfer of a calling to the new employer from another employer. The Union submitted that the calling in question was primarily Mr Burke’s occupation of Car Park Attendant, however, the undertaking of the operator of the car park could also be considered to be the calling. This latter submission was more consistent with that of the respondent who said that s. 69(1) implies that the calling is something owned by an employer and able to be transferred to another employer. It is not the calling of the employee that is in issue. In this case the relevant definition of calling is “undertaking” and the undertaking is that the business of operating car parks. As the definition permits a section of an undertaking to be considered as a calling, the undertaking is more properly defined as the car park at 118 Charlotte Street, Brisbane.

The word “undertaking” was first inserted into the definition of calling in the *Industrial Relations Act 1990*. There appears to be sufficient uncertainty about the matter to allow resort to extrinsic materials. In the same way that Hall, P found in *Harrison v Electcom Limited* (2000) 163 QGIG 375 that s. 14B(1), (2) and (3)(b) of the *Acts Interpretation Act 1954* authorise resort to the Minister’s Second Reading Speech, the Explanatory Memorandum and the Report of the Industrial Relations Taskforce of December 1998, the Commission has had regard to the relevant parliamentary materials as well as the Report of the Committee of Inquiry into the *Industrial Conciliation and Arbitration Act 1961-1987* of Queensland, November 1988 (the Hangar Report). None of these documents provide any guidance about the meaning of this term and the reason it was inserted into a definition that had largely remained unchanged for many years.

In *Reference under Electricity Commission (Balmain Electric Light Co. Purchase) Act 1950* (1957) NSWSR 100 “undertaking” was described as being “a word of variable meaning . . . Basically the idea which it conveys is that of a business or enterprise.”. On the basis that the word undertaking in the definition of calling is accepted to include business or enterprise, then the operations of a car park can be considered to be an undertaking.

Although in *Tinniswood* the Industrial Court was considering an earlier Act provision, it was dealing with a case where a transmission of business was being argued. The decision of the Industrial Court indicated that it was the calling of the employer that had to be examined to determine whether a transmission of business occurred. In light of the decisions cited above, I consider the respondent’s approach to be correct and that the calling is the operation of the car park at the said location.

With that is accepted as the calling, the next matter that needs to be examined is whether that calling transferred from one employer to another as a result of an agreement. The Union submitted three scenarios where a transfer of a calling might arise within s. 69 of the Act *viz*:

- (i) by agreement directly between the former employer and the new employer;
- (ii) by agreement effected by a third party, in this case the landlord;
- (iii) by transfer of the operations of the car park.

The Union submitted that the onus was on the respondent to prove the service was not continuous (*Glengair v Walsh* supra). The Commission does not accept this submission. The decision in *Glengair* related to s. 17(16) of the *Industrial Conciliation and Arbitration Act 1961*. Section 17 of that Act dealt specifically with long service leave and s. 17 (16) contained an express provision that matters averred to in the complaint were taken to be proved unless the employer proved the contrary. This application is not brought by way of complaint which is a specific process in the Industrial Magistrate’s Court. This application is brought under s. 278 of the *Industrial Relations Act 1999* and it does not have an equivalent provision to the paragraph referred to and contained in s. 17(16) of the earlier Act. Neither does Chapter 2 Part 3 of the present Act, which sets out the Long Service Leave provisions. The relevant provision is Rule 97 of the *Industrial Relations (Tribunals) Rules 2000* which provides that the applicant has to prove, on the balance of probabilities, Mr Burke’s service was continuous.

The evidence before the Commission about whether there was any agreement to continue Mr Burke’s employment was from Mr Burke and Mr Staines, the State Manager for the last car park operation for which Mr Burke worked. There is no oral evidence from Mr Burke’s former employers. The “evidence” such as it is, is presented by way of letters received by Mr Burke from his former employers at the expiration of their lease or, in one case, by the agent of the landlord.

The periods of Mr Burke’s employment with the various car park operators show that his service has been continuous. This is not conclusive of agreements existing between former operators and incoming operators. The letters attached to Mr Burke’s statement show that his employment was terminated by each operator. They said they would talk to the new operator to arrange an interview or otherwise secure employment, but none of the evidence from Mr Burke establishes that the former operators had an agreement with the incoming operator for him to be employed. Nowhere in the available evidence is there any indication of a commitment to, a guarantee of, or an agreement to future employment. The evidence of Mr Staines (although he was not directly involved in Mr Burke’s employment) is that it is common for recommendations on staff to be given by the former operators to the new operator but it is not the practice to enter into agreements between operators on such matters. Moreover, the new operator’s particular business exigencies may prevent it from employing staff who are recommended. For example, the new operator may have excess staff from other car parks that it wishes to deploy in the operation for which it has secured a lease or changes in the opening hours of the newly leased car park may prompt a reduction in staff numbers. Wilson Parking employed Mr Burke in 1999 as a result of a recommendation by Care Park and observance of his work performance by Wilson Parking while Mr Burke was still an employee of Care Park.

In *Tinniswood*, the Industrial Court said:

“The mere fact that a subsequent employer of an employee, without any interruption of time, carries on a certain business at a particular place after a previous employer of that employee had carried on the same type of business at the particular place does not constitute a transmission from one to the other unless it be by agreement between the previous and subsequent employer or by operation of law.

To constitute a transmission there must be some definite legal nexus or privity between the previous and subsequent employers (the alleged predecessor and the alleged successor).”.

(p. 1021)

In the present matter there is no evidence of any legal nexus between Care Park and Wilson Parking or between Care Park and the former operators of the car park. There is also insufficient evidence of dealings between the former and new operators of the car park to find that any agreement existed between them to transfer the employment of Mr Burke. Moreover, the evidence does not establish any agreement between the former and new car park operators to transfer the undertaking.

