



# The Queensland Government Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$358.62 (GST inclusive)

ISSN 0155-9362

Vol. 170

FRIDAY, 30 AUGUST, 2002

No. 19

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
CA256/02	Pozzolan Drivers (North Queensland) - Certified Agreement 2002	2/8/02	CA581/88
CA320/02	Building Service Contractors' Association of Australia – Queensland Division Certified Agreement 2002	15/8/02	CA409/99
CA335/02	Goodman Fielder Mills Ltd Toowoomba Mill - Certified Agreement	16/8/02	CA586/00
CA337/02	Gracehaven Lutheran Homes Nursing Staff - Certified Agreement 2002	16/8/02	CA484/00
CA340/02	Ridley Agriproducts Toowoomba Enterprise - Certified Agreement 2002	16/8/02	CA271/96
CA572/01	Transit Australia Pty Ltd trading as Townsville Sunbus – Certified Agreement 2001	0/8/02	CA235/00
CA341/02	Brisbane Market Corporation (Operational Employees) – Certified Agreement 2002	20/8/02	CA289/00

E. EWALD  
Industrial Registrar

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 287 – application for exemption from general ruling*

**Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers AND  
Queensland Nurses' Union of Employees (No. B1193 of 2002)**

**NURSES' AGED CARE INTERIM AWARD – STATE**

PRESIDENT HALL  
VICE PRESIDENT LINNANE  
COMMISSIONER EDWARDS

20 August 2002

General ruling re wages – Application for absorption in work value award increase – Application for phasing in by partial absorption in work value award increase – Scope of s. 287(2) and (5) – Power to reopen referred to – Commission refrain from hearing application.

DECISION

On 15 April 2002 a Full Bench of the Queensland Industrial Relations Commission published a decision in case No. B1019 of 1998, 169 QGIG 769, by which (amongst other things) the Full Bench varied the *Nurses' Aged Care Interim Award – State* to introduce certain new classification structures and awarded significant work value increases the quantum of which was fixed by *consent*. Significantly, though it might have done so, the Full Bench did not vary the Award to provide for absorption of future State wage increases in the work value increases made available by its decision. The Full Bench might have done so because the Queensland Industrial Relations Commission's Statement of Principles guides the discretion of Commissioners sitting alone and says nothing about the exercise of discretion by a Full Bench, compare *The Australian Workers' Union of Employees, Queensland v. Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* (2001) 168 QGIG 2. The circumstance that principle 3 does not permit absorption of State wage increases into arbitrated work value increases is, to a Full Bench, irrelevant. Indeed, with the emphasis on awards which has flowed from the enactment of the *Industrial Relations Act 1999*, it will be surprising if parties do not seek the right to absorb State wage increases in a variety of award increases which, if they had been conferred by a certified agreement or other agreement dehors the Award, might have been used to absorb the State wage increase. Given s. 3(g) of the Act it would be entirely appropriate for a Full Bench to look favourably upon such applications. But no such application was made in case No. B1019. It is conceded by Mr Nance for Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers, who has argued his case with frankness and skill, that in No. B1019 of 1998 it was disclosed neither to the Queensland Nurses' Union of Employees (who consented to the money amounts) nor to the Full Bench (which made the Award) that the employers proposed to absorb future State wage increases into the work value increases which were the subject matter of No. B1019 of 1998.

On 9 May 2002 a Full Bench of the Australian Industrial Relations Commission released its decision in the matter of the Safety Net Review – Wages May 2002, 112 IR 411. On 13 May 2002 the Queensland Council of Unions filed an application which, following amendment, sought to flow the decision into the Queensland industrial relations system by way of a declaration of general ruling. Later on the same day The Australian Workers' Union of Employees, Queensland filed a similar application.

At the hearing of the application by Queensland Council of Unions and the application by The Australian Workers' Union of Employees, Queensland, the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers indicated that it had instructions to make an application for exemption/partial exemption of that area of employment regulated by the *Nurses' Aged Care Interim Award – State*. A formal application under s. 287 was filed on 26 July 2002. The relief sought was formulated at Schedule 1 to the application as follows:

#### “Schedule 1

##### Relief Sought:

##### EXCLUSION

1. By providing a general ruling in accordance with s. 287 of the *Industrial Relations Act 1999*, to absorb the increase sought by way of the Declaration of General Ruling of B753 and B755 of 2002 in the wage increase provided in decision B1019 of 1998.

##### LIMITED EXCLUSION

2. In the event that the relief sought in paragraph 1 is not granted the following is sought:

- (a) By providing a general ruling in accordance with s. 287 of the *Industrial Relations Act 1999*, providing a limited exclusion of parties bound by the *Nurses' Aged Care Interim Award – State* as follows:
- (i) All employees who received less than \$10 per week as part of the transitional arrangement will be entitled to receive the \$18 wage increase in accordance with the Declaration of General ruling for B753 and B755 of 2002 from 1 September 2002;
  - (ii) Employees who received a wage increase greater than \$10 per week but less than \$20 per week will be entitled to receive a wage increase of \$12 per week from 1 September 2002 with a further increase of \$6 per week from 1 July 2003;
  - (iii) Employees who receive a wage increase of \$20 per week or more as part of the transitional arrangement shall be entitled to receive a wage increase of \$6 per week from 1 September 2002, \$6 from 1 February 2003 and \$6 from 1 July 2003.
  - (iv) All employees be entitled to adjustment of work related allowance by 3.5%.”.

There is room for argument about whether the relief sought falls within s. 287(1) and (5) of the Act. At least as a matter of form, so far from excluding the Award (or alternatively various classes of employee) from the operation of the general ruling, the relief sought assumes the application of the general ruling and seeks to manage its operation. It is not necessary to decide the point. In pith and substance what the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers seeks to do is to make the application for an absorption clause which might, and in our view should, have been made in case No. B1019 of 1998. In our view such a case should be pressed before the Bench which determined No. B1019 of 1998 by way of an application for reopening pursuant to s. 280. We make it clear that we do not encourage the Queensland Chamber of Commerce and Industry Limited, Industrial Union of Employers to make such an application. On the submissions which we have heard, such an application would appear to have little prospect of success. We have, for example, been told that the Queensland Nurses' Union of Employees would not have consented to the quantum of the increases if it had known that absorption or partial absorption was planned. To the extent that the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers did not anticipate the date of operation of the increases awarded in No. B1019 of 1998, that is *prima facie* a matter of a forensic judgement later regretted. But although an application under s. 280 may not be an attractive route, it is the proper route. It would not be appropriate for this Full Bench to revisit proceedings before another Full Bench particularly where those proceedings are not yet complete. In all the circumstances we exercise the power at s. 331(b) to refrain from hearing the application of Queensland Chamber of Commerce and Industry Limited, Industrial Union of Employers.

Dated 20 August 2002.

D.R. HALL, President.

D.M. LINNANE, Vice President.

K.L. EDWARDS, Commissioner.

##### *Appearances:*

Mr S. Nance for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.

Mr M. Healy, with him Ms G. McCaul, for the Queensland Nurses' Union of Employees.

Released: 20 August 2002

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – application for unpaid wages***Graham William Badham AND Hardy Brothers Pty Ltd (No. W82 of 2002)**

COMMISSIONER FISHER

22 August 2002

Application for unpaid bonus – s. 278 *Industrial Relations Act 1999* – Definition of wages – Case law – Change of duties – No change to contract of employment – New bonus system – Memorandum – Bonus to be paid within 30 days of release of decision.

## DECISION

This is an application by Graham Badham under s. 278 of the *Industrial Relations Act 1999* (the Act) seeking an order that Hardy Brothers Pty Ltd (the Company) pay to him an amount of \$20,000, such amount being for bonuses not paid for the period 30 June 2001 to 31 January 2002.

