



The Queensland Government Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$358.62 (GST inclusive)

ISSN 0155-9362

Vol. 170

FRIDAY, 21 JUNE, 2002

No. 9

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 |
|----------|---|----------------|------------|
| CA241/02 | Sunshine Coast Children's Therapy Centre Inc. and its employees - Certified Agreement 2002 | 29/5/02 | |
| CA247/02 | Doboy Cold Stores - Certified Agreement 2002 | 7/6/02 | CA345/01 |
| CA68/02 | John Scates Electrical Contractor Pty Ltd - Certified Agreement 2001/2002 | 11/6/02 | |
| CA77/02 | D & M Projects (Qld) Pty Ltd Certified Agreement - 2001/2002 | 11/6/02 | |
| CA78/02 | SDF Electrical Pty Ltd Certified Agreement - 2001/2002 | 11/6/02 | |
| CA91/02 | Termita Holdings Pty Ltd T/A Compulec Certified Agreement - 2001/2002 | 11/6/02 | |
| CA92/02 | Nilsen Electric Queensland Certified Agreement 2001/2002 | 11/6/02 | |
| CA239/02 | BPM Electrical Services Pty Ltd Trading as Combined Electrical Services Certified Agreement – 2002 | 11/6/02 | |
| CA249/02 | ABB Industry Pty Limited Certified Agreement - 2001/2002 | 11/6/02 | CA264/98 |
| CA258/02 | Bauhinia Shire Council State - Certified Agreement 2002 | 11/6/02 | CA58/99 |

The following Agreement has been amended by the Commission:—

| No/s | Title | Date Amended |
|----------|---|-----------------|
| CA277/01 | Princes Fabricare Services Pty Ltd - AWU - Certified Agreement 2001 | 8/5/02 & 6/6/02 |

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(1) – appeal against decision of industrial commission**Queensland Nurses' Union of Employees AND Longreach and District Aged Peoples Inc.
t/a Pioneers Hostel/Nursing Home (No. 2) (No. C28 of 2002)**

PRESIDENT HALL

6 June 2002

DECISION

This is an appeal against a decision of the Queensland Industrial Relations Commission delivered on 15 March 2002 and now reported at 169 QGIG 272.

The matter before the Commission was a claim under s. 278 of the *Industrial Relations Act 1999*. The matter was argued as a question of interpretation on an agreed statement of facts. The agreed statement of facts was in the following terms:

- “1. That Rhonda Jackson (the employee) at all material times was and is an employee of the Pioneer Nursing Home.
2. That the relevant award is the Nurses Aged Care Interim Award – State.
3. The employee is and at all material times has been correctly classified as an Assistant Nurse under that award.
4. The employee works night shifts under that award.
5. The employee is required to remain on the premises during her meal break on night shift.”.

The agreed question was:

“Is the employee entitled to the allowance provided for in Clause 9(8)(b) – Night Shift Meal Allowance of the Nurses Aged Care Interim Award – State.”.

The Commission answered the question in the negative and referred the matter of reformulating clause 9(8)(b) to another Commission for conciliation. (Whatever the outcome of the appeal that attempt at reformulation should occur. There are deep seated problems with the clause. Clause 9(8)(b) has been before the Court on a previous occasion, see *Queensland Nurses' Union of Employees v Bethlehem Nursing Home* (2000) 165 QGIG 216). On the appeal, as before the Commission, the issue is whether “employee” should be read as “employee (being a registered nurse or an enrolled nurse).” Clause 9(8)(b) of the Nurses Aged Care Interim Award – State provides as follows:

“Where an employee is required to remain on the premises during the meal break whilst engaged on night duty the employee shall be paid an allowance of \$7 per shift. Should the employee’s meal break be interrupted by work or inquiries pertaining to work, then the meal break shall be paid at the appropriate overtime rate.”.

At one time the appellant’s case would have been unassailable. In *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161 to 162 Higgins J formulated the cardinal rule of statutory interpretation as follows:

“...The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable. Words limiting the power are not to be read into the statute if it can be construed without a limitation . . .”(Emphasis added).

The “mischief rule”, commonly said to be derived from the decision in *Heydon’s Case* (1584) 3 Co Rep 7 at 7b; 76 E.R. 637 at 638, might be invoked only where the literal rule produced ambiguity or inconsistency; see *Wacal Developments Pty Ltd v Realty Development Pty Ltd* (1978) 140 CLR 503 at 513 per Stephen J.

On its natural and grammatical meaning clause 9(8)(b) applies to assistant nurses.

Since the passage of what is now s. 15AA of the *Acts Interpretation Act 1901* (C’wth), see *Statute Law Revision Act 1981* (C’wth), the traditional approach has broken down. Section 15AA provides as follows:

“In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.”.

In *Mills v Meeking* (1990) 91 ALR 16 at 30 to 31 Dawson J proffered the following view of s. 15AA:

“[T]he literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act. Section 35 of the Interpretation of Legislation Act must, I think, mean that the purposes stated in Pt 5 of the Road Safety Act are to be taken into account in construing the provisions of that Part, not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose: *Miller v Commonwealth* (1904) 1 CLR 668 at 674; *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 20 ALR 621 at 630. The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in the light of its purposes.”.

Section 15AA may not, of course, be invoked in support of the respondent's case on this appeal. The section applies in the construction of Commonwealth statutes. However, consideration of s. 14A of the *Acts Interpretation Act 1954* is mandatory. Section 14A provides:

“Interpretation best achieving Act's purpose

14A.(1) In the interpretation of a provision of an Act, the interpretation that will best achieve the purpose [which by s. 36 includes ‘policy objective’] of the Act is to be preferred to any other interpretation.

(2) Subsection (1) does not create or extend criminal liability, but applies whether or not the Act's purpose is expressly stated in the Act.

(3) To remove any doubt, it is declared that this section applies to an Act passed after 30 June 1991 despite any presumption or rule of interpretation.”.

It is a wider provision than its Commonwealth counterpart. The Commonwealth provision operates only in a situation of choice. In *Chuggs v Pacific Dunlop Ltd* (1990) 95 ALR 481 at 489 in discussing s. 35(a) of the *Interpretation of Legislation Act 1984*, Dawson, Toohey and Gaudron JJ said:

“The choice directed by s. 35(a) of the *Interpretation of Legislation Act* is not as to the construction which ‘will best achieve’ the object of the Act. Rather, it is a limited choice between ‘a construction that would promote the purpose or object [of the Act]’ and one ‘that would not promote that purpose or object’.”.