The Industrial Court considered an application for long service leave under the *Industrial Conciliation and Arbitration Act 1961-1976* for an employee in circumstances where there had been a change in the lessee of certain premises. The case of *Saunders v R.O.F. Hoole* (1980) 104 QGIG 40 concerned the employment of Hoole by Saunders as a butcher for a brief period from 10 February 1977 when Saunders acquired the right and did occupy certain premises. Until the previous day, the premises had been occupied by Hoole's former employers who also carried on a butchering business there. This occupation of the premises as tenants at will had been brought to an end on 9 February by the action of the lessor. In that case the Industrial Magistrate found that each of the employers derived the right to occupy the premises from the same lessor and hence saw a sufficient legal nexus to create a transmission by operation of law.

In the appeal decision, the Industrial Court noted that the Industrial Magistrate found there were no dealings between the two employers and hence there was no transmission by agreement. The Industrial Court also found that there was no basis for deciding that the law so operated as to effect a transmission. This case is on point with the present matter and is authoritative.

In its submissions outlined earlier the respondent clearly set out what happens when a lease expires and a lease is granted to a new operator. The former operator terminates all staff and removes all of their property from the premises. The physical fittings of the car park remain but the building owner, not the car park operator, owns these. The new operator brings in its own operating procedures and if necessary, staff. In this way there is no evidence that the undertaking of the car park operations transfers from the old operator to the new operator.

The question of what is meant by "agreement, including an agreement effected by a third party", received some attention in the submissions of both the Union and the respondent. There appears to be sufficient lack of clarity to warrant resort to extrinsic materials. Both parties submitted that neither the Minister's Second Reading Speech nor the Explanatory Memorandum assisted with an interpretation. Relying again on the decision in *Harrison and Electcom* regarding resort to extrinsic materials, I intend also to refer to the report of the Industrial Relations Taskforce of December 1998. Nothing of relevance appears in Chapter 4.1.3 General Employment Conditions. Chapter 4.3 addressed the issue of the protection of employee entitlements especially in the face of transfer of business or insolvency. Recommendation 32 states:

"That there be further legal investigation of the implications of widening the definition of transfer of business to deal with contrived circumstances where employee entitlements are lost." (p. 57)

As the definition of transfer (albeit transfer of a calling) was extended to include the clause, "including by an agreement affected by a third person" it seems reasonable to conclude that this was intended to respond to Recommendation 32. These circumstances do not apply in the present matter.

The Union argued that the agreement effected by a third person is that effected by the lessor. There is no evidence before the Commission that points to the building owner or the lessor requiring Mr Burke to be continued in employment. The invitation to Wilson Parking to submit an expression of interest to lease the car park, prepared by Knight Frank, does not include any provision for employees of the current operator to be employed by the successful lessee. While the lease signed by Wilson Parking requires competent and trained employees to be engaged – and there is no argument that Mr Burke fell within this description – this cannot be construed as an agreement between the lessor and Wilson Parking that Mr Burke be employed. There is nothing in the lease, as there are with some contracts, which imposes a condition that the new car park operator employ the staff of the previous operator. It is usual business practice that where such a condition was imposed, the tenderer would adjust its price to take account of the accrued employee liabilities that it would assume on employment of the employees of the former operator. This did not occur in this case. In the same vein, the letter from Wilson Parking to Mr Burke giving notice of the termination of his employment on 31 March 1993, said that the Manager of Wilson Parking had been assured by the directors of National Mutual Property Services that all car parking staff will be considered for employment with KC. Again, this cannot be construed as a guarantee of or agreement to employment.

Section 32 D (1) of the *Acts Interpretation Act 1954* provides that "In an Act, a reference to a person generally includes a reference to a corporation as well as an individual." It may be arguable that the change to the definition of calling was intended to capture those circumstances described above where a company letting a contract or tender requires the new contractor or successful tenderer to employ the staff of the previous contractor. In this case, the lessor did not require those tendering to employ the employees of the previous lessee and there was no such condition contained in either the invitation to tender or the lease. For these reasons I do not consider that the change to the definition of transfer assists the Union's case.

The Commission must also consider whether Mr Burke became an employee of Wilson Parking because of the transfer of a calling to it from another employer. Section 69(2) of the Act makes provision for employment to be continuous where an employee has been terminated by an employer before the transfer of a calling and the employee is employed by the new employer within three months after the dismissal. Even in that case, a transfer in the calling must have occurred to establish continuity. I have already found that the calling did not transfer from Care Park to Wilson Parking. It follows then that Mr Burke could not become a transferred employee within the meaning of s. 69 of the Act because of a transfer of a calling to the new employer from the former employer. Mr Burke became an employee of Wilson Parking because it decided to offer him employment.

The Union argued that the definition of transfer in Schedule 5 of the Act was not exhaustive and that transfer should be given its ordinary meaning particularly in circumstances such as those of Mr Burke where he had continuous service with a series of employers. The decision in *Rose v McKillop* (supra) was relied on to support this contention. In that case the Court found that "[I]n each instance an employer was carrying on a retail butchery business in a certain shop premises. Each employer ceased to carry on that business and was succeeded in the carrying on in the same business in the same shop premises without any interval of time, by another employer. Each of these employers continued to employ William Rose without any interruption in his service in that retail butchery." (at 912). The Court found that in that case there had been a transmission of the service by the employee from one employer to another. The Union argued that given the similarity in facts to the present matter, *Rose* should be accepted as authority that a transfer occurred in the case of Mr Burke.

The respondent sought to distinguish *Rose* from the present matter on a number of grounds including the lack of evidence from the employers and in fact the paucity of evidence that is recited in the decision. The respondent noted that this decision stood in contrast to the decision of the same members of the Industrial Court in *Tinniswood* where no transmission was found to occur.