An application for the recovery of bonus payments that are not prescribed by an industrial instrument can be made pursuant to s. 278 of the Act. In *Giddins v Turner Valuers* (2002) 169 QGIG 295 I decided that such an action could be brought. In doing so I relied on a decision of Hall, P in *O'Connor v Electroboard* (2001) 168 QGIG 90 that the meaning of the term “wages” includes bonuses. Further, Hall, P determined that the definition of “wages” where it appears in Schedule 5 of the Act could comfortably be inserted into s. 278(1)(a) of the Act “without violence to the language”. The President also commented that employees not engaged under industrial instruments are permitted to bring applications for the recovery of wages.

Mr Badham commenced employment with the Company on 10 March 1996 as a Stock Controller. At no time during his employment was Mr Badham employed under the terms of an industrial instrument. In or around November 1997, Wallace Bishop Pty Ltd purchased the Company. The Managing Director, Wal Bishop, promoted Mr Badham to the position of National Manager in or about February 1998. In that new position Mr Badham was entitled to a base salary, car allowance and superannuation. The memorandum to Mr Badham from the Company Secretary, Ian Winterburn, dated 12 February, regarding the salary arrangements to apply, indicated these three components comprised his “total package”. In addition, the memo advised that he would be paid a bonus based on Store Performance of between \$5,000 to \$10,000. A handwritten note is to the effect that this was a per annum amount.

A letter from Mr Bishop to Mr Badham dated 20 July 1998 clarified aspects of the “Hardy Brothers Management Bonus System”. The letter stated that “the Bonus is paid monthly” and the “National Manager receives 33 1/3% of collective bonuses paid to Managers (over the top)”. In about August 1999 Mr Bishop and Mr Badham entered into an oral agreement whereby the 33 1/3% figure was increased to 50%.

Mr Badham was paid all bonuses until June 2001. While he was aware of the method of calculating his bonus he was not privy to the method of calculating the bonuses paid to store managers. This lack of knowledge caused some difficulty in quantifying the claim.

The argument between the parties is whether the payment of the bonus formed part of Mr Badham’s contract of employment or whether it was separate to it and paid entirely at the discretion of the employer.

Mr Badham relies on the documents referred to above to support his claim that the bonus formed part of his contract of employment. In opposing the claim the Company relies on the change in Mr Badham’s duties that occurred in July 2001 to argue that he was no longer responsible for the performance of the stores and hence not entitled to payment of a bonus. Secondly, and perhaps more importantly, the Company relies on a memorandum headed “New Bonus System” issued by Mr Winterburn to all Hardy Brothers Associates (employees) on 14 May 2001 which stated, *inter alia*:

“A couple of questions about bonus and superannuation matters following my recent memo which require clarification.

...

2. A reminder too that any bonus payment is entirely discretionary and all rights are reserved by management.

3. Any incentive or bonus scheme that is offered in good faith from time to time is completely separate from any contract of employment.”.

The first argument relates to the change in Mr Badham’s duties in July 2001. Prior to that date a significant proportion of Mr Badham’s duties were directed to the sales performance of the stores and the performance of employees. In early 2001 Mr Badham also assumed responsibility for marketing on the resignation of the marketing co-ordinator. From July 2001 Mr Badham’s focus was directed to stock control in order to reduce the over supply of stock in stores and to ensure that more appropriate stock was placed in Hardy Brothers Stores. The responsibility for the sales performance of employees and the stores was directed to two other employees.

In addition to the changed focus of Mr Badham’s role, his reporting relationship changed and his office was relocated from the City to Newstead where other head office staff were located. Mr Winterburn said that although Mr Badham’s title may not have changed, it was clear that there had been a fundamental alteration to his position and this was permanent. The change had occurred because of poor sales performance of the stores. While Mr Badham had not been personally criticised or warned about poor performance, repeated criticism and concern had been expressed at the Board of Governance such that action had to be taken to arrest the slide in sales. Since the change in allocation of duties, sales had increased markedly. The Company argued that it was the duties of managing sales performance of employees and the stores that attracted the payment of a bonus and it did not matter what the title of Mr Badham’s position was because it was sales performance that determined whether a bonus would be paid, not the title of the position.

Mr Winterburn said that the change in role for Mr Badham meant that he was no longer responsible for the sales performance of stores. He could not therefore expect to be paid a bonus that is based upon store performance. The other two employees who had assumed Mr Badham’s sales performance role had been paid the bonus, however, Mr Badham, like other head office employees, did not have an entitlement. All bonuses were premised on sales performance.

Mr Badham said that Mr Bishop did not tell him that the change in duties resulted from unsatisfactory performance by him. He did not believe the change was permanent and considered his focus on stock issues would only continue until those issues were under control. In addition, and importantly, Mr Badham said that Mr Bishop had not told him that the bonus would not be paid as a result of the change in his duties.

I accept Mr Winterburn’s evidence that the alteration to Mr Badham’s duties in terms of the removal of the management of sales performance was permanent. Even if this had not been the original intention, in light of the marked improvement in sales performance after the re-allocation of duties, it would be unlikely that the Company would have wanted to change a winning formula. The real question is whether the bonus was part of Mr Badham’s contract of employment, irrespective of the title of his position. The term of the contract of employment regarding the bonus was reflected in the letters

of 12 February 1998, 20 July 1998 and the oral agreement made between him and Mr Bishop in or about August 1999 that increased the percentage bonus figure. The evidence is that Mr Badham was not issued with any written document advising of any changes to his remuneration aspects of his conditions of employment. Neither did Mr Bishop advise him orally of any such changes.

Although there may have been a mutually agreed change to the duties to be performed by Mr Badham, there was no associated agreement to the change in the remuneration aspects of his package. A party to a contract cannot unilaterally vary a contract. There was no mutual consent to any change and the decision not to pay the bonus from July 2001 was a unilateral change made by the Company and not one consented to by Mr Badham. Mr Badham indicated that he had not accepted the change by raising with Mr Winterburn both in writing and orally the non-payment of the bonus in November 2001. Mr Badham said at that time that Mr Winterburn told him that Mr Bishop would raise the issue with him. When this did not occur, he wrote again two days before his resignation took effect in January 2002. Mr Badham said it was not unusual for bonuses to not be immediately paid but after payment of the bonus had been raised in the September Board of Governance meeting and he had not been paid in October he thought a reasonable period of time had elapsed for him to raise the issue.

Although the first document provided to Mr Badham about his remuneration did not include the bonus as part of his total package, it was clear that a bonus would be paid based on store performance. I am of the view that from this letter and subsequent actions of the Company in paying and increasing the bonus that it formed part of his contract of employment. While I am satisfied that Mr Badham accepted changes to his duties to focus on stock control and away from managing store performance, I am not satisfied that along with this he accepted an alteration to his contract of employment that removed an entitlement to a bonus payment. In the minds of Mr Bishop and Mr Winterburn such an outcome might have been implied or been consequential upon such acceptance of a change in duties but there was no express statement to that effect in order for Mr Badham to decide whether such changes in direction and remuneration were acceptable to him. It is not for me to contemplate what the Company might have done had Mr Badham not accepted the changes. His actions in seeking the payment of the bonus indicate that he had not accepted its removal and that he saw it as part of his contract irrespective of the change in duties. Accordingly I consider that the payment of a bonus was part of Mr Badham's contract of employment.

In relation to the "New Bonus Scheme" memorandum recited earlier in this decision, Mr Winterburn said that it had been prepared in consultation with Mr Badham. Given that it was addressed to "Hardy Brothers Associates" it was intended to apply to all employees.

Mr Badham disputed this. He said there were two distinct schemes that were in operation at Hardy Brothers: one applied to sales assistants based on achievements of their sales budgets and the other payable to himself and store managers based on net profits. He said that the memorandum had not been prepared in consultation with him.

Given that the memo in question referred to an earlier memo, the Commission sought its production in order to resolve the issue of whether the new bonus arrangements had application to Mr Badham. The RAQ, acting for the Company, supplied two memos; one that was sent only to Managers and Assistant Managers and the other that was sent to sales employees. The second memo advised of a new Associate Individual Incentive Scheme that was to operate for May and June 2001 with a view to extending it to the forthcoming financial year. The memo to the Store Managers and Assistant Managers enclosed a copy of the memo to Sales Associates and advised that the amended profit figures applied to their profit incentive system. It advised that the profit incentive arrangement that was set out in the memo replaced any previous agreements. In addition, the memo stated that Mr Bishop was considering extending the program to Store Managers.