Section 14A of the *Acts Interpretation Act 1954* is not so limited. It is expressly directed to the construction which “will best achieve” the purpose of the Act. [The Nurses Aged Care Interim Award – State is not, of course, an Act of the Queensland Parliament. The Award is a statutory instrument within the meaning of the *Statutory Instruments Act 1992*. By s. 14(1) of that Act the provisions of s. 14A of the *Acts Interpretation Act 1954* are applied to statutory instruments].

Contemporaneously with the change in approach to the interpretation of legislative and quasi-legislative commands there was a change in approach to the use of extrinsic materials in construing documents. In *Queensland Police Union of Employees* (2000) 164 QGIG 16 at 16 I summarised the development of the law as follows:

“There are divergent lines of authority about whether resort may be had to extrinsic material to aid in the construction of a document. For many years the view held sway that resort might be had to extrinsic material only to resolve an ambiguity, compare *Victoria v Australian Teachers' Union* (1993) 47 IR 328 at 334 per Gray J. Indeed, there is some authority that even where there is an ambiguity the extrinsic evidence may be used only to establish the mischief aimed at rather than to show light upon the solution, compare *Bell v Gillen Motors Pty Ltd* (1989) 24 FCR 77 at 86 per Wilcox J. However, in more recent times a more generous approach, most fully expounded by Burchett J in *Short v F W Hercus Pty Ltd* (1993) 40 FCR 511 at 517 to 519 has found favour: see *Western Newspapers Pty Ltd v Warren* (1994) 1 IRCR 393 at 405 per Moore J, *Hawkins v Queensland Meat Export Company* (unreported), IRCA, 31/7/96 per Madgwick J, *AMACSU v Treasurer of the Commonwealth* (1998) 82 FCR 175 at 177 to 178 per Marshall J, *P & O Services Pty Ltd v ALHMY* (unreported), IRCA, 18/8/99 at para 30 per Ryan J and, of course, *Short v F.W. Hercus Pty Ltd* itself, at 523, where Drummond J expressed his agreement with the views of Burchett J. It seems now to be accepted that extrinsic material may be allowed in to expose an ambiguity as well as to resolve it.”.

All of that is of some moment here.

The Nurses Aged Care Interim Award – State was an award made by a Full Bench of the Queensland Industrial Relations Commission on 17 December 1993 (operative date 20 December 1993). The reasons for decision are reported at (1994) 145 QGIG 118. The very first paragraph is in the following terms:

“In general terms, the Queensland Nurses' Union of Employees (QNU) seeks to vary on-call, recall, overtime, roster and external transfer duty provisions of the various abovementioned awards. Case No. B426 of 1992, relating to the Red Cross Blood Transfusion Service Employees' Award – State, seeks only to vary the recall and overtime provisions as this award does not currently contain on-call provisions. These applications affect Registered Nurses (RN's) and Enrolled Nurses (EN's). Case No. B424 of 1992, relating to the Nurses' Award – Domiciliary Nursing Services – State, in addition to the above matters seeks the inclusion of the Commission's policy on termination, change and redundancy.”. (Emphasis added).

The paragraph both suggests that “employee” at clause 9(8)(b) is ambiguous (which employees?), and suggests the solution (registered nurses and enrolled nurses).

Counsel for the appellant has been good enough to search out the (amended) application upon which the Nurses Aged Care Interim Award – State was made. It is apparent that the amendment which is now clause 9(8)(b) was not, unlike many other amendments, limited to registered nurses and enrolled nurses. However, on a fair reading of the transcript it was plainly put to the Full Bench that all amendments were so limited. But a clear statute will prevail over an inconsistent second reading speech, compare *Clarke v Bailey* (1993) 30 NSWLR 556 at 567 per Kirby P with whom Sheller JA agreed. So also should an expression of purpose by the Commission in making an award prevail over the purpose of the original proponent of the Award. Further, if the views of the parties to a consent award be generally admissible, as Gray J seems to have accepted in *Seymour v Stawell Timber Industries Pty Ltd* (1985) 9 FCR 241 at 265, the better view seems to be that the views of the parties at the time the Award is made should not be allowed in evidence if themselves contradictory or otherwise ambiguous, *Short v F.W. Hercus Pty Ltd* (1993) 40 FCR 511 at 517 per Burchett J.

It seems to me to be tolerably plain that in exercising jurisdiction under s. 278 the Queensland Industrial Relations Commission sits as a court of construction and not as an arbitrator. The admonition of Dawson J in *Mills v Meeking* (1990) 91 ALR 16 at 31 previously quoted, viz, “section [14A] requires a court to construe an Act, not to rewrite it, in the light of its purposes” is squarely in point. But a court does not legislate if it does no more than read in words. In *Birmingham v Corrective Services Commission of NSW* (1988) 15 NSWLR 292 McHugh JA read s. 28(6)(b) of the *Prisoners (Interstate Transfer) Act 1982 (NSW)* as if the words “sentence of imprisonment” were preceded by “minimum term”. At 302 His Honour said:

“[I]t is not only when Parliament has used words inadvertently that a court is entitled to give legislation a strained construction. To give effect to the purpose of the legislation, a court may read words into a legislative provision if by inadvertence Parliament has failed to deal with an eventuality required to be dealt with if the purpose of the Act is to be achieved.”.

His Honour limited that passage as follows:

“First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.”. (at 302)

Substituting "Award" for "Act" and "Queensland Industrial Relations Commission" for "Parliament", those conditions are met in this case. "Employee" in clause 9(8)(b) of the Nurses Aged Care Interim Award – State should be read as "employee (being a registered nurse or an enrolled nurse)."

I dismiss the appeal.

Dated 6 June 2002.

D.R. HALL, President.

Released: 6 June 2002

Appearances:

Mr J. W. Merrell of counsel, directly instructed, for the appellant.

Dr N. Timo and with him Mr P. Varendorff, of Miles Witt Partnership, for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

John Labaj AND Lollo Plumbing Pty Ltd (No. B2311 of 2001)

VICE PRESIDENT LINNANE

11 June 2002

Application for reinstatement alleging dismissal was unfair and for an invalid reason – Warning issued some two months after incident – Incident did not warrant formal warning – Whether applicant disobeyed lawful instruction – Applicant not warned of consequences of disobeying instruction – Applicant believed he was entitled to disobey instruction given – Held Applicant did disobey lawful instructions however not warned of potential consequences – Whether Applicant afforded procedural fairness upon dismissal – Held Applicant denied procedural fairness – Whether dismissal for invalid reason – Held Applicant not dismissed for any invalid reason – Consideration of appropriate remedy – Actions of Applicant subsequent to dismissal relevant to issue of remedy – Reinstatement and re-employment found to be impracticable – Compensation awarded – *Industrial Relations Act 1999* ss. 73 (2) and 74.