The respondent also commented on the statement of the Court that the "transmission was constituted by transfer of his services from one employer to another by agreement between each new employer and William Rose." Mr Muir noted that the judgment contains neither reasoning to explain how this conclusion was arrived at nor any evidence to support the conclusion. In addition the "transmission" referred to was a transmission of the service of the employee. The respondent argued that this would be distinguished from s. 69 of the present Act where an entitlement to long service leave is contingent upon showing there has been a transfer of a calling.

I agree that *Rose* can be distinguished for the reasons outlined by the respondent. In addition, the decision in *Saunders* deals specifically with a case involving a change of employers due to actions of the lessor. It is the more relevant decision.

The Union's argument that the term "transfer" should be given its ordinary meaning and not be limited to the operation of law or by agreement is not supported by the construction of the definition as it appears in Schedule 5 of the Act. The list of ways in which a transfer of a calling may occur is not exhaustive, but, irrespective of the method of the transfer, it is still limited by the operation of law or by agreement.

Finally, the Union argued that the Act is beneficial legislation and should be construed beneficially. Contrary to this argument the respondent outlined the unfairness that would accrue to it if the application was successful and submitted the Union was attempting to introduce portability of long service leave by stealth.

The car parking industry is akin to other industries based on contracts and tenders, e.g. cleaning and security. Contracts are won and lost and employment is contingent upon the successful tenderer employing the employees of the previous contractor. There are no guarantees of continuous employment. It may be that a portable long service leave scheme would be beneficial to contracting industries, as noted by Hall, P and Brown, C in the *Review of the Entitlement to Long Service Leave* (2000) 164 QGIG 236. However, as regrettable as it may be, the 1999 Act does not, in my view, create an entitlement to long service leave for employees of contracting industries at least where there is no requirement by the contracting party for the successful tenderer to employ the employees of the former contractor. Whether such a requirement would create an entitlement to long service leave has not been argued before me and a separate case would need to be conducted to determine that matter.

In the case of Mr Burke I find that he is not a transferred employee within the meaning of s. 69 of the Act and thus does not have an entitlement to long service leave.

The application is dismissed.

G.K. FISHER, Commissioner.

Appearances:

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

Released: 13 August 2002

Mr G. Muir (Employer Services) and with him Mr B. Staines behalf of the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Marilynn Anne Davey AND Liquorland (Qld) Pty Ltd (No. B349 of 2002)

Jennifer Rosemary Towner AND Liquorland (Qld) Pty Ltd (No. B350 of 2002)

COMMISSIONER SWAN

9 August 2002

Application pursuant to s. 276 of the *Industrial Relations Act 1999* (the Act) – Two jurisdictional challenges mounted – Whether contract of service was covered by an industrial instrument – Whether application precluded because of prior s. 74 application – Section 135 of the Act considered – Employees' contract of service is covered by an industrial instrument – In the alternative contracts are not unfair – Jurisdictional challenge upheld.

DECISION

There are two amended applications before the Commission. The applications are identical and are made by Ms Jennifer Towner and Ms Marilynn Davey. Both applications are made pursuant to s. 276 of the *Industrial Relations Act 1999* (the Act), and seek the following:

“1. A decision, declaration, ruling or order which amends or declares void wholly or partially two contracts of employment which are attached to Schedule 1. The relevant Award for consideration of section 276(2)(c) of the *Industrial Relations Act 1999* is the *Clerical Employees Award – State* and the Termination Change and Redundancy Decision, 16 June 1987 as amended, however the clauses in dispute in the two contracts attached in Schedule 1A and B are not covered by an industrial instrument. This application is made pursuant to section 276 of the *Industrial Relations Act 1999* ‘Power to Amend or void Contracts’.

This application is seeking a declaration and order by the Commission that part of the contracts in Schedule 1 are void and that the contracts are a device to avoid the obligations by the employer under the provisions of the Termination of Employment, Introduction of Changes and Redundancy Full Bench Decision dated 16 June 1987 as amended and the provisions of the *Clerical Employees Award – State*; and

A decision that the contracts were unfair; and

2. The following decision:

- (a) That the contracts of employment attached in Schedule 1 to this application are unfair contracts pursuant to section 276(2) and (4).
- (b) The applicant seeks that the Commission make an order it considers appropriate about the payment of amounts for a contract, amended or declared void pursuant to section 276(5).

The amounts sought are as follows:

- (i) Severance pay of 4 weeks (an amount of \$2615) pursuant to the provisions of the Termination of Employment, Introduction of Changes and Redundancy Full Bench Decision dated 16 June 1987 as amended by the Queensland Industrial Relations Commission.
- (ii) The benefits of 8 weeks pay (an amount of \$5231) provided in the contract of employment dated Monday 18 June 2001 included in Schedule 1 paragraph 5(e).
- (c) A declaration or order that a second contract of employment dated 29 October 2001 titled ‘Addendum to Employment Contract dated 28 June 2001’ marked B in Schedule 1 is an unfair contract and the third paragraph is void ‘*ab initio*’.
- (d) The applicant seeks a declaration or order for general damages for pain and suffering including emotional distress, humiliation and loss of wages and seeks the sum of \$5,000 compensation or such other amount as the Commission deems appropriate.
- (e) The applicant seeks a declaration or order for the full sum of the amounts claimed in (b) and (d) above which is a total of \$12,846.”

These matters have had a protracted history before the Commission. Pursuant to s. 74 of the Act, an application (application for reinstatement) had been lodged by the applicants with the Commission with the focus being upon the payment of the “retention bonus” only. Whilst a conference had been held (but no certificate issued by the Commission pursuant to s. 75(3)), the advice given to the parties was that their applications might be misplaced and might be better pursued under s. 276 of the Act. Section 276 applications were then lodged.