It is apparent from these memos that the new bonus scheme affected the Sales Associates. The effect on Store Managers was to the extent of revised profit figures and notification that the new scheme could be extended to them in the future. There is nothing in any of the memoranda to support a conclusion that the bonus scheme that applied to Mr Badham was affected except to the extent that the revised profit figures affected the Store Managers' bonus and hence the bonus paid to him. The memorandum headed "New Bonus System" that was attached to Mr Winterburn's statement and which was relied on by the Company to support a contention that the bonus that applied to Mr Badham was separate from his contract of employment, clearly referred to his earlier memo to Sales Associates. Accordingly, the Commission cannot accept with the Company's contention that this memo affected Mr Badham's entitlement to a bonus. Specifically, the Commission rejects the Company's contention that this memo altered Mr Badham's contract of employment.

The Commission has rejected the two arguments advanced by the Company that Mr Badham did not have an entitlement to the payment of the bonus for the period July 2001 to January 2002. The bonus payments remain outstanding and are to be paid. As mentioned at the outset, Mr Badham had some difficulty quantifying the amount of the unpaid bonuses because he was unaware of the method of calculation. In the discovery process two documents were produced that Mr Badham believed could be used to calculate the amount. One of these resulted in an amount of \$20,000 being calculated while the other produced a figure of \$11,712. The Commission asked Mr Winterburn while giving his evidence what the amount would be in the event Mr Badham was successful in his claim. He replied that the \$11,712 figure would be correct. Given this and that Mr Badham said in his evidence that he would be prepared to accept Mr Winterburn's assessment, I have decided that the amount outstanding in unpaid bonus payments is \$11,712.

Accordingly, the Commission orders that Hardy Brothers Pty Ltd pay to Graham Badham an amount of \$11,712 being for bonuses unpaid for the period 30 June 2001 until 31 January 2002. Such amount is to be paid within 30 days of the release of this decision.

Order accordingly.

G.K. FISHER, Commissioner.

*Appearances:*

Mr C. Pollard (Jones Ross) on behalf of the Applicant.

Ms L. Vanderstoep for the Retailers' Association of Queensland Limited, Union of Employers and with her Ms A. Price on behalf of the Respondent.

Released: 22 August 2002

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Denise Thompson, Robyn Evans and Erica Lewin AND Seair Trading Co Pty Ltd  
t/a Gold Coast Telebet Centre, TAB Queensland (Nos. B1927, B1928, B1929 of 1998)**

COMMISSIONER BECHLY

20 August 2002

DECISION

The history of the progress of these applications is tortuous and does not bear repeating in any detail.

The course adopted by the parties in the initial proceedings was that the applicants' case would be heard in full and the respondent would initially deal only with an argument that there had been no termination of the applicants' employment. If the finding on that argument went against the respondent it would then provide evidence and argument that the terminations were not harsh or unjust and would also provide evidence and argument to discharge the onus upon it to prove that the dismissals were not for an invalid reason.

A finding was made by decision of 10 August that the applicants' employment had been terminated by the respondent. The second stage of the process described above required the respondent to provide material and argument to defend its actions.

The dismissals occurred on 25 November 1998, and Applications for Reinstatement were filed on 4 December 1998. There then followed conferences and later hearings culminating in the decision of 10 August 2000.

The lapse of time between the issues of the above decision and the commencement of proceedings to finalise the matter is partially explicable by other proceedings relating to recovery of unpaid wages by the applicants from the respondent and a subsequent appeal and subsequently a change of representation for both the applicants and the respondent.

Steps were eventually taken by the Commission to continue the above agreed process when the respondent informed the Commission that it did not intend to make any further representations to the Commission. That position was later reversed but for some time afterwards the respondent's principal, Mr M. Goldsmith, was unable to take part in the proceedings because of stated illness.

Efforts by the applicants and the Registrar to have the reasonableness of the respondent's absence through the illness of Mr Goldsmith tested were without avail although he did later provide two affidavits in defence of the applications (additional to that provided in the earlier hearing) and later, when given the opportunity to respond to the final submissions of the applicants, Mr Goldsmith did so in writing.

No evidence was provided by the respondent from two senior staff members, Ms Rae and Ms Porter, who were intimately involved in the processes which led to the dismissals. Mr Goldsmith takes full responsibility for the actions of the staff involved in the matter.

Chapter 5 – Dismissals, Part 2 at s. 217 provides that dismissal is unlawful if (a) it is harsh, unjust or unreasonable; or (b) it is for an invalid reason. Among the invalid reasons listed in s. 217(b) are (iii) membership of an employee organisation or participation in the organisation's activities outside working hours or, with the employer's consent, during working hours and (xi) discrimination that would contravene *The Anti-Discrimination Act 1991*.

It is these two invalid reasons that the applicants rely upon for one limb of the argument. Reliance is also placed upon the alleged harsh, unjust or unreasonable factor.

Section 221 places the onus upon the respondent to prove that the dismissal was not for an invalid reason and upon the applicant to prove that the dismissal was harsh, unjust or unreasonable.

The difficulty now existing is that the respondent has done little to discharge the onus placed upon it to prove that the dismissals were not for an invalid reason.

In addition to evidence given by the applicants and others in the initial hearings, evidence was called in the last hearing from Ms J. Justo, an organiser with the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees (AMACS) who was involved in various matters prior to the applicants' termination and who had prepared an affidavit which was filed and exchanged between the parties for the earlier proceedings.

It was agreed that her evidence would stand over until the threshold matters were determined.

The evidence contained in that affidavit and other material presented by her in the most recent hearing was not tested by the respondent in cross-examination.

The applicants were employed in 1996 as casual telebet operators at the Gold Coast Telebet Centre. The employment agreement, amongst other things, required them to be available for duty on certain nominated days of the week, public holidays and specified race days. They could be employed as "Saturday Only" employees or "Flexi" staff.

The work of the applicants was well regarded with some receiving high performance certificates.

Sometime during 1998 an employee ceased employment midway during a shift. Later action was taken in the Industrial Magistrates Court on his behalf for recovery of underpayment of wages for work performed as a telebet operator.

At about the time that this litigation was underway a document was circulated by the respondent, without explanation, which the applicants were instructed to sign and which purported to change their employment status to a "Telesales/Telemarketing employee of the Gold Coast Telebet Centre".

The applicants were informed by a supervisor that employees who did not sign the document would be rostered off. The applicants believed that this would be equivalent to termination of employment. This prompted some employees, including the applicants, to seek advice from AMACS.

At this time the work of telebet operators was covered by *The Clerical Employees Award – State* but the work of persons performing sales and marketing work by telephone was award free. Telebet employees of the respondent were, at the relevant time, being paid rates lower than that provided in the Award.

This action by the respondent endeavouring to change the employment classification has the appearance of an attempt to avoid award obligations by changes in job title without any change in job content.

The applicants and some others became members of AMACS on 26 October 1998, which then commenced a process to conduct an inspection of time and wage records.

Initially in late October 1998, Ms J. Justo, an organiser of AMACS, contacted Ms Lani Rae, one of the principals of the Gold Coast Telebet Centre, by telephone to introduce herself and advise that the Union wished to conduct an inspection of records and that follow-up correspondence would be sent.

The respondent says that it immediately wrote to AMACS and proposed an appointment at 11:30 a.m. on Monday 6 November and that Ms Justo later rang to confirm that appointment. The respondent indicated that it intended to seek approval from employees who were not members to disclose information to the Union.

That evening Ms Justo says that she received an abusive and threatening phone call from Mr Goldsmith warning her off. AMACS became aware that a document being circulated for employees' signature restricted access to employee pay records to the Australian Tax Office.

An application was made by the Union pursuant to s. 400 of the *Workplace Relations Act 1997* (the Act) for a certificate to enable inspection of time and wage records and a waiver of the 48 hours' notice to the employer required by s. 400(2) of the Act. The requested certificate was granted on the same date, 27 October 1998.