DECISION

- [1] This is an application by John Labaj (Applicant) pursuant to Chapter 3 of the *Industrial Relations Act 1999* (Act) seeking reinstatement to his former position of estimator with Lollo Plumbing Pty Ltd (Respondent). The Applicant was dismissed from employment on 14 December, 2001. He was paid two weeks in lieu of notice plus his contractual and statutory entitlements. The Applicant alleges that his dismissal was both unfair and for an invalid reason.
- [2] The Applicant commenced employment with the Respondent in or about August, 2000. Initially he was employed to administer and manage two industrial projects at Lavarack Barracks in Townsville. The Respondent utilised the services of Drake Employment to find a project manager. Having been offered the position the Applicant relocated to Townsville from Adelaide in August, 2000 with, as the Applicant states, a "promise" and a "prospect of permanent position".
- [3] Eric James Lollo, the Respondent's Managing Director, says that the Applicant was employed because he was "computer literate, he was a plumber and he had a history of administrative experience having run his own business". When the Applicant commenced employment with the Respondent he was required to use his own laptop computer and all necessary software to manage and administer the two projects. During the course of his employment at Lavarack Barracks the Applicant was provided with a computer and all the necessary software to do the job.
- [4] The two industrial projects at Lavarack Barracks were completed in or around July, 2001. In or about June, 2001 the Applicant was offered a position of estimator at the Respondent's office in Garbutt. At that time the Respondent was in the process of Quality Assurance accreditation. The Applicant states that Mr Lollo informed him, at that time, to do all "estimating using ... program called 'Sharp Estimator' ". Further the Applicant states that he was told that all tenders were to be "prepared from relevant tender documents for the project concerned, and all tenders must comply with the Regulation and by-laws under the Sewerage Act, local council by-laws and AS3500". Mr Lollo disputes that he ever told the Applicant that all tenders must so comply.
- [5] Mr Lollo says that he had numerous conversations with the Applicant instructing him not to change plans. It was Mr Lollo's evidence that he had advised the Applicant that he was to estimate on the plans as given and he was not to change the plans to comply with any regulation or standard. In this regard Mr Lollo referred to a "highly embarrassing" incident when he had a meeting with the Applicant and Honeycombes in relation to a development in Townsville. According to Mr Lollo the Applicant insisted that Honeycombes' plans were wrong and had to be changed. It was Mr Lollo's evidence that the local council approved the plans that Honeycombes submitted and that the development is presently being constructed on those plans. It was Mr Lollo's view that it was not the Respondent's position in submitting a tender to redraw the plans before the Respondent had costed the plans. To do otherwise impacted on the Respondent's prospect of gaining the tender. The Honeycombes' incident was the only particularised occasion when Mr Lollo instructed the Applicant not to alter plans.
- [6] The Applicant says that he was told to complete the "first cost" for all tenders and that this "first cost" was the "sum of all labour and material costs necessary to complete the project". Further he says that on completion of the "first cost" stage, a conference was to be held with Mr Lollo and Richard Jones, the Applicant's immediate supervisor whilst employed with the Respondent. This conference was to evaluate the "first cost" tender prepared by the Applicant and then apply the "Preliminary Cost, Overhead Cost and desired profit" to the "first cost" to arrive at the final tender sum. It was at this conference stage that the Applicant says that he was also instructed as to which builder the Respondent would submit the tender and whether or not the same or a different tender would be submitted to all builders.
- [7] Mr Lollo says that he had instructed the Applicant to meet with himself, Mr Jones or both of them at least 24 hours before the tender. Mr Jones agreed that the Applicant was advised to provide him and/or Mr Lollo with any tender bid at least 24 hours prior to the tender closing. Mr Lollo agreed that at this time they may also have instructed the Applicant on the name of the preferred builder and/or whether different tenders would be supplied to different builders.
- [8] The Applicant says that these were the only instructions that he received in respect of the estimator's role until late October, 2001. At or about that time the Applicant was provided with a written job description that included the roles and responsibilities for the occupant for the position of Estimator. The Quality Assurance consultant engaged by the Respondent prepared these documents. Mr Lollo agrees that a written job description was not provided to the Applicant until late October, 2001 as the Respondent was progressing through the quality assurance process.