In the interests of all parties, it was agreed that, notwithstanding the fact that the respondent raised a jurisdictional challenge, the matter should proceed with the jurisdictional point being heard in conjunction with the applicants' full case. This occurred, and as it has transpired, the jurisdictional challenge has been upheld by the Commission.

The jurisdictional challenge has been made on two grounds, namely:

1. That the applicants were employed pursuant to the *Clerical Employees Award – State*. Both were exempt employees being paid above the relevant exemption rate in the Award.

Relevantly, s. 276(1) of the Act states that:

“276 Power to amend or void contracts

(1) On application, the commission may amend or declare void (wholly or partly) a contract if it considers –

- (a) the contract is –
 - (i) a contract of service that is not covered by an industrial instrument; or
 - (ii) a contract for services; and
- (b) the contract is an unfair contract.”.

The respondent states that the applicants are excluded from utilising the provisions of s. 276 of the Act because they were in a contract of service which is covered by an industrial instrument (see s. 276(1)(a)(i) of the Act).

2. That the applicants had made an earlier application to the Commission pursuant to s. 74 “application for reinstatement” and are precluded from accessing s. 276 relief (see s. 276(6)(a) as a consequence of that application).

Relevantly, s. 276(6)(a) reads as follows:

- “(6) A person can not make an application under this section if –
- (a) an application has been made under section 74 for the same matter; or”.

It is submitted that the relief sought in the s. 74 application contained the essence of the relief sought in the s. 276 application.

In order to understand the decision taken in this matter, a brief outline of the applicants' case is as follows.

Brief History of Applicants' Claim

Both applicants had worked for the Leda Hotel Group for approximately one year. In around June 2001, Leda declared their positions redundant. The Leda Hotel Group was purchased by the respondent, Liquorland (Qld) Pty Ltd.

Liquorland utilised stock control systems different to those used by the applicants when employed by Leda. Liquorland however, required the services of the applicants for the transitional period only. To this effect, Liquorland offered short-term contracts to both applicants.

In order to ensure that the applicants, who would presumably be looking for more secure employment, stayed for the requisite period of time, Liquorland offered an incentive bonus. The incentive bonuses were payable upon completion of the task and the contract drawn between the parties set a “target date” for such completion.

For the purposes of further following the debate, the relevant sections of the contract entered into between the applicants and Liquorland is stated hereunder:

- “...
 3. Period of Engagement
 Your employment with the Company will commence TBC pending final settlement of the contract with Leda. Subject to Clause 15, the contract will terminate at a target date of 30 November 2001. The target date will only be revised with the provision of one months written notice by the business.
4. The purpose of the Contract
 The reason for your employment being on a limited tenure basis is to assist in the introduction and conversion to a new Point of Sale system.
5. Retention Program Principles/Severance
 (a) Liquorland will pay a severance payment as advised to you at the time of your appointment or a retention bonus in accordance with this clause whichever is the greater, on termination by Liquorland.
 (b) The target date is 30th November, 2001.
 (c) The target date will only be revised with the provision of one month's written notice.
 (d) If the employee accepts an alternative position on completion of the target the retention bonus shall be applied.
 (e) If the employee works up to the target date, Liquorland will pay a retention bonus equivalent to 8 weeks pay.
 (f) This formula is based on: 4 weeks notice plus, 1 additional week for each month worked.
 (g) Where Liquorland moves the target date with a month's notice the bonus will increase by 1 week for each month of service up to a maximum of 12 weeks (including the bonus provided in paragraph (e). If the employee resigns prior to the target date or is terminated in accordance with paragraph 15 no retention bonus or severance payment shall be applied.

...

15. Termination
 Notwithstanding the fixed period of employment provided for in this contract, termination for reasons that constitute summary dismissal may occur without notice.”.

On 29 October 2001, Liquorland corresponded with the applicants in the following manner:

“Addendum to Employment Contract dated 18 June 2001

With reference to your limited contract of employment, we wish to advise that the target date has been extended from 30th November, 2001 to 22nd February, 2002. The reason for this revision is the delay with the conversion to the new Point of Sale system.

The extended period of your contract will also ensure that hotel management teams can progressively take on responsibility for all administrative matters other than the Focus stock system. As the need for administration reduces, it is envisaged that your duties will vary and will incorporate operational tasks in the retail or hotel outlets in addition to your Focus related responsibilities.

Under the terms of your contract, the 8 week retention bonus for working up to 30th November will be included in your final payment if you continue to work up to the revised target date of 22nd February 2002. In addition to this 8 week retention bonus, as the target date has now increased by 3 months, you will be eligible for an additional 3 weeks retention pay at the completion of your contract on 22nd February 2002.

In line with the needs of the business, you may choose to reduce your working hours from full-time to part-time and concentrate solely on the Focus system. To determine if this is the case, you need to consult with Stuart McLeod. Please be aware that in this scenario, your retention bonus would be calculated on a *pro rata* basis according to your new part-time hours. A revised contract will be issued should this option eventuate.

This letter is in an addendum to your original contract and we recommend you refer to it accordingly. All other terms and conditions are as prescribed in your employment contract dated 18 June 2001.

Please do not hesitate to call me should you require any further clarification. I would also ask that to signify your acceptance of this addendum, you sign and return the attached copy and return it to me no later than Friday 2nd November 2001.

Regards,

Julia Crombie

Human Resources Manager.”