On Thursday 5 November 1998 a petition was being circulated, apparently with approval of those managing the centre. The petition related to union activity and a request that it cease as there was a fear that jobs would be lost.

A telebet operator, Ms Gail Simpson, who had joined the Union took the petition at the end of the shift to Ms Porter to ask if it had come from management. While she said that it did not she indicated support for it. Discussion then followed about the propriety of allowing the petition to be circulated. Ms Simpson later that day raised the matter with a representative of TAB Queensland Limited.

On the following day, 6 November, that person was seen by her on the Gold Coast Telebet premises.

At the end of her shift Ms Simpson was called into the office by Ms Porter and asked to apologise for the tone of voice used the previous day.

At this stage it became known that Mr Goldsmith had instructed that the petition be thrown away.

Ms Simpson declined to apologise because she believed her actions had been correct and that her tone of voice had not been offensive. She then left the office with a Ms Mico who had joined her as a witness.

When she attended for work on the following day she discovered that her rostered shifts for the following week had been crossed off and initialled by Ms Porter and that her name had been totally removed from the following roster.

She then prepared a letter about the matter (Exhibit 55) with the intention of handing it to Ms Rae. She did so at about 1:30 p.m. that day when Ms Rae arrived at the premises. Ms Porter was present. Both Ms Porter and Ms Rae exercised authority as to employment and allocation of work.

The applicants and two other employees who were union members joined her in the office when she handed the letter to Ms Rae to enquire as to why she had been struck off the roster.

On the evidence available Ms Rae referred three times to Gary Lawrence and to the union and pay claims.

Ms Simpson offered to apologise to Ms Porter but she rejected the offer saying "no way will I accept an apology – it was her tone of voice. It is the second time she has used that tone of voice to me".

Arrangements were made by the respondent to discuss the matter later that afternoon. The applicant and other union members attended, about six or seven in all.

Mr Goldsmith attended the later meeting and some six or seven non-union telebet operators were instructed to attend the meeting by the respondent.

On a consideration of all the evidence on this meeting it appears that Mr Goldsmith put as an ultimatum two choices to those present to resolve the issues of the immediate past. He expressed the view that the matter had got out of hand because of the Union (not that he has a problem with people being in a union) and he was prepared to fight them in the highest court of the land. He also informed those present that they could leave if they wished to because there were always plenty of applicants for the job.

The ultimate proposal was that "either everything keeps going the way it is now" with consequent further litigation or "we can all forget everything and go back to the way things used to be".

Mr Goldsmith informed Ms Simpson that she would get her shifts back on 14 November and that others would continue to have the full shifts that had been allocated to them.

He then indicated to those persons that he would "leave the rest to Lani" and left the meeting.

It was after the meeting that the hourly rates were increased by some \$2 per hour.

Contrary to the undertakings given by Mr Goldsmith the hours of the applicants and some others were reduced for the week ending 14 November and subsequent weeks.

On 24 November Ms Rae put up a notice to all staff informing them in the following terms:

"Due to the unique nature of this call centre, the upcoming workload for 1998/1999, inclusive of major work load requirements of Holiday Resorts International next year, and, having due regard to the right to roster casual employees solely at the company's discretion (sic). All future shift preference will be allocated to staff members willing to perform a variety of telesales activities and to be rostered as and where work demands dictate. There may even arise the necessity to rotate staff during shifts. Full training and product knowledge for any new or existing projects will be given."

On Wednesday 25 November at about 2:00 p.m. two of the applicants, Ms Erica Lewin and Ms Denise Thompson, approached Ms Rae with a formal grievance letter requesting a meeting regarding the reduction of shifts. A similar letter from Ms Evans was handed to Ms Rae at the same time by Ms Thompson. Ms Evans was not rostered on that time. Ms Thompson also handed in a similar letter at the same time for a Ms Helen McLaughlin.

At about 3:30pm on that day Ms Thompson and Ms Lewin were called into the office by Ms Rae and told that obviously they were not happy working there and that they were rostered off. On being asked how long they were rostered off Ms Rae said "indefinitely". They were then escorted from the premises after being taken to the lunchroom to collect their belongings.

On the afternoon of 25 November Ms Evans received a phone call from Ms Porter at her home and was informed that "due to the heavy workload of HRI and the new staff training, we have no work available, but we will call you when there is OK!". On her evidence Ms Evans was not contacted with a request to work at any later date.

It has been earlier held that the three applicants' employment was terminated by the above action of the respondent.

On the material before me I find that the termination of each of the applicants' employment on 25 November 1998 was harsh and unjust.

The respondent maintains the position in the face of a contrary finding that the applicants' employment was not terminated, but, as casuals, they were rostered off because of stated but unproven circumstances.

The evidence before me is that they were dismissed by Ms Rae after they sought a meeting in accordance with the disputes resolution process contained in the Clerical Employees Award – State.

That response from Ms Rae and the manner in which she dealt with each of the applicants in removing them from the premises was harsh and unjust. The reason given to Ms Evans by Ms Porter has no demonstrated basis of fact. Her termination was harsh and unjust.

What followed during the conference process needs to be considered to determine the remedy. The circumstances for each applicant are different.

#### **Ms Robyn Evans**

With respect to Ms Evans, when the first conference was held on 17 December 1998, the respondent objected to dealing with her application because it had made a complaint to police about her and her suspected involvement in a criminal action.

The complaint was made on 14 December 1998 and implicates her in the alleged removal of three files from the respondent's possession. The complaint alleges that Ms Evans was an employee of Simpsons Cleaning Company which cleaned the respondent's office and knew the code to deactivate the security alarm. The respondent advised police when making the complaint that it believed that the cleaners had taken the files or let another person into the office while they were cleaning.

The respondent, in the complaint, alleges that Ms Evans wrote a letter to the General Manager, TAB Queensland and that the letter contained details of information that was kept in the complainants desk and only accessible by the informant and her Operations Manager.

Ms Evans was interviewed by the police over this complaint.

Ms Evans' reinstatement application was not dealt with by way of conference on 17 December or apparently on any other date, other than as a formality, because of these objections and thus the Commission made no recommendations similar to those made in respect of the other applicants.

On Wednesday 24 March 1999 a further conference was held on the three applications. At this conference the respondent informed the Commission that Ms Evans was still under investigation by the police and new evidence had come to light. Her application was, as a result, not dealt with.

On the evidence before me, Ms Evans has never been an employee of Simpsons Cleaning Company nor is she employed as a cleaner by anyone, although she did help out, as a friend, the named cleaning company twice in 1999.

There is nothing in the letter to the General Manager of TAB Queensland which is not apparently common knowledge or freely available from published rosters.

The police crime report on the complaint (obtained under FOI legislation) states on 27 January 1999 that:

"Inquiries into this matter have now been completed. There is no evidence to suggest any of the persons interviewed by police were responsible for the theft of these documents. There is no other information to suggest who the offender may be for the alleged theft of these documents. Suggest that this matter be filed."

On 8 February 1999 the crime report indicates "the complainant company has been advised of the result of this inquiry".

This advice was provided to the respondent some six weeks before the 24 March 1999 conference. At no stage during the proceedings before me was the alleged "new evidence" demonstrated to the Commission.

Ms Evans contacted the officer in charge of the investigation at the Criminal Investigation Bureau on 24 March and sought information on what new evidence was being investigated. She was informed there was none to his knowledge.

On 13 April 1999 Ms Evans was formally advised by police that the investigation was over and that no criminality had been uncovered as a result of the investigation.

At about this time there was correspondence between Ms Evans and Ms Rae about the alleged theft of a file, a group certificate and a change of Ms Evans address. In her response to Ms Evans on 19 April Ms Rae states "the abovementioned letter is the only communication received from you for quite a lengthy period, and as such (coupled with your request for a group certificate) I can therefore only assume that you no longer require to be included on our available casual staff roster".

Ms Evans responded and advised Ms Rae that she had been rostered off by Ms Porter who stated that she would contact her when further work was available.

Ms Rae responded on 24 April advising that that was not Ms Porter's advice to her. (However, see later written advice to Ms Lewin that Ms Porter would contact Ms Lewin when work was available, Exhibit 21).