Mitchell Centre Incident

- [9] According to the Applicant the tender for the Mitchell Centre project in Darwin closed on 28 September, 2001. Four builders tendered for the project i.e. Walters Construction, Barclay Mowlem, John Holland and Multiplex. The Applicant says that he was instructed to concentrate his efforts on Walters Construction and to give that builder "all possible advantage" as the Respondent "wanted Walters to win that job". At approximately 9.00 a.m. on the closing date of the tender Mr Lollo and Mr Jones came to his office to evaluate the tender bid undertaken by the Applicant. During the course of this meeting Mr Lollo telephoned the estimator from Walters Construction to enquire what the Respondent's bid to Walters Construction should be. It was agreed that the tender to Walters Construction should be \$1.65 million. There is no dispute about this aspect of the Applicant's evidence.
- [10] Further it was the Applicant's contention, in paragraph 2.2.2.8 of the Statement of Material Facts relied upon to support the Application, that he was instructed to "add the margin of approximately 15% to the Walters bid and submit that bid to all other tenderers". Once again there was no dispute with this part of the Applicant's evidence. In his statement of evidence (Exhibit 1) however, the Applicant elaborates further stating that he was instructed to "apply an additional 15% to the final tender sum, providing that the final sum, when calculated would be in the vicinity of \$1.65 mill as in the Walters bid... [s]ome discussion evolved and it was finally decided that our bid to other builders should not go over \$1.8 mill ... [a]s we wanted to be still competitive with all others".
- [11] During the course of the morning of 28 September, 2001 the Applicant submitted a tender of \$1.65 million to Walters Construction and tenders of \$1.798 million to the other three builders.
- [12] In his original witness statement (Exhibit 1) the Applicant says that at approximately 12.00 noon Mr Jones returned to the office whereupon the Applicant informed him of the final bids and handed Mr Jones the copies of the faxes sent to the various builders containing the bids. It was the Applicant's evidence that Mr Jones immediately showed anger at what the Applicant had done saying "it does not take a rocket scientist to calculate 15% from 1.6 million". The Applicant says that he responded by saying that "we did not want the bid to go over \$1.8 million in order to make the bid more presentable and also competitive with other builders". According to the Applicant, Mr Jones said that "Eric will have a piece" of him when he returns.
- [13] According to the Applicant's evidence Mr Lollo returned to the office shortly after the conversation between the Applicant and Mr Jones. The Applicant says that he handed the bid to Mr Lollo and "relayed the interaction with Richard Jones to him" making Mr Lollo aware of Mr Jones' opinion that the bid to other builders was too low and that he may have "made a mistake". The Applicant said that Mr Lollo looked at the bids and said words to the effect "[n]o, that is OK. I would have gone the same way. Leave it as it is." Mr Lollo in his evidence denies that any such conversation occurred. It was the evidence of Mr Lollo that he first became aware of the actual tender bid through a discussion with Mr Jones on or about 2.00 p.m. on that day.
- [14] At approximately 2.00 p.m. the Applicant says that he received a telephone call from Mr Lollo advising him that the bid to the other three builders was too low and that he was to advise the builders that there was a typographical mistake in the tender and to amend the tender from \$1.798 million to \$1.898 million. The Applicant says that he telephoned the three builders and advised them orally of the mistake and then faxed the altered tender to each builder.
- [15] The Applicant says that if he made a mistake, which he denies, the mistake was the result of a misunderstanding of unclear instructions.
- [16] Mr Lollo says that his instruction to the Applicant was that "we would do \$1.65 million" for Walters Constructions and that "all the other builders at 15% above that and not more than \$1.9 million". Mr Lollo denies ever saying that the bid should not go over \$1.8 million and he denies ever saying that the bid to the other builders should be competitive.
- [17] It was Mr Lollo's evidence that he did not reprimand or warn the Applicant either on 28 September, 2001 or at any time shortly thereafter about this incident. Nor did he inform the Applicant at this time that he had disobeyed an instruction that had been given to him. In fact Mr Lollo says that he told the Applicant only that it "wasn't the way ... it was to be done". He was not warned or cautioned about any of the alleged disobedience of lawful instructions.
- [18] Mr Jones was not present throughout the whole of the 9.00 a.m. conversation. Mr Jones did however support the evidence of the Applicant that it was Mr Lollo who, after a conversation with the estimator for Walters Construction, said to the Applicant "can we do it for 1.65 or thereabouts". Mr Lollo's evidence was that the Applicant gave him the figure of \$1.65 million that he then verified that amount with the estimator for Walters Construction. According to Mr Jones the discussion after Mr Lollo got off the telephone went something like:
- "We need to give Walters an advantage. Walters suggested a figure in the vicinity of 200,000... What we need to do with Walters, we need to give them a figure of 1.65 thereabouts. We need to do something with the others in the vicinity of a couple of hundred thousand dollars more ... make all the others come up to no more than 1.89 or 1.9 million."
- [19] The evidence before me reveals that the instruction to the Applicant on 28 September, 2001 was anything but clear. I do not accept that the Applicant disobeyed any instruction given to him on 28 September, 2001 concerning the Mitchell Centre.

First Warning

- [20] On 29 November, 2001 the Applicant was diagnosed by his general practitioner with eye strain. The general practitioner had indicated that there were three possible causes of the eye strain. One of those causes was excessive computer work undertaken by the Applicant whilst working for the Respondent. The Applicant at this time was referred to a specialist medical practitioner.
- [21] On 30 November, 2001 the Applicant completed an Injury/Illness/Disease Occurrence Report and gave it to the Respondent's Occupational Health & Safety Officer. Mr Lollo agrees that he became aware of the complaint in relation to the eye strain on 30 November, 2001.
- [22] On that same day, 30 November, 2001, the Applicant was provided with correspondence that relevantly provides as follows:

"Re: Written Warning
Disobeying Lawful Instructions

Since your appointment as Estimator there have been numerous occasions when I have given you lawful instructions and you have blatantly disobeyed those instructions.

By your own admission you have advised me that you cannot work with me and Dick Jones.

I put you on notice that when I issue you with a lawful instruction you are to comply with that instruction. I cannot and will not accept any staff member disobeying my instructions.

If you disobey my lawful instructions again I will terminate your employment.”.

[23] That letter did not particularise any lawful instruction nor did it particularise the alleged disobedience of such an instruction. When he received the letter the Applicant apparently asked Mr Lollo to be more specific about what instructions he was referring to in the correspondence. According to the Applicant Mr Lollo responded by saying “there were numerous occasions... however the one to come to his mind was the tender submission for Mitchell Centre in Darwin”. Mr Lollo confirmed that the only instance he particularised to the Applicant on 30 November, 2001 was the Mitchell Centre incident.

[24] I have already determined that the Applicant had not disobeyed any lawful instruction on that date as there was no clear instruction given to him.

[25] According to Mr Lollo the Applicant became argumentative during the course of the meeting on 30 November, 2001 and did not accept that he had done anything wrong.

[26] Shortly after 30 November, 2001, both Mr Lollo and Mr Jones went on a business trip and the Applicant saw Mr Lollo on only a few occasions in the following two weeks. During that time the Applicant says that he continued to prepare tenders for the Respondent. In fact Mr Lollo only returned from Dili on the afternoon of Wednesday 12 December, 2001.

[27] At approximately 9.00 a.m. on 14 December, 2001 the Applicant says that Mr Lollo called him into his office and handed him his letter of dismissal. The letter of dismissal relevantly provides as follows:

“Re: Termination of Employment

I refer to my letter of 30th November 2001 when I put you on notice that you were to obey all lawful instructions.

Since that date there have been occasions where you have blatantly disobeyed my lawful instructions.

As advised I cannot allow this situation where my work instructions are repeatedly disobeyed. Accordingly I advise your employment is terminated effective as of 14th December, 2001. You will be paid two weeks in lieu of notice plus your statutory entitlements.”.

[28] No particulars were provided of the lawful instructions said to have been blatantly disobeyed since 30 November, 2001. After being handed the termination letter the Applicant says that he was escorted to his office to collect his personal belongings and then escorted to the gate.

[29] In his statement of evidence Mr Lollo referred to a couple of incidents that followed 30 November, 2001. He said that on 13 December, 2001 he had a discussion with the Applicant about the tender for Whitsunday Sailing Club. That statement was later corrected so that the date was 3 December, 2001 and the project was the Whitsunday Police Citizens’ Youth Club. Mr Lollo says that the Applicant was again argumentative during the course of this meeting and disagreed with him about how the tender should be done. Mr Lollo says that he asked the Applicant to stop arguing and to “go and do his job”. Mr Lollo says that the Applicant only returned to his desk after he directed him to go and do his job. When the Applicant gave his evidence the statement from Mr Lollo referred to the conversation being on 13 December, 2001 and it relating to the Whitsunday Sailing Club. The Applicant denied such a conversation.