The applicants ceased their employment with Liquorland in December 2001. They say they were constructively dismissed. They claim that Liquorland would not pay them the incentive bonuses which they believed were due to them upon the expiry of the original target date of 30 November 2001. They submit that they were led to believe that they would have received the bonuses at that time irrespective of the terms outlined in the contract which they both signed with Liquorland and to which reference has previously been made.

Before considering the jurisdictional challenges, were I to determine the issue relying solely on the question of the essence of the contracts existing between the parties, I would start by saying that the contracts are clear and unambiguous.

It is stated that the contracts will terminate on the “target date” of 30 November 2001. The “target date” (or date of termination) could be revised upon the giving of one months notice. That notice was given. Liquorland was obliged under the terms of the contract to pay the retention bonus upon termination of employment. Termination of employment would not occur until the revised target date was met. The applicants agreed to these terms, but resigned from Liquorland prior to the revised target date being met.

On the evidence before me on that point, I do not accept that the applicants were constructively dismissed at all. They chose to leave the employment of Liquorland. Any claim around the question of redundancy is misplaced. They were not paid the retention bonus. I see nothing untoward in that. The contracts in themselves are not unfair regardless of whichever yardstick is used. The applicants were engaged under short-term contracts with a defined completion date and the applicants chose to leave before the expiration of that period of time. By doing that, the applicants lost any claims they believed they might have had in these applications.

The Jurisdictional Challenge

Turning to the jurisdictional challenge, the first ground cited is in my view correct. There is no question, even between the parties, that the applicants were employed pursuant to the *Clerical Employees Award – State*. The fact that they were exempted from certain provisions of the Award does not preclude them from being in fact covered by the Award.

Section 135 of the Act states as follows:

“135 Inconsistency between awards and contracts

(1) To the extent of any inconsistency, an award prevails over a contract of service that is –

- (a) in force when the award becomes enforceable; or
- (b) made while the award continues in force.

(2) The contract is to be interpreted, and takes effect, as if it were amended to the extent necessary to make the area of inconsistency conform to the award.

(3) However, no inconsistency arises only because the contract provides for employment conditions more favourable to the employee than the award.”

The applicants’ claim is that:

“the clauses in dispute in the two contracts attached in Schedule 1A and B are not covered by an industrial instrument.”

Schedules 1A and B are the contracts (already cited) and the letter headed “Addendum to Employment Contract dated 16 June 2001”.

The applicants state that the contracts are not “covered” by an industrial instrument and therefore fall outside of the exclusion in s. 276 of the Act. Section 276(1)(a)(i) excludes employees who are engaged in service which is covered by an industrial instrument. It would be the “service” which was covered by an industrial instrument not the contract in existence as claimed by the applicants. The award prevails over a contract to the extent of any inconsistency in terms (see s. 135).

As far as the "retention bonus" is concerned, this is a provision which is in excess of any award provision and therefore would fit within the requirements of s. 135(3). The work performed by the applicants for Liquorland is work of a type which would be covered by an industrial instrument, even though the applicants were partially exempted from the instrument because of the salaries received. On these grounds alone, the applications fail.

On the second ground, it is clear that the applicants made an application pursuant to s. 74, on the grounds which were incorporated within the s. 276 application i.e. for the payment of the "retention bonus". The s. 276 application raises broader grounds of complaint, and is not in fact confined to the "same matter" raised in the s. 74 application. Were I to simply exclude what is described as the "same matter" and consider the remaining claims, then those issues have already been considered and where relevant determined by the Commission in the body of this decision. Those claims fail as a consequence of the particular decision having been reached.

Conclusion

In drawing all of these issues to conclusion, I would state that even if I am wrong on the question of jurisdiction, I reiterate that I would have been unable to find any justification for a finding in the applicants' favour in terms of the s. 276 general application for reasons earlier outlined and particularly so on the basis that the applicants had resigned from their employment.

In simple terms, I believe that the applicants held an erroneous belief as to the terms of the contract into which they freely entered. The terms of the contract are not ambiguous. Those terms were explained to the applicants. The fact that the terms of the contract were enacted in full by the respondent does not make the contract or any of its contents unfair. The question became academic in any event. The applicants walked away from their employment obviating the need for me to consider any further argument regarding the possible ramifications emanating from their actions.

Overall, the applicants are excluded from seeking redress in terms of s. 276 of the Act. Even had that recourse been available to them, I can see no merit in their claims on the other points raised.

I dismiss all claims made by the applicants.

Order accordingly.

D.A. SWAN, Commissioner.

Released: 9 August 2002

Appearances:

Mr A. Camp of Alan Camp & Associates for the applicants in both matters.

Mr D. Williams of Minter Ellison and with him Ms S. McRostie on behalf of Liquorland.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Jeff Davis of Woodview Transport AND Toll North Pty Ltd (No. B575 of 2001)

COMMISSIONER SWAN

9 August 2002

Application made pursuant to s. 276 of the *Industrial Relations Act 1999* (the Act) – Claims that applicant purchased truck on the promise of a guaranteed amount of work per week – Respondent denied any guarantee – Respondent stated that it would attempt to facilitate applicant's needs – Alleged guarantees not met by respondent – Financial hardship suffered by applicant – Evidence not sufficient to satisfy requirements of a s. 276 application – Application dismissed.

DECISION

This application is made by Mr Jeff Davis pursuant to s. 276 of the *Industrial Relations Act 1999* (the Act) for "orders amending or avoiding the contracts for services between Woodview Transport and Toll North Pty Ltd . . .". The specific relief sought in the application is as follows:

- i Woodview Transport will receive minimum payment of \$4,500.00 per week during the course of this contract.
- ii The respondent pay the applicant an amount of \$153,000, or such other amount as this Commission deems fit."

The essence of the applicant's claim is best detailed in the brief summary provided in the application:

"On or around March 1997 I entered into a contract for services, trading as Woodview Transport, with the Respondent.