No action was taken, at this later stage, to remove any misunderstanding (if there was any) or to attempt to provide further work by the respondent.

Neither Ms Porter nor Ms Rae were called to provide evidence to counter Ms Evans' evidence as to what was said to her on 25 November 1998.

The respondent in written material forwarded to the Commission maintains, in the face of the previous decision, that the applicant's employment was never terminated.

The issues of harsh or unjustness and dismissal for an invalid reason were not addressed.

A summary of roster information provided with the material indicated that Ms Evans' hours were dramatically reduced in the period concluding 5 December 1998, from an average of about 30 hours per fortnight to 4. This coincided with the events of 25 November 1998.

The material also indicates that Ms Evans was not rostered in the pay fortnights ending 16 January 1999 and 30 January 1999. It then indicates that Ms Evans was rostered for work or on call through to 27 March 1999 but did not show up for work. However, I accept that Ms Evans was advised by Ms Porter that she, Ms Porter, would contact her when work was available.

The material provided by the respondent indicates that, on average during her employment, Ms Evans' earnings were \$291 per fortnight. From January 1997 to the fortnight prior to her dismissal her average fortnightly pay was \$393.

These earnings do not take into account the significant underpayment of wage rates, in excess of \$2.50 per hour, which occurred during the whole of the employment. What is also not taken into account are additional payments for work performed during various hours on various days including weekends and Statutory Holidays.

Although there were some limited fluctuations in her earnings there was a relative consistency in her fortnightly earnings throughout the period of her employment which placed a strong requirement upon her to work on nominated and agreed days. The change brought about on 25 November 1998 by the respondent terminated that contract.

In all the circumstances reinstatement is not an appropriate remedy. I have examined the table of earnings and projected hours that would have been worked if the employment had not been terminated. The respondent has made no submissions with respect to this matter other than to continue to deny that a termination took place. The applicant seeks an amount of \$6,640.47 as compensation.

In all the circumstances an appropriate remedy would be the payment of a global amount of \$6,000 compensation by the respondent, Seair Trading Co. Pty Ltd to the applicant, Ms Robyn Evans, within twenty-two days of the release of this decision to the parties.

#### Ms Erica Lewin

Ms Lewin's employment was terminated on 25 November 1998.

An application for reinstatement was filed on 4 December 1998 and a conference was held on 17 December 1998.

At the conclusion of the conference, according to the parties, the Commissioner managing the conference recommended that Ms Rae reinstate Ms Lewin to regular hours and that telesales/telemarketing work be done on a voluntary basis.

On 18 December Ms Lewin telephoned Ms Porter to ascertain her shift rosters and was given "on call" shifts for 19 and 28 December, and 1 and 2 January for which she was not called in. She worked 5 hours on 26 December.

In the next fortnightly period she received a total of 14 hours over 3 shifts work and was not called in on the two "on call" shifts rostered.

There was then a further Commission conference over the issue after which she was rostered on for seven shifts in the following fortnight and worked a total of 30 hours.

She was rostered to work on Saturday 13 February but was advised by phone that morning that some terminals were down and that she would not be required for work.

On Monday 15 February she received a letter from Ms Porter advising her that no further work was available for her. This letter carries the date of 10 December 1999, being also the date of the shift cancellation, and is in the following terms (Exhibit 15):

"Dear Erica,

Due to recent changes and subsequent lower hourly shift requirements from a major client, I am compelled to reduce our casual work requirements in some areas.

Accordingly, we do not have a requirement to roster you for duty during the next few weeks. The Company is currently negotiating with its major clients with a view to obtaining additional work hours.

We anticipate re-rostering most casual staff for duty pending the successful outcome of these negotiations.

However, following on from your recent notice to me of your unwillingness to be trained for, and/or rostered for work involving Holiday Resorts International, or indeed any other client, I am unable to offer you compensatory hours by rostering you for these duties.

However, please do not hesitate to advise me in the event that you are able to participate in the full range of the Company's current activities at any time in the future.

J. Porter  
Operations Manager".

There then followed a series of correspondence between Ms Lewin and Ms Porter and Ms Rae over the period between 10 February 1999 and 27 July 1999 during which time Ms Lewin received no further employment, initially because of the false allegation that she was not prepared to perform work for HRI of a sales nature and secondly that she failed to contact the respondent.

That it was a false allegation is demonstrable from a reference on a Gold Coast Telebet Centre – TAB Queensland letterhead dated 15 July 1998 and signed by Julie-Ann Porter – Operations Manager that Ms Lewin had, for two and a-half years, been an employee, worked a minimum of 20 hours per week "plus other marketing when it is available" and earned a gross pay of \$480 per fortnight on average plus bonuses.

On 18 February 1999 Ms Lewin wrote to Ms Rae in response to the letter of 10 February from Ms Porter and informed her that at no time either verbally or in writing gave any indication that she was unwilling to be trained an/or rostered for work involving Holiday Resort International. She reminded Ms Rae of earlier such work she had performed, including a number of occasions without payment as a favour to Ms Rae.

Ms Rae responded in writing on 22 February advising that the Operations Manager advised her that Ms Lewin had refused a request to do HRI work on 26 November 1998. Ms Lewin's evidence is that at about 1:50 p.m. on 25 November Ms Porter had requested that she come in two hours early on the following day to do HRI work. Ms Lewin was unable to do so at such short notice due to prior commitments.

Ms Rae instructed Ms Lewin to advise in writing to the Operations Manager of her willingness to participate as a casual in the full range of company activities.

Ms Lewin did so on 25 February 1999.

On 5 March Ms Lewin again wrote to Ms Porter requesting a response to the letter of 25 February and seeking a copy of the wage slip for 17 February.

On the same date, 5 March, Ms Porter responded, acknowledging receipt of the letter of 25 February and advised in the following terms (Exhibit 20):

“Following on from your recent decline of telesales training and work for our major client (HRI), I was required to initiate rosters for the next four weeks, including only those persons willing to undertake a full range of duties. Accordingly, you were not considered for work.

However, subsequent to your recent advice I will be pleased to reconsider you for further casual work at the expiration of all current rosters (approximately one month) subject to the requirements of the call centres clients.”

Considering that the only time that Ms Lewin was unable to work as requested on HRI duties was the result of short notice to do so, the content of Ms Porter's reply is extraordinary. It is more so when one takes into account advice provided in the affidavit of Mr Goldsmith in August 2001 which portrays Ms Lewin as being rostered on for duty for 13 February 1999 to 27 March 1999 on nineteen days but not showing up for work.

Ms Lewin spoke to Ms Porter by phone on 13 April 1999 with respect to a reinstatement to the roster. On 15 April Ms Lewin received a response from Ms Porter in writing in the following terms (Exhibit 21):

“To Erica Lewin  
Casual telesales Consultant

From Julie-Ann Porter  
Operations Manager

RE: Work Roster

Dear Ms Lewin,

Re your telephone call today in relation to your reinstatement on our roster. Following on from your written notification of your willingness to now participate in the full range of the company's work requirements (and Ms Rae's subsequent instructions) I have reinstated your name onto our current available casual staff roster.

Unfortunately, we have recently (despite our best efforts to secure work from clients) suffered a decline in client work requirement, so much so that we have been compelled to temporarily stand down in excess of twenty casual staff. Following the recent misunderstanding in relation to your availability, your name was deleted from our roster.

Notwithstanding the above, **I will keep in touch with you and advise you (with notice) immediately that further work becomes available.**”(emphasis added)

No contact was made by Ms Porter as indicated by her that she would initiate (with notice) to advise when work became available.

On 25 July Ms Lewin contacted Ms Porter by facsimile again requesting a copy of a pay slip for work performed in February 1999.

Ms Porter replied in the following relevant terms on 27 July 1999 (Exhibit 23):

“There was at no time any decision taken “in my wisdom” to no longer employ you. In fact I refer you to Ms Rae's letter of 22<sup>nd</sup> February advising you of your reinstatement to the roster subsequent to your notification of your willingness to participate in the full range of company employees rostered duties.