[30] Further Mr Lollo in his statement of evidence says that on 14 December, 2001 he had a further meeting with the Applicant when the Applicant brought in plans for the Mackay Sailing Club. The Applicant had made changes to the plans. Mr Lollo says that he asked the Applicant why he had changed the plans after having been instructed not to do so. The response from the Applicant was that “they were not to Australian Standards”. Once again during the course of his evidence Mr Lollo corrected the date of this discussion to 13 December, 2001. Once again the Applicant had completed his evidence before Mr Lollo corrected the mistake.

[31] I accept that the Applicant did make changes to the Mackay Sailing Club project plans.

[32] It was the evidence of Mr Jones that he had been present when Mr Lollo had informed the Applicant not to alter plans before tendering. As Mr Jones said it was “not appropriate we change the plans and submit a tender based on what we think the plan should say”. Mr Jones was however unable to be specific about the occasions when the Applicant was so instructed.

[33] I accept that the Applicant had been informed, prior to 13 December, 2001, not to alter plans before preparing a tender bid.

[34] According to Mr Jones’ evidence the Applicant became “more defiant and argumentative and less willing to work in a team from approximately September/October, 2001 onwards”. Mr Jones says that it became so difficult to deal with the Applicant that he advised Mr Lollo, in or about mid November, 2001, that he would no longer work with the Applicant. From that time onwards Mr Jones says that only Mr Lollo had dealings with the Applicant in relation to tenders.

Was the Dismissal Unfair?

[35] The warning was issued to the Applicant on 30 November, 2001. The only example offered to the Applicant at this time of his disobedience of “lawful instructions” was the Mitchell Centre project. The incident in relation to the Mitchell Centre project occurred on 28 September, 2001. Mr Lollo did not mention that incident to the Applicant during the period 29 September, 2001 and 29 November, 2001. A period of two months elapsed between the incident and the warning. I do not accept that an employer would take two months to issue such a warning notice particularly when the matter had not been raised at all during that two month period.

[36] In any event I have already determined that the instruction given to the Applicant on 28 September, 2001 was not clear and that any error that resulted was an error that arose from unclear instructions.

[37] Something caused Mr Lollo to issue the warning on 30 November, 2001. Mr Lollo gave evidence that he became aware of the complaint in relation to eye strain on 30 November, 2001. Mr Lollo however contends that the warning letter had nothing to do with the complaint of eye strain. He says that he had spoken to a Les Nicholson on 27 November, 2001 wherein he advised Mr Nicholson that he was “having trouble with the applicant because he was not following instructions”. Mr Nicholson did not give evidence in this proceeding.

- [38] The evidence does not reveal any other incident on or about 30 November, 2001 that would have warranted the warning letter.
- [39] Having witnessed the Applicant in the giving of his evidence and in the presentation of his case I can accept that the Applicant may have, at times, been a difficult employee. I accept that he may have been very argumentative at times. Neither of those attributes, however, was referred to in the warning letter or during the discussion between the Applicant and Mr Lollo on 30 November, 2001.
- [40] In the period following the warning letter of 30 November, 2001 and up to the dismissal letter of 14 December, 2001 Mr Lollo was away from the office for a reasonable period. It seems that the Applicant's changing of the Mackay Sailing Club plans was the catalyst for the letter of termination given to the Applicant on 14 December, 2001. The Applicant agreed that he was given instructions that when he found any problems, mistakes or omissions on the plans or in any tender documents he was to alert either Mr Lollo or Mr Jones about them. He agreed that he was told to calculate the tender as per the documents and that a note would be made in the tender submission that the Respondent had tendered as per the documents, however the Respondent was aware that there were some problems with the plans as provided by the developer or builder.
- [41] The Applicant says that he got those instructions at about the time of the High Point Apartments or the Honeycombes' project. This accords with the evidence of Mr Lollo who could only particularise this project. The Applicant says that he received those instructions sometime in late October, 2001. This incident however was not particularised to the Applicant on 30 November, 2001. In my view he could well have formed the view that the Honeycombes' project incident was not a matter that he was being warned about in the warning letter.
- [42] The Mackay Sailing Club plans were dated 19 November, 2001. The Applicant agreed that he changed those plans and that he did not estimate on the plans as provided to him. He says that he estimated on his "own design". The Applicant further agreed that from the plans as provided to him, the Mackay Sailing Club could be built. The changing of the Mackay Sailing Club plans occurred well before the warning letter of 30 November, 2001.
- [43] I accept that the Applicant had been earlier told not to change the plans before he provided a tender bid. I accept that in defiance of that instruction the Applicant did alter the plans for the Mackay Sailing Club project. I can understand the difficulties associated with tendering on the basis of altered plans. The tender bids of the Respondent in such circumstances may not have been competitive.
- [44] In the circumstances I find that the Applicant did disobey a lawful instruction in that he altered the Mackay Sailing Club project plans when he had been instructed on an earlier occasion not to alter plans prior to preparing a tender. I do not however accept that he had been warned of the consequences of disobeying such an instruction given that the plans had been altered prior to the warning letter of 30 November, 2001. I am also of the view that the Applicant did not accept any such instruction as lawful. The Applicant appeared to be of the belief that he was required by law to alter plans so that they complied with relevant legislation and/or standards.

Procedural Fairness

- [45] Whilst I accept that the Applicant had been told by Mr Lollo not to change plans before preparing a tender bid, the evidence before me establishes that only once, prior to 13 December, 2001, was the Applicant clearly informed not to change plans. I do not believe the warning letter of 30 November, 2001 to have been based on any specific work performance issues. It may have been that the Applicant was, at that time, becoming a difficult employee but the warning letter and the discussion on 30 November, 2001, do not appear to have gone to that issue.
- [46] At no time was the Applicant advised, prior to 19 November, 2001 when the Mackay Sailing Club plans were altered, of the potential consequences of continuing to alter plans.
- [47] The Respondent in terminating the Applicant on 14 December, 2001 was relying upon the warning letter of 30 November, 2001 and the meeting of 13 December, 2001. As indicated previously I have concerns about why the warning letter of 30 November, 2001 was issued and I do not rely upon that letter in determining whether or not procedural fairness has been afforded to the Applicant. In any event the warning letter came after the Mackay Sailing Club plans had been altered by the Applicant.
- [48] In all the circumstances, I find that the Applicant was denied procedural fairness. The issue of the altered plans for the Mackay Sailing Club arose on 13 December, 2001 and the Applicant was dismissed on 14 December, 2001.
- [49] In such circumstances, I find the dismissal of the Applicant on 14 December, 2001 to be unfair.