In or about January 1999, I was informed by the respondent that I was required to purchase a new vehicle. The vehicle that I was operating at that time was still operational and road worthy, however, the respondents insisted on the change.

I made enquiries regarding obtaining finance for a new vehicle. During the course of my enquiries, and to assist me in obtaining finance, the respondents made representations to my financier to the effect that I would be in receipt of approximately \$4,500.00 per week derived from two return trips between Sydney and Brisbane.

As a result of these representations, I was successful in obtaining finance for my vehicle and I then committed to a significant loan based on the expectation of income that I had from the representations of the respondents.

Between January 1999 and February 2001, I received substantially less return trips between Brisbane and Sydney than I had been promised.

I was generally paid \$1,500.00 per trip between Sydney to Brisbane and \$750.00 per trip between Brisbane and Sydney. Between January 1999 and February 2001, the Respondents failed to provide me with approximately 50 trips between Sydney and Brisbane (\$75,000.00), and 112 trips between Brisbane and Sydney (\$91,500.00). In total, I have been denied 162 trips as promised, totally \$166,500.

I believe the conduct of the Respondent in relation to its contract with me constitutes an unfair contract within the meaning of s. 276 of the *Industrial Relations Act 1999* in that it is harsh, unconscionable and/or unfair on the following grounds:

- i. Because the respondent made representations to me to the effect that my contract would include not less than two return trips between Sydney and Brisbane per week, which I reasonably understood to be valued at \$4,500.00 in total;

- ii. That the respondent made similar representations to a financial institution in order to assist me in obtaining credit when they knew or ought reasonably to have known that the credit provider would act on those representations; and
- iii. The respondent then failed to provide work and/or payment in accordance with the representations made to the applicant and the credit provider, and has thereby caused significant financial hardship for the applicant.”.

The respondent raised an initial challenge. Issue is made around the question of the appropriateness of the applicant’s pleadings. It is claimed that:

“...in a matter such as this, the applicant is to be held to the pleadings and the matter determined solely on the basis of the unfairness alleged in those pleadings. So too, any application which may now be made to amend to add further or alternative grounds of unfairness should be refused.”.

The authorities relied upon for the first proposition are decisions of the Commission in *P&J Trucking Pty Ltd v Toll Transport Pty Ltd trading as Toll Logistics* (2001) 166 QGIG 434 at 437 and *Muslin v Cantilever Pty Ltd and Norman Floodline* (2002) 170 QGIG 3 at 4 and for the second proposition, *TDG Logistics Pty Ltd v Peter William Reilly* (2001) 167 QGIG 247. I reiterate my views expressed in *Graham Mather AND Toll Express Pty Ltd* (No. B480 of 2000).

“Upon the question of pleadings, I respectfully adopt the views expressed by President Hall in *TDG Logistics Pty Ltd v Peter William Reilly* (2001) 167 QGIG 247 where the President cited the decision of *Gould and Birbeck and Bacon v Mt Oxide Mines Limited* (in liquidation) (1916) 22 CLR 490 per Isaacs and Rich JJ where it was stated:

‘... pleadings are only a means to an end, and if the parties in fighting their legal battles choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of contest.’.

Pleadings represent, in general, a summarised form of the relevant facts to be relied upon in an application or response. The essence of pleadings, amongst other things, is to ensure that a party is not ambushed during the course of a hearing by claims which have the capacity to impact upon the outcome of the case to which no prior reference has been made. The facts pleaded are assertions which would require to be proved by evidence (see *Laws v Australian Broadcasting Tribunal* (1990) 170 CLR 70 at 85-87 per Mason CJ and Brennan J, at 98 per Gaudron and McHugh JJ). Were there to be rigid adherence to the pleadings made by either party, it may be that a decision is made which fails to take into account the merits of the case. It would seem to me that the most appropriate course to adopt in this matter is to ensure that, in the main, the case put relies upon the facts pleaded, with amendments being made if sought (see **Part 2 – Industrial Tribunals and Registry Subdivision 2 – Amendments – Industrial Relations (Tribunals) Rules 2000**), but that leniency be afforded where no significant departure has arisen from the case as pleaded or formally amended. In this matter, it is clear to me that the case as pleaded adequately details to the respondent the facts to be relied upon.”.

Much of the respondents’ evidence was based upon its assertions that it would not have given Mr Davis or any finance company guarantees that the sub-contractor would be assured of obtaining a set number of trips per week – in effect, a guaranteed income. The respondent denied that any contract/arrangement existed between the parties which would guarantee a set income.

Mr Davis, in his affidavit and in his direct evidence stated that his wife undertook most if not all of his financial transactions. It was Mrs Davis who kept records of trips taken and who understood the financial situation of Woodview Transport. Mrs Davis, whilst present within the court room, was not called to give evidence.

Mr Davis had asserted in his affidavit that he believed that Mr Jeff Dockett (former NQX Supervisor) and Mr Patrick Williams (former Terminal Manager, NQX) had, after giving him an assurance that he would receive a return number of trips per week, at his request contacted the finance body, Esanda, (through which he obtained the loan for the purchase of his truck) and had assured them about the number of trips and remuneration he would receive per week. Mr Davis had been negotiating his financial arrangements through a Mr Seymour (or Bryan McMahon and Associates Group). The evidence of Mr Davis during the trial showed, however, that he had no direct knowledge of whether Mr Dockett or Mr Williams ever contacted Esanda. Mr Davis also stated, whilst giving evidence, that he was not aware of where the finance sought was coming from until just before the commencement of the trial.