Unfortunately, upon your repeated failure to contact this office (in the normal manner) to ascertain your shift allocations I was reluctantly forced to replace you on the roster.

You must appreciate that as a casual employee it is your responsibility to report for work when rostered or at least advise us if you are unable to do so.

We are unable to supply our clients with the level of service they demand without co-operation and communication from all employees.”

Some commentary should be made about the contents of this correspondence. Such commentary is of course made in the absence of the respondent providing any evidence from those involved in the interchanges.

It stretches the imagination to read into the letter of Ms Rae of 22 February that she had reinstated Ms Lewin to the roster. Subsequent advices confirm that she had not. Her intention to do so was stated but dependant upon negotiations with various clients and Ms Lewin agreeing to undertake a full range of work available.

Ms Porter herself on 5 March advises that Ms Lewin would be reconsidered for further casual work “at the expiration of the current roster (approximately one month) *subject to the requirements of the call centre's clients.*”

Of greater significance, in April 1999, Ms Porter instructed Ms Lewin that "I will keep in touch with and advise you (with notice) immediately that further work becomes available."

The contradictory terms of Ms Porter's letter of 27 July, particularly with respect to the "repeated failure to contact this office" are extraordinary.

The actions of the respondent's representatives exhibit either incompetence or a deliberate attempt to delay and ultimately frustrate her return to employment. In all probability it would appear to be a combination of both.

During the period of employment to 25 November 1998 Ms Lewin was paid an average of \$343 per fortnight. In the last twelve months of that time she earned an average of \$407 per fortnight.

The action of the respondent on 25 November 1998 terminated the contract of employment then in place between the parties.

During conferences following the filing of a reinstatement application the Commission recommended that that contract be restored by the provision of the hours of work usually worked as a telebet operator and any additional hours for HRI on a voluntary basis. That recommendation was never complied with by the respondent.

New employment terms were proposed by the respondent and, when accepted by the applicant, a process of frustration was taken by the respondent which prevented the applicant from working for several months.

The steps taken by Ms Lewin subsequent to 25 November 1998 to work for the respondent in the changed circumstances dictated by it do not remove the recourse she has to Part 2 of the Act with respect to the termination on 25 November.

Reinstatement in these circumstances would be inappropriate. I award as compensation a global amount of \$8,000. I order that Seair Trading Pty Ltd pay the amount of \$8,000 to Ms Erica Lewin within twenty-two days of the release of the decision to the parties.

### Denise Thompson

Ms Thompson's contractual arrangements with the respondent were terminated on 25 November 1998. As with the other applicants, her hours of work were reduced in the pay period immediately preceding 25 November and she was walked off the premises on that date along with Ms Evans.

A few hours work were offered and accepted for Saturday 5 December. An application for reinstatement was filed at about that time and, at a conference on 17 December 1998, the Commissioner chairing the conference recommended that the respondent reinstate Ms Thompson to her regular hours and that telesales/telemarketing be performed on a voluntary basis. Limited hours on an *ad hoc* basis were made available to her.

Some hours offered to her appeared to coincide with a police interview concerning alleged missing files of the respondent. Other, but limited, hours offered were said by the respondent to have been refused.

On 11 February 1999, Ms Thompson approached Ms Rae and asked that if she resigned and dropped the unfair dismissal application would she be provided with a written reference. She said that she considered this course of action because of the stress she was under and the treatment she was receiving (from the respondent).

The evidence is that Ms Rae indicated that a reference would be provided if a resignation was put in writing.

On Saturday 13 February she showed Ms Rae draft unsigned copies of a resignation. She asked if she could sight a copy of the reference that would be provided and was informed that she could sight a reference after she had handed over the drafts for faxing to Mr Goldsmith.

At 12:50 p.m. on Saturday she was called in to the office by Ms Porter and told by her that the letter would only be accepted if she added the undertaking "no other industrial action of any kind will be taken now or in the future against Seair Trading or Gold Coast Telebet Centre".

She ascertained that this meant that she would not proceed with a claim for unpaid wages. She declined to accept that condition.

A short time later she was recalled to the office by Ms Porter, who informed her that she had just got off the phone to Ms Rae and also informed her that she would not be getting a written reference and asked if she was still resigning.

She replied that she was not resigning and enquired as to whether she could be given shifts for the following week.

At 1:00 p.m. she was called back into the office by Ms Porter and dismissed. Ms Porter informed her that she had just got off the phone from Mr Goldsmith who adopted the view that she had resigned.

Ms Porter informed Ms Thompson that Mr Goldsmith had said that "we can't have anyone working here who is suing us". She was then told to pack her things and go.

The respondent's schedule of hours worked/rostered alleges that Ms Thompson resigned on 13 February but, somewhat peculiarly, shows her as being rostered on until 27 March 1999 but not showing up for work despite the alleged resignation.

Documentation signed apparently by Mr Goldsmith on 16 February 1999 and forwarded to Centrelink states that she resigned and last worked on 13 February 1999. No explanation has been provided as to why the company records allegedly show that she was rostered on for duty until 27 March 1999 but shown as a "no show" on the records until that date.

I accept the evidence of Ms Thompson that she was terminated by the respondent. It follows that I accept the evidence that the draft letter referred to above was for discussion purposes only and that the action taken by the respondent followed her refusal to undertake not to pursue a claim for underpayment of wages.

Ms Thompson's earning to 25 November totalled \$19,847, the average fortnightly earnings being \$352. During the last twelve months of her employment she was paid an average of \$281.

These earnings do not take into account the underpayment of wages by way of hourly rate or additional payments prescribed in the Award for working on public holidays or on weekends.

Ms Thompson has sought compensation of \$5,657.25, this being the amount she could have expected to be paid for projected hours in the six month period following termination on 25 November 1998. Her employment was, of course, again terminated on 13 February 1999 in a manner which would be in breach of Part 2 of the Act.

On the evidence, reasonable steps were taken by Ms Thompson to secure alternative employment. She experienced difficulty in securing employment. Since she arrived in Australia, the main job that she had had was as a telebet operator for the respondent and she had only that job to provide to prospective employers as a reference.

I award as compensation a global amount of \$5,000. I order that Seair Trading Pty Ltd pay the sum of \$5,000 to Ms Denise Thompson within twenty-two days of the release of this decision to the parties.

#### **Penalties s. 222(5)**

The applicants have alleged that the dismissals were carried out in breach of s. 217(b)(iii) (membership of an employee organisation) and s. 217(b)(xi) (discrimination that would contravene the *Anti-Discrimination Act 1991*).

The onus is upon the respondent to prove the dismissal was not for either of those two reasons.

The little that the respondent has provided to the Commission with respect to this aspect of the applications has not discharged the onus placed by s. 217.

The Conclusions contained in the earlier decision (QGIG 25 August 2000 Vol. 164 No. 18 at pages 392-397) invite the respondent to provide material to establish "that the training programme referred to necessarily required the indefinite rostering off (termination) and therefore did not contravene the unfair dismissal provisions of the Act".

Little material was provided with respect to the training programme and then by statement only. No information or evidence was provided by those in charge of rostering and training employees.

While not intending to repeat the background of the engagement of and work performed by the applicants, some reference is necessary.

The applicants were each engaged for a position with the Gold Coast Telebet Centre. They were trained as telebet operators with terms of employment (as to performance of duties) being determined by a contract mimicked that used by TAB Queensland Limited. Those duties took up almost the whole of their employment.

Some work was available for another organisation, HRI International, and was performed at the same premises. This could consist of selling holiday packages or responding to enquiries generated from outside the premises.

On the evidence this work was very limited. That is, by comparison with the number of employees and hours worked by telebet operators, this work was minimal.

Until October/November 1998 the applicants' work was highly regarded. They were on a relatively regular roster to perform telebet duties. Very occasionally they were asked to perform duties for HRI.

This circumstance changed following their joining AMACS and that being made known to the respondent by letter of 6 November 1998 from Ms Evans which was endorsed by Ms Lewin and Ms Thompson.