Dismissal for an Invalid Reason

- [50] The Applicant alleges that the dismissal was for an invalid reason in that it occurred during an unresolved Workers' Compensation claim for a workplace injury. Essentially the argument advanced in support of this claim is that on 29 November, 2001 the Applicant had been diagnosed by his general practitioner with eye strain. On 30 November, 2001 Mr Lollo became aware that the Applicant had lodged an Injury/Illness/Disease Occurrence Report with the Respondent's Occupational Health & Safety Officer. I am not prepared to find that the lodging of the Report was the catalyst for the warning letter although the reason for issuing the warning letter at that time is not obvious.
- [51] In the Material Facts relied upon to support this ground of dismissal in his application, the Applicant says that at the time of termination the "Worker's Compensation Claim was not resolved". There was no Workers' Compensation Claim or WorkCover Claim lodged at the time of dismissal. The Respondent only became aware of a WorkCover claim in a letter from WorkCover dated 21 January, 2002. According to that correspondence the Applicant had only "recently" lodged that claim. This was well after the termination date of 14 December, 2001.
- [52] The evidence is that the Applicant was not temporarily absent from work because of the injury during the period 30 November, 2001 to 14 December, 2001, the date of dismissal. Thus the provisions of s. 73(2)(a) do not appear relevant. The only other ground of s. 73(2) that could possibly be involved in such circumstances is paragraph (m) i.e. discrimination on the attribute of "impairment".
- [53] Ultimately the Applicant was dismissed because he altered plans after he had been instructed not to do so. He was not dismissed because of any eye strain complaint. I do not find that the Applicant was dismissed for any invalid reason under s. 73(2) of the Act.

Remedy

- [54] In dealing with the issue of remedy two issues were raised by the Respondent that have some bearing on the issue.
- [55] The evidence before me is clear that the Applicant continued, well beyond his termination date, to have access to the Respondent's e-mail system through his own home computer. The applicant admitted that he had received e-mails addressed to the Respondent following the termination of his

employment. He admitted that he knew how to delete access to the Respondent's e-mails from his computer. John Peppas, Managing Director of North Queensland Computer Services Pty Ltd, gave evidence that he sent a test mail to Mr Lollo at the Respondent's e-mail address. That e-mail was opened by the holder of e-mail services jlabaj@austranet.com.au i.e. the Applicant's personal e-mail address. The e-mail was never received by Mr Lollo at the nominated work station of the Respondent. The Applicant agreed that it was possible that a particular e-mail message sent to Mr Lollo was deleted from his computer. The Applicant agreed that his deletion of the e-mail would mean that it was not received by Mr Lollo. As at the date of hearing the Applicant still had not deleted access to the Respondent's e-mail system from his home computer.

[56] The other issue of concern involved an e-mail received by Mr Lollo on 8 March, 2002 from the Area Manager of Thiess Constructions Pty Ltd. The Area Manager was on-forwarding a copy of an e-mail he had received that same day from the Applicant. Relevantly that e-mail from the Applicant provides as follows:

"With regret, I have to inform you that I am in a legal dispute with one of your subcontractors from Lavarack Stage 2 project and, unfortunately, there is a strong possibility that it might be necessary to involve your company in this dispute. This matter is very unpleasant for me and I would like to keep Thiess out of this if possible. However, Lollo Plumbing Pty Ltd refuses to pay my entitlements arising from my employment on this project. Lollo is alleging that Thiess has not met with all the obligations arising from their contract, and therefore Lollo refuses to pay me. If this dispute goes to court, it will be necessary for me to involve Thiess as a witness to clarify this point.

At this early stage of the dispute, I am only advising you as a matter of courtesy and perhaps seeking some advice or suggestion of overcoming this dispute or at least to keep your company out of this.

You may be of the opinion that this does not concern you or your company. If that is the case, I am truly sorry to have taken the liberty and imposed on your time. However, if you feel that you need to be involved I would be grateful for any help or suggestion in this unpleasant matter."

[57] I have formed the view that the Applicant sent this e-mail in an attempt to embarrass the Respondent in some way. The Respondent clearly has ongoing dealings with Thiess Constructions Pty Ltd and the relationship could have been harmed by the Applicant's correspondence.

[58] The Applicant has, since dismissal, conducted himself in a manner that has resulted in the trust relationship between the Respondent and the Applicant being harmed. The Respondent is a small employer and that trust relationship is important. The Respondent also needs to rely upon the person performing the work of estimator to perform work according to the instructions given. As I have already indicated the Applicant had become a difficult employee of the Respondent during the latter stages of his employment. The Respondent has, since 14 December, 2001, engaged an employee to perform estimating duties. In those circumstances, I consider that reinstatement or re-employment are impracticable.

[59] Having found that reinstatement and re-employment are impracticable I am left with the remedy of compensation. The Applicant submits that he was not paid two weeks' salary in lieu of notice because of the public holidays that fell within that two week period. I find however that he was paid two weeks' salary in lieu of notice. Mr Lollo, in his statement of evidence, indicates that the Applicant was paid a gross figure of \$1,845.60 for those two weeks. The Applicant did not dispute that his fortnightly salary was \$1,845.60 i.e. an annual sum of \$47,985.60.

[60] I have decided to award the Applicant an amount of \$7,500.00 as compensation for his unfair dismissal. I have adopted the approach laid down in *Chenery v Klemzig Nursing Home* (1988) 55 SAIR 544, and awarded a global sum which I have arrived at after considering factors which include:

- the age of the Applicant;
- the salary that the Applicant received;
- that the Applicant had not been successful in obtaining employment since the date of dismissal;
- the opportunities for employment of the Applicant in Townsville;
- that the Applicant had disobeyed an instruction and that it was the failure to afford him procedural fairness that resulted in a finding that the dismissal was unfair; and
- the two instances after the termination of employment e.g. the accessing of the Respondent's e-mail system and the sending of the e-mail to Thiess Constructions Pty Ltd.

[61] The amount of \$7,500.00 is to be paid by the Respondent to the Applicant within twenty-two (22) days of the date of release of this decision.

Order accordingly.

D.M. LINNANE, Vice President.

Appearances:

Mr J. Labaj, the Applicant representing himself.

Ms M. Morton of Wilson Ryan Grose Lawyers, with Mr L. Nicholson of Gibson-Nicholson Consultants Pty Ltd, for the Respondent.