The credit application made by Mr Seymour, on behalf of Mr and Mrs Davis, to Esanda states, *inter alia*:

“Purpose

Jeff Davis is an interstate haulage contractor and presently works for NQX (Toll Express). He has just been awarded a second return trip from Sydney to Brisbane and his 1989 Mack Value-liner has reached the end of its economic life in terms of interstate haulage.

The purpose of this application is to provide a hire purchase facility for the acquisition of the subject International prime mover.

...

Background/Management

... NQX have recently been taken over by Toll Express and Toll have approached him to do regular two return Brisbane to Sydney trips per week. The pay rates for this job is Sydney to Brisbane leg \$1480 and the Brisbane to Sydney leg \$850. Confirmation of these work sources can be sought by contacting Pat or Bill at work Sydney (phone...) and Mark or Jeff Dockett at NQX Brisbane (phone...).

...

Recommendations

The applicants are possessed of a sound asset position, are highly experienced are believed to have clean credit, have sound work with secure work sources and can demonstrate the capacity to service the proposed commitment. The result of this transaction will be that the applicants have equity in all of their major assets. This application carries our recommendation for your approval.

...

Any information given by Bryan McMahon and Associates Group is based on information supplied by the client and no responsibility is accepted for errors and omissions ...

Bryan McMahon & Associates.”.

Both Mr Williams and Mr Dockett deny that they gave Mr Davis assurances about the number of trips he would have per week. Mr Williams states:

“I definitely did not ever give him any sort of promise or guarantee of a particular volume of work. If I had done so, I would have immediately had fifty other subcontractors on my doorstep seeking the same arrangement. There is no way which an arrangement could have been left secret in the depot. I do not specifically recall doing so, but I may have said to him something like “we could give you two loads Sydney to Brisbane per week if there’s product available.”.

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With regard to Mr Davis' claim that he was told to get a new truck, Mr Williams recalled telling Mr Davis words to the effect "If you can't be reliable, either get a new truck or fix your truck up." Mr Williams had given credit references for subcontractors on many occasions but claims to have been cautious to provide only an estimate of work being performed by a subcontractor. Mr Williams also claimed that:

"... after I returned from leave I continued in employment with NQX until June 1999. Jeff Davis never complained to me about not getting his 'promised' trips or not getting any agreed volume of work or remuneration. I note, for example, that in April 1999, he only did five loads in the whole month. It seems extraordinary to me that if he believed he had a guarantee of 16 trips per month that he did not raise this with me at the time."

Mr Dockett's evidence was that there was one subcontractor driver, Mr Stamos, whose services were utilised by the respondent for two return trips from Brisbane to Newcastle/Sydney. Mr Davis, it was claimed, sought a similar arrangement with the respondent. At a point in time, a decision was made by the respondent to run its trips from the Sunshine Coast to Sydney. Mr Stamos, who had for a while undertaken the Sunshine Coast to Newcastle/Sydney trips, reverted back to the Brisbane to Newcastle/Sydney run because he would not have sufficient rest time doing the Sunshine Coast to Newcastle/Sydney trip.

From both Mr Williams and Mr Dockett's evidence, it was clear that they viewed subcontractor work as being given when freight was available. Mr Dockett stated that:

"it was certainly never my practice to promise any amount of work to any driver. It was something I could not do because the clear NQX policy – and every one knew it – was that company vehicles had to be loaded first and if there was any work over, then subcontractors took that."

Mr Dockett's evidence was similar to that of Mr Williams on the question of comments made to finance companies.

Further, Mr Dockett was adamant that any reference made by him with regard to subcontractors' trucks was on the basis that if the truck was not roadworthy then drivers would be refused loads until the roadworthiness of the truck was evident.

In support of Mr Davis' claim that there existed an agreement between the parties that he was promised two return trips to Newcastle/Sydney each week, documents were tendered which made reference to an arrangement.

Mr King, National Linehaul Manager referred to a meeting which had been held between himself, Mr Hugh Williams (Secretary of the Transport Workers' Union of Australia, Union of Employees (Queensland Branch) (the TWU)) and Mr Jeff Davis. The meeting related to allegations which had been made by Mr Davis against the respondent which had allegedly required Mr Davis to drive outside regulated hours. Mr King stated that it was during the meeting that Mr Davis told him that he had been promised two Sydney to Sunshine Coast return trips every week. Mr King claimed not to have taken much notice of this reference because the negotiations centred upon the question of driving regulated hours and not whether Mr Davis had been promised a certain number of trips per week. However, Mr King did agree that he had advised Mr Davis that NQX would assist him to achieve two return trips per week but, that any trips would be subject to freight being available.

There was considerable debate around the question of whether, in any event, Mr Davis could have undertaken the alleged two return trips and stayed within legal driving hours. Mr Brandt, current Haul Line Manager of Toll North Pty Ltd since December 2000, stated that Mr Davis operated under the Regulated Hours Fatigue Management Structure and that:

"Based on this typical schedule and on the various scenarios of hours for driving and pickup and deliveries and other work which I have considered, I say it is not possible for a driver doing the typical work of a subcontractor owner driving for NQX to do two return trips between Brisbane and Sydney each week and stay within Regulated Hours."

Mr G Williamson, an official from the TWU, agreed that it was theoretically possible for a subcontractor driver to undertake the two return trips to Sydney each week provided a number of other factors were in place e.g. if waiting time and unloading time were efficiently organised.

In considering all of the evidence in this matter, I have drawn the conclusion that Mr Davis had not been guaranteed the trips he claims to have been.

The evidence points to the following conclusion. Firstly, I accept that Mr Davis was told by the respondent that it didn't want subcontractors driving unroadworthy/old trucks whilst performing contract work for them. That comment in itself is unsurprising. The respondent was entitled to make that request. Mr Davis' evidence is that he was never directed by the respondent to buy a new truck, rather that it was put to him that it would be preferable to buy a new truck. Ultimately, it was Mr Davis' decision to make that purchase.