At this time also the applicants, among others, attended the meeting about the removal of Ms Simpson's shifts at which Mr Goldsmith, Ms Rae and Ms Porter were present with some other employees. Their membership of the Union thus became well known.

The hours of work then allocated to the applicants were then considerably reduced by comparison with previous allocations and their employment eventually terminated on 25 November.

Prior to the termination of the applicants' employment Ms Rae, as Manager, published Staff Notices to provide employees with some information about the respondent's view of the then circumstances (Exhibit 8 and 9).

The notice of 30 October set out to inform employees of the various events from the employers point of view, and informed members that the company's legal firm had been instructed to take action to have AMACS Industrial Officer's authorisation withdrawn due to the "aggressive, unprofessional and disgraceful behaviour" and to "seek damages from them for defamation and slander".

That notice also set out the respondent's policy that it had no opinion as to the merits or otherwise of union membership and that no person would ever be treated unfairly or discriminated against for any reason. It also stated that the decision to join any union organisation was "purely and totally a free choice of any individual".

It then set out to clarify some company structure and employment terms in brief and confirmed that "all other considerations relating to your part time or casual work with the centre are as written in our staff agreement". However, it goes on to say "as casual staff you are free to work if rostered or not".

This statement ignores the compulsion contained in the contract to work as required on certain days.

The staff notice of 5 November refers to Mr Gary Lawrence's action to recover unpaid wages and stated that while there is no award for Telebet Operators a wage increase was being passed on in an attempt to bring rates in line with TAB Queensland Limited.

While "telesales" employees may not then have been bound by an award, the work of "telebet" operators of course then was covered by an award.

That notice also incorrectly informed employees that the action taken by the "Department" (to recover unpaid wages for Mr Lawrence) had been dismissed.

The notice concluded in the following terms:

"As stated to you recently, we expect further attempts by the Unions to destabilise our business prior to the TAB privatisation debate. May I suggest that you approach us as to the authenticity of any claims and/or simply check the facts in relation to wages with the QLD Department of Industrial Relations. We will be happy to direct any employee to the nearest office or supply the appropriate telephone number."

The material provided by the respondent to answer this claim under a covering letter of 10 August 2001 by way of Affidavits of Michael Goldsmith and Susan Pinchin does not address the claim of dismissal for an invalid reason but addressed only an argument that the applicant's employment was not terminated.

When provided with a further opportunity to respond to the claim the respondent provided a short submission from Mr Goldsmith on 16 January 2002 which again, except for one matter, dealt only with an argument that there was no termination.

There was a brief mention of a training programme in place for junior employees and others in conjunction with a requirement for less rostered weekday hours that resulted in an adjustment for the rosters of all employees.

There appears to be much smoke and mirrors about the respondent's material on this point.

Prior to 25 November 1998 there does not appear to have existed any circumstance, from the point of availability of work, that would give rise to a need to drastically alter the hours of work of the applicants.

The respondent would have the Commission believe that circumstances changed, prior to 25 November, which required that the applicants, who were amongst the respondent's most efficient telebet operators, be "rostered off" to enable training of other persons on presumably telebet and HRI work.

I have difficulty in accepting that story. In September/October 1998 there was a significant increase in the work allocated to the respondent by TAB Queensland which required an increase from sixty telebet operators to one hundred and thirty.

While it is apparent that the work of telephone sales persons (not telebet operators) fluctuates somewhat because of contract fluctuations it would seem that the requirement for such employees is extremely limited. On examination, Ms Young, a supervisor who works mainly in the HRI area but who also does telebet work, referred to the addition of employees in the HRI area as being noticeable where she is apparently usually the only operator in that section with some involvement with Ms Rae.

Ms Young seems to be accepted as the regular experienced operator in the HRI section of the respondent's business. She holds the opinion, I think quite correctly, that most people can't sell on the phone. She determined from observation if employees put on the HRI work for training were satisfactory. If they were not she informed Ms Rae and they were not required to do the work any longer but were retained on telebet work.

The respondent moved on 24 November to alter that situation and issued a memo (Exhibit 12) informing all staff that, "in future shift preference will be allocated to staff willing to perform a variety of telesales activities and be rostered to work where work demands dictate".

While on its face such a requirement is perfectly reasonable, the applicants hold the belief that the contents of the notice in reality were a sham.

In the face of the limited information from the respondent and in consideration of the information before the Commission as to the numbers required in the telemarketing area as distinct from the telebet area, the belief that it was a sham seems to have quite a strong foundation.

This belief could be easily dispelled by the respondent providing details of the various contracts secured for other than Gold Coast Telebet at the relevant time and the hours worked by telephone operators to demonstrate the extent of the fluctuations and need to roster telebet operators on other work.

Mr Goldsmith's recollection as to the specifics of the contractual requirements at that time were very hazy. While the evidence is that, at least for some persons, the payment for HRI work was separate from payment for telebet work, no details were provided to the Commission of the hours required of employees for HRI work.

There is no evidence to support the proposition that the dismissals arose out of any operational necessity.

The initial dismissals clearly came about because the applicants wrote to the respondent requesting a meeting to discuss the reason for the reduced hours allocated on the roster.

There is sufficient in the evidence before the Commission to support an apprehension that the dismissals arose from the applicants joining AMACS and subsequent action to recover unpaid wages and attempt to utilise the dispute resolution process provided for in the Clerical Employees Award – State.

Additionally, while it is the stated policy of the respondent that employees were free to join a union and that the respondent had no opinion as to the merits or otherwise of union membership, there is the evidence as to the phone call from Mr Goldsmith to Ms Justo warning her off; the attempt by the respondent to prevent the Union speaking to employees in the carpark on their breaks by ushering them into the lunch room, smokers included in a non-smoking area; the attempts to prevent the inspection of time and wage records after having agreed to a meeting to allow the inspection; and observation through the toilet window by Ms Rae of employees who spoke to union organisers and, in the case of two, her comment "oh, so they're all in the union too", and their subsequent removal from the roster.

With respect to the inspection of employees' records, it is recognised that s. 40 of the Act does allow for a prevention of inspections in certain circumstances.

### **Findings**

The respondent has failed to discharge the onus placed upon it to prove that the dismissal was not for an invalid reason.

There is a reasonable belief held by the applicants that their employment was terminated because of their union membership and their participation in the Union's activities.

The respondent has been given every reasonable opportunity to discharge the onus placed upon it by s. 221(b) of the Act but has failed to do so.

Section 222(5) provides that, if satisfied an employer has dismissed an employee for an invalid reason, the Commission may, in addition to an order made under subsections (1) and (2), order the employer to pay the employee an amount of not more than the monetary value of 135 penalty points.

The value of a penalty point is presently set at \$75.

I am satisfied the respondent has dismissed the applicants for an invalid reason.

I order that the respondent pay to each of the applicants, Ms Denise Thompson, Ms Erica Lewin and Ms Robyn Evans the value of seventy penalty points, this being five thousand, two hundred and fifty dollars, within twenty-two days of the release of this decision to the parties.

R.E. BECHLY, Commissioner.

*Appearances:*

Ms K. O'Donnell, of Redwing Consulting, Ms K. Parkin and Ms L. Nadj of the Australian Municipal, Administrative, Clerical and Services Union, Central and Southern Queensland Clerical and Administrative Branch, Union of Employees for the Applicants.

Released: 22 August 2002

Mr M. Loane, of Michael Loane and Associates, and Mr M. Goldsmith for the Respondent.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 125 – application to amend award*

**The Australian Workers' Union of Employees, Queensland AND Queensland Sugar Limited  
and Others (No. B1197 of 2002)**

**BULK TERMINALS AWARD – STATE**

COMMISSIONER BROWN

9 August 2002

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 9 August 2002 this Commission orders that the said Award be amended as follows as from 1 January 2002:

1. By adding to Part 4 (Definitions, Hours of Work, Overtime) in the Arrangement of Award the following:

“Subject matter	Clause No.
Aggregate Wage for Ordinary Time	4.9”.