Released: 11 June 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – making, amending and repealing awards

Mercy Aged Care Services and Others AND Queensland Nurses' Union of Employees and Others (No. B994 of 1999)

VICE PRESIDENT LINNANE
COMMISSIONER BLOOMFIELD
COMMISSIONER SWAN

7 June 2002

Application for new Award for 13 operators of residential aged care facilities – Whether proposed Award constitutes an appropriate regulation of the industrial interests of parties in accordance with the Act – Award making powers considered – Consideration of interests of persons immediately concerned, community as a whole, objects of the Act and effect of any decision on community and the particular industry concerned – Whether seeking exemption from existing awards – Industrial instruments currently provide employers and employees in residential aged care industry with industrial coverage – Evidence of widespread use of enterprise bargaining in the residential aged care industry – Evidence of use of enterprise bargaining by some Applicants to achieve desired outcomes – Evidence that remaining Applicants had not pursued enterprise bargaining – Application opposed by all unions in the industry – Evidence of unions servicing the industrial instruments that apply in the industry – Acknowledgement that changes had occurred in

residential aged care industry in recent years – Acknowledgement that a number of industrial instruments may have applicability to operators and that these industrial instruments do provide for different conditions of employment – No evidence of widespread uncertainty as to which industrial instruments have applicability at particular establishments – Benefits of proposed Award could be achieved through enterprise bargaining process – Applicants not demonstrated need for replacement of existing industrial instruments with the proposed Award – *Industrial Relations Act 1999* ss. 3, 126, 132, 320(3), 320(5).

DECISION

[1] The application, as amended, before the Commission seeks the making of a new Award entitled “The Retirement Residential and Community Care Award – State” (the proposed Award). The proposed Award seeks to bind various operators of residential aged care facilities (Applicants) that are named in Schedule 1 to the proposed Award. The Applicants are listed in Schedule 1 to this decision.

[2] These Applicants operate some 44 residential aged care facilities within the State and employ approximately 2,965 employees. Given the material provided in B1019 of 1998 to a Full Bench as currently constituted, this approximates to something like 10% of the residential aged care industry in Queensland whether that is calculated by way of facility numbers or employee numbers.

[3] This application is opposed by the following parties:

- The Australian Liquor Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees (ALHMWU);
- The Australian Workers’ Union of Employees, Queensland (AWU);
- The Queensland Nurses Union of Employees (QNU); and
- The Queensland Council of Unions (QCU) on behalf of its affiliates.

[19] The QCU sought, pursuant to s. 322(2) of the *Industrial Relations Act 1999* (the Act), to intervene in the proceeding. Leave to intervene was granted as affiliates of the QCU had a sufficient interest in the proceedings.

[20] The question before the Full Bench is whether, in principle, an award generally of the type sought by the Applicants would constitute an appropriate regulation of the industrial interests of the parties in accordance with the requirements of the Act. On the issue for determination the Applicants made the following submission:

“By a decision given on 13 February 2001, the Full Bench determined that at this stage of proceedings, the question of whether a single award dealing with the terms and conditions of all employees of the Applicants (other than the nominated exceptions) should be made would be determined as a separate and preliminary point. The Full Bench also acknowledged that the Applicants may need to address the Commission as to the content of the proposed Award in order to advance the application that a single award should be made, but the Commission did not require the Respondents to cross-examine witnesses in any detail as to the content of the proposed Award at this stage. It is evident from that decision, and the Applicants have conducted the proceedings accordingly, that the Commission was not proposing to examine the content of the award with the same detail as would be the case if the proceedings were to result in the actual making of an award, but rather the Commission was only concerned to examine the content of the award to the extent that it had a bearing upon the question as to whether a single award of this kind should be made, and/or whether an exemption from the terms and conditions of the relevant common rule awards should be granted.”

That perspective accurately reflects the situation as it transpired.

[19] In the course of the hearing of this application the Full Bench has released the following decisions:

- *Application for the making of a new Award entitled The Retirement, Residential and Community Care Award – State* (2000) 165 QGIG 770 – application to be legally represented;
- *Application for the making of a new Award entitled The Retirement, Residential and Community Care Award State* (2000) 165 QGIG 790 – application for adjournment;
- *Application by Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees for Joinder of Case Nos. B994 of 1999 and B669 of 2000* (2001) 166 QGIG 51 – application for joinder;
- *Queensland Nurses’ Union of Employees* (2001) 166 QGIG 165 – disclosure of documents; and
- *Mercy Aged Care Services and Ors v Queensland Nurses’ Union of Employees and Ors* (2001) 166 QGIG 224 – application pursuant to s. 132 of the Act for exemption from the effect of B1019 of 1998.

Principles to be applied

[20] As to the principles on which this application should be determined the Full Bench was referred to a decision of Williams P (as he then was) in *Queensland Independent Education Union of Employees v Study Group Australia trading as Lorraine Martin College* (1999) 161 QGIG 270 where His Honour considered a number of provisions of the then *Workplace Relations Act 1997* including s. 127 (analogous with s. 127 of the *Industrial Relations Act 1999*) and s. 335(4) (similar to s. 320(5) of the *Industrial Relations Act 1999*). In that case His Honour concluded that a broad discretion was conferred upon the Commission by what is now s. 125(1) of the Act and “providing that discretion is exercised in conformity with the principles of the legislation, it cannot be said that the Commissioner must make an award in any particular case.”

[21] His Honour also considered the public interest considerations of the *Workplace Relations Act 1997* that is in similar terms to s. 320(5) of the Act. In so doing His Honour concluded that, despite the application being supported by the relevant employees, in the highly competitive state of the private education industry, there was no justification for singling out a single employer from its competitors.

[22] The Commission’s award making powers and obligations are contained in Chapter 5 of the Act, particularly in ss. 125 and 126. Section 126 of the Act provides as follows:

“126 Content of Awards

The commission must ensure an award –

- (i) does not contain discriminatory provisions; and
- (j) is stated in plain English and is easy to understand in structure and content; and
- (k) does not contain provisions that are obsolete or need updating; and
- (l) provides for secure, relevant and consistent wages and employment conditions; and
- (m) provides for equal remuneration for men and women employees for work of equal or comparable value; and
- (n) provides fair standards for employees in the context of living standards generally prevailing in the community; and
- (o) is suited to the efficient performance of work according to the needs of particular enterprises, industries or workplaces; and
- (p) takes account of the efficiency and effectiveness of the economy, including productivity, inflation and the desirability of achieving a high level of employment; and
- (q) whenever possible –
 - (a) contains facilitative provisions that allow agreement at the workplace or enterprise level, between employers and employees (including individual employees), on how the award provisions are to apply; and
 - (v) contains provisions enabling the employment of regular part-time employees; and
 - (vi) provides support for training arrangements.”.

[19] In any determination of this application regard must also be had to the public interest and community considerations found in s. 320(3) and s. 320(5) of the Act which are as follows:

“(3) Also, the commission or Industrial Magistrates Court is to be governed in its decision by equity, good conscience and the substantial merits of the case having regard to the interests of –

- (a) the persons immediately concerned; and
- (b) the community as a whole.

...

(1) In making a decision, the commission must consider the public interest, and to that end must consider –

- (b) the objects of this Act; and
- (c) the likely effects of the commission’s decision on the community, local community, economy, industry generally and the particular industry concerned.”.