That Mr Davis wished for and repeatedly requested from the respondent two return trips per week from Brisbane to Sydney is not doubted. There is ample evidence, which I accept, to support that contention. I do not accept, however, that the respondent promised Mr Davis that outcome. I accept that the respondent committed to attempt to provide those return trips to the applicant if work was available. As the respondent states, its first obligation was to its permanent staff – then to the subcontractors.

In reaching this conclusion, I have given consideration to the following factors:

- Mr Davis' initial contact with the finance company shows that the finance company asked him what he was earning and he advised them that if he could get two trips per week, then he would be able to repay the loan.
- Mr Davis' affidavit stated that he had informed Mr Williams that he had conducted those discussions with Esanda and that Mr Williams had stated that he would contact Esanda and confirm that 'arrangement'. However, Mr Davis, in his evidence stated that he knew nothing about Esanda's involvement in the matter until he had discussions with his solicitor prior to the trial. On the applicant's own evidence, those claims, earlier made and sworn to, are not accurate.
- The evidence which I accept shows that it was Mr Davis who was the provider of the information contained within the credit application.

It is evident that Mr Davis did not ask Mr Dockett and/or Mr Williams to make contact with Esanda and there is nothing in the documents supplied by Esanda to show that any representations had been made to them by either of these persons.

Mr Seymour (the financier) was not called to give evidence. There was no explanation as to why this did not occur. I am entitled, in the circumstances, to draw the adverse inference that any evidence Mr Seymour may have given to the Commission would not have been helpful to the applicant (*Jones v Dunkel* (1959) 101 CLR 298).

I accept the evidence of Mr Dockett and Mr Williams that had either been contacted by a finance company to give assurances regarding work for a subcontractor, their responses would have been as they stated. They were simply not in a position to make such guarantees and, more tellingly so, I accept that, had they done so they would not have been able to contain the requests from other subcontractors (with the noted exception of Mr Stamos) for similar guarantees.

All that is contained within the credit application compiled by Mr Seymour is a reference to the fact that:

“confirmation of these work sources can be sought by contacting Pat or Bill . . .”.

That is not evidence of the fact that Mr Seymour had made contact himself with those persons or had been contacted by them directly. It was open, apparently, to Esanda to confirm those sources and there is no evidence to show that occurred. It may be the case that one could presume that Esanda would not have granted the loan without confirmation of income, but neither Mr Dockett nor Mr Williams could have made contact with Esanda as the applicant did not know of its involvement in the matter until before the trial. It may be the case that Esanda made contact with them, but there is simply nothing before me in the documents supplied by Esanda to show that.

The only evidence which is credible is that were that to have happened, and neither Mr Dockett nor Mr Williams can recall that contact being made, then both would have made the type of comments to which they attest.

As for the documentation which passed between respondent witnesses and other parties, including Mr Williams from the TWU, I view that as being reference only to a view held by Mr Davis with regard to his alleged “arrangement”. It was not a matter which had been agitated by Mr Davis until the time he called for assistance from his Union representatives with regard to the alleged unsafe driving hours being requested of him. The respondent did no more than to promise to “attempt” to provide Mr Davis with the work as requested.

Because of the decision which I have made, it is not necessary for me to address the question of Mr Davis’ personal financial state, save to say that, in some important areas, his sworn statements do not withstand scrutiny by Counsel for the respondent. The facts asserted by Mr Davis are simply not factually correct in some instances.

Mr Davis has failed to make out a case pursuant to the provisions relied upon under s. 276 of the Act. The respondent promised only to “attempt” to provide two return trips per week to Mr Davis – no more than that. There was no “arrangement/understanding/contract” between the parties in the terms alleged by Mr Davis. Mr Davis has been unable to put before the Commission any evidence sufficient to support his claims.

I dismiss all elements of the claim.

Order accordingly.

D.A. SWAN, Commissioner.

Appearances:
Mr S. Ross of Reidy & Tonkin Solicitors for the applicant.
Mr A. Horneman-Wren of Counsel (instructed by Mr R. King of Blake Dawson Waldron) for Toll North Pty Ltd.

Released: 9 August 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

The Australian Workers’ Union of Employees, Queensland AND The Crown and Others (No. B1402 of 1994)

CIVIL CONSTRUCTION, OPERATIONS AND MAINTENANCE GENERAL AWARD – STATE

COMMISSIONERS FISHER, BECHLY

31 July 2002

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 25 June and 8 July 2002, this Commission orders that the said Award be amended as follows as from 16 April 1996:

By inserting the following new definition in clause 3.1(11) as follows:

“(u) Traffic Controller – Construction Sites (excluding employees of employers whose substantial function and character is that of providing security services, but who, to varying degrees and on an as required basis, provide their employees to work as traffic controllers on construction sites pursuant to a contract between the employer and the authority undertaking road construction work.)”.

Dated 31 July 2002.

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

Operative Date: 16 April 1996
Amendment – Definition clause
Released: 8 August 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 473.
Industrial Relations Regulation 2000 – s. 20

(No. U21 of 2002)

NOTICE OF APPLICATION FOR CHANGE OF NAME**OF AN INDUSTRIAL ORGANISATION**

NOTICE is hereby given that application has been made to change the name of Australian Federation of Civil Engineering Contractors, Queensland Branch, Industrial Union of Employers to read Queensland Major Contractors Association, Industrial Organisation of Employers.

Interested persons may obtain a copy of the application from the Applicant.

All Notices of Objection to such change in name must be lodged with me within thirty-five days from the date of publication of this Notice.

Dated 12 August 2002.

E. EWALD,
Industrial Registrar.

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