2. By deleting clause 2.1.4 (Casual Employment) and inserting the following in lieu thereof:

“2.1.4 Casual Employment

A casual employee is one engaged and paid as such. A casual employee will be one engaged on an hourly basis and for working ordinary time will be paid a rate calculated in accordance with the following formula operative from 2 April 2002:

Weekly wage prescribed x 1.23 divided by 38.

A casual employee will not be entitled to the benefits of Part 5 of this Award nor to the benefits of clause 2.5 (Redundancy) for work carried out on a Public Holiday. Public Holiday rate = weekly wage prescribed x 2.5 divided by 38.”.

3. By deleting from clause 2.5.1(a) the reference to “clause 2.5.2” and inserting the reference “clause 2.5.4” in lieu thereof.

4. By adding to clause 3.2.1 in numerical order the following:

“Schedule 11 Employees of BT Wages Operative 1/1/02”.

5. By inserting in clause 4.5.1(b) the word “aggregate” before the word “ordinary” where it appears in the dot points.

6. By deleting from clause 4.6 (Shift Allowance) the amount of “\$1.50” and inserting the amount of “\$1.75” in lieu thereof.

7. By inserting a new clause 4.9 (Aggregate Wage for Ordinary Time) as follows:

**“4.9 Aggregate Wage for Ordinary Time**

An employee by agreement with the employer may sacrifice a portion of their ordinary time earnings to the recognised superannuation fund, this amount shall not effect the base rate for the computation of overtime, public holidays and any allowances based on such ordinary time earnings.”.

8. By deleting from clause 5.3.1(b) the words “the employer shall not be bound to make payment for any period in excess of thirteen (13) weeks sick leave in any one year.”.

9. By deleting clause 7.2 (No Extra Claims) and inserting the following in lieu thereof:

“7.2 This Award has made provision for any CAN claims during the period 1 January 2002 to 31 December 2002.”.

10. By adding a new Schedule 11 to the Award as follows:

**“SCHEDULE 11**

**BULK TERMINALS WAGES RATES**

**Operative 2 January 2002**

**2% increase in wages following renegotiation of EBA**

Employee – Bulk Terminals Award – State and *Bulk Terminal (Enterprise Bargaining) Certified Agreement*

An Aggregate of the following rates of pay shall apply to all employees who have reached agreement with their employer.

Competency Level	Southern District Per Week	Central District Per Week	Northern District Per Week
	\$	\$	\$
1	637.40	638.30	638.45
2	677.20	678.10	678.25
3	717.00	717.90	718.05
4	756.90	757.80	757.95
5	796.70	797.60	797.75
6	836.50	837.40	837.55
7	876.40	877.30	877.45
8	916.20	917.40	917.25

**Apprentices** – The following rates of pay for apprentices shall be inclusive of all District Allowances, Travel Days and Shift Allowance unless specified elsewhere.

Year	\$ per week
1 <sup>st</sup>	233.30
2 <sup>nd</sup>	320.90
3 <sup>rd</sup>	437.50
4 <sup>th</sup>	525.00 <sup>00</sup> .

Dated 9 August 2002.

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

Operative Date: 1 January 2002  
Amendment – Rates etc.  
Released: 19 August 2002

#####

QUEENSLAND INDUSTRIAL REGISTRAR

*Industrial Relations Act 1999 - s. 482 – arrangement for conduct of election*

**Queensland Nurses’ Union of Employees (No. Q26 of 2002)**

REGISTRAR EWALD

20 August 2002

Conduct of Election – Timing of Election – Term of Office – Reason for Election – Electoral Commission to Conduct Election

DECISION

On 13 August 2002, the Queensland Nurses’ Union of Employees lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 36 of the *Industrial Relations Regulation 2000* in relation to its request for the conduct of an election by the Electoral Commission for the following Offices:-

<i>Office</i>	<i>Number of Positions</i>
President	1
Vice President	1
Executive Members	4
Councillors	18

**Timing of Election**

No date is prescribed by the Rules for the opening of nominations to assist in determining the prescribed date for the filing of prescribed information and, after reading all rules, a date is not definable by me.

Rule 19(f) provides as follows:

“(f) Elections for officers and members of the Council (other than Secretary and Assistant Secretary) shall be conducted between the first day of September and the thirtieth day of October in each alternate year provided that the Returning Officer may call for nominations prior to the first day of September in the year of such elections.”.

Notwithstanding that, I am prepared to exercise my discretion and extend the prescribed time for filing of such information to 13 August 2002.

**Number of Councillors**

Rule 19, Council, provides for the number of other members (hereinafter referred to as ‘Councillors’), no fewer than five or more than twenty as determined by Council.

The Industrial Organisation has declared that there are presently 18 Councillor positions for election.

**Term of Office**

Rule 19(c) prescribes that the President and all officers (except the Secretary and Assistant Secretary) and all members of Council shall hold office for a term of two years and shall be eligible for re-election for a further term of two years each.

**Method of Election**

The method of election for the above positions is a direct vote by way of a secret postal ballot to every financial member of the Union entitled to vote.

**Conduct of Election**

I have considered the application, the Act and Rules, and I am satisfied that an election is required to be held under the rules for each of the above positions of Office.

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

Dated this twentieth day of August, 2002.

E. EWALD  
Industrial Registrar

Released: 20 August 2002

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999*

**TRAINING WAGE AWARD – STATE**

*(Rates of pay varied to accord with the General Ruling  
Declaration, 7 August, 2002)*

PURSUANT to the Declaration of the Commission as to a General Ruling made on 7 August, 2002, the Award is amended as follows as from 1 September, 2002:

By deleting paragraphs (d), (e), (f) and (g) of subclause (1) of clause 2.4 (Wages) and inserting the following in lieu thereof:–

“(d) **Skill Level A** Where the approved training course and work performed are for the purpose of generating skills which have been defined for work at Skill Level A.

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	157.00(50%)* 183.00(33%)	194.00(33%)* 219.00(25%)	265.00
plus 1 year out of school	219.00	265.00	309.00
plus 2 years out of school	265.00	309.00	359.00
plus 3 years out of school	309.00	359.00	410.00
plus 4 years out of school	359.00	410.00	
5 years or more out of school	410.00		

(e) **Skill Level B** Where the approved training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level B.

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	157.00 (50%)* 183.00 (33%)	194.00 (33%)* 219.00 (25%)	255.00
plus 1 year out of school	219.00	255.00	294.00
plus 2 years out of school	255.00	294.00	345.00
plus 3 years out of school	294.00	345.00	392.00
plus 4 years out of school	345.00	392.00	
5 years or more out of school	392.00		

(f) **Skill Level C** Where the approved training course and work performed are for the purposes of generating skills which have been defined for work at Skill Level C.

**Highest Year of Schooling Completed**

School Leaver	Year 10	Year 11	Year 12
	\$	\$	\$
	157.00 (50%)* 183.00 (33%)	194.00 (33%)* 219.00 (25%)	247.00
plus 1 year out of school	219.00	247.00	278.00

plus 2 years out of school	247.00	278.00	311.00
plus 3 years out of school	278.00	311.00	347.00
plus 4 years out of school	311.00	347.00	
5 years or more out of school	347.00		

\* Figures in brackets indicate the average proportion of time spent in approved training to which the associated wage rate is applicable. Where not specifically indicated the average proportion of time spent in structured training which has been taken into account in setting the rate is 20%.

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

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

Dated 20 August 2002.

E. EWALD  
Registrar.

Filename: no.19 30.08.02  
Directory: S:\QIRCDEV-BASE\qgig\2002\vol 170  
Template: H:\NORMAL.DOT  
Title: QGIG - Vol. 170 No. 19 30.08.02  
Subject:  
Author: Queensland Industrial Relations Commission  
Keywords:  
Comments:  
Creation Date: 27/08/2002 10:25:00 AM  
Change Number: 3  
Last Saved On: 17/01/2008 2:17:00 PM  
Last Saved By: TorrenVM  
Total Editing Time: 3 Minutes  
Last Printed On: 17/01/2008 2:17:00 PM  
As of Last Complete Printing  
Number of Pages: 16  
Number of Words: 13,347 (approx.)  
Number of Characters: 68,604 (approx.)