[20] Consequently, in considering this application, the Commission is compelled to consider the interests of the persons immediately concerned, the community as a whole, the objects of the Act, and the likely effect of the decision on, *inter alia*, the community and the particular industry concerned.

Section 132

[21] The QNU, amongst others, submitted that, pursuant to s. 132 of the Act, the Applicants must seek and be granted exemption from the existing award regime. Section 132 is as follows:

“132 Exemptions

(1) The commission may, of its own initiative or on application by an organisation or employer, by the order by which it makes an award, or by its later order, exempt from the application of the award –

- (rrr) an employer or class of employer, or employee or class of employee, in a locality or in the calling to which the award applies; and
- (sss) a person who is engaged, whether as employer or employee, in the locality or calling, while the award remains in force.

(2) The commission may give the exemption only if satisfied the exemption –

- (rrr) is in the best interests of the employees and employers concerned; and
- (sss) is not contrary to the public interest.

(3) While an exemption exists, the award does not bind the employer, employee, class, or person, according to the exemption.”.

[1] According to the QNU s. 132 sets out a series of tests or requirements that must be met in order for an application for exemption to be successful. The QNU submits that the Commission must be satisfied that firstly any exemption is in the best interests of the employees and employers concerned and, secondly, is not contrary to the public interest. The QNU contend that the evidence before the Commission points to the fact that the application is not in the employees’ interests at all, let alone their best interests.

[2] The Applicants submit that they have not sought exemption from existing awards, but that “...the application seeks the making of an award to apply to the applicants, as a necessary consequence of which that award will override the applicability of the existing awards”. What they do seek is a single award to cover all employees in their residential aged care facilities with the following exceptions:

- employees covered by the *Physiotherapists' Award – State*; and
- employees employed as speech therapists, occupational therapists, musical therapists or leisure therapists who hold a recognised degree in that discipline from a University.

[19] The proposed Award seeks to supersede the following industrial instruments insofar as their application to the facilities operated by the Applicants is concerned:

- Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division* (the ALHMWU Accommodation Award);
- Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division – State (Excluding South-East Queensland)* (the AWU Accommodation Award);
- Private Hospitals and Nursing Home Industry (Interim) Award – State*;
- Nurses' Aged Care Interim Award – State*;
- Nurses' Award – Domiciliary Nursing Services – State*;
- Diversional Therapy – AWU – Industrial Agreement*;
- Clerical Employees Award – State*;
- Building Products, Manufacture and Minor Maintenance Award – State*;
- Motor Drivers, Etc., Award – Southern Division*; and
- Passenger Vehicle Drivers Etc., Award – Northern and Mackay Divisions*.

[20] Whilst there is no actual application seeking exemption from the abovementioned awards of this Commission the result, should this application be granted, would be that those awards would no longer have application to the Applicants and most of those that they employ. As such the interests of the Applicants, and those employees whose terms and conditions are sought to be covered by the proposed Award, will be considered in deciding whether, in principle, an award generally of the type sought by the Applicants would constitute an appropriate regulation of the industrial interests of the parties in accordance with the requirements of the Act.

Applicants' Argument

[21] Those persons who gave evidence for the Applicants in this proceeding are listed in Schedule 2.

[22] It is the Applicants' claim that the Act encourages the promotion of awards "to a position of equivalence with workplace agreements" in the event that workplace agreements could not be easily achieved within industries, and particularly so within the aged care industry. This view was reinforced by reference to the Objects of the Act, the Second Reading speech of the then Minister for Industrial Relations in 1999 and the commentary of the Industrial Relations Task Force (December 1998). The Applicants further contend that it is evident from the Act (see s.3.(j)) that the facilitation of appropriate regulation of employment can be achieved through the making of awards and agreements. Whilst it is evident from the legislation that there is a greater emphasis upon the making of agreements between the parties that does not carry with it, according to the Applicants, the implication that contemporary awards should be discouraged.

[23] The Applicants point to a number of changes in recent years to the provision of aged care. These changes, it is argued, warrant a change to the manner of industrial regulation of their residential aged care facilities. These changes can be summarised as follows:

- an irretrievable breakdown in the previous clear demarcation between nursing homes and hostels. The Applicants point to the fact that it is now "very common for facilities previously known as hostels to have evolved into a resident profile which is substantially different from that which was characteristic of hostels in an earlier era, to the extent that many former hostels now share a number of (but not all) characteristics with nursing homes"; and
- nursing homes and hostels are now routinely co-located within a single all encompassing residential aged care facility and are often operated in a different manner to that of a stand alone nursing home or hostel.

[19] According to the Applicants the industrial regulation of their facilities does not accommodate the changes that have occurred in the residential aged care industry and are a "significant source of inequity, inequality, administrative inefficiency, unfairness and inflexibility". It is submitted that the existing industrial instruments developed from the "incidental historical fact that hostels were themselves evolved from mere places of accommodation and nursing homes were evolved from hospitals". With the changing nature of the residential aged care industry the Applicants contend that the industrial regulation should also be adapted to the modern requirements of the industry.

[20] In submitting its case for the making of a new award, the Applicants claim that the existing award coverage is inefficient and outdated and as such does not satisfy the needs of their various enterprises. The Applicants cite many instances where they claim that uncertainty exists as to the actual application of certain awards. In highlighting these points, the Applicants illustrate the following situations:

- all registered and enrolled nurses in all facilities conducted by the Applicants are regulated in their employment by the *Nurses' Aged Care Interim Award – State*;
- employees who are engaged in capacities, other than those of registered or enrolled nurse, can be either an assistant in nursing, a personal care attendant or a domestic or "other employee";
- assistant nurses employed in what is categorised as a nursing home are employed under the *Nurses' Aged Care Interim Award – State*;
- employees engaged in the same nursing home facility who do not perform the work of an assistant nurse are employed under the terms of the *Private Hospitals and Nursing Homes (Interim) Award – State*; and
- in establishments other than those which fit the description of a nursing home, those employees performing personal care attendant roles are employed under the terms of either the ALHMWU Accommodation Award or The Australian Workers' Union of Employees, Queensland Accommodation Award.

[19] The Applicants point to the dilemma faced by employers with the proliferation of awards that apply within the residential aged care industry. Part of the difficulty, according to the Applicants, is attributable to the inability to clearly draw a distinction between "nursing homes" and facilities that are not designated as nursing homes. In the recent decision of *Queensland Nurses' Union of Employees v Queensland Chamber of Commerce and*

Industry Limited, Industrial Organisation of Employers and Others (2002) 169 QGIG 769 a Full Bench of this Commission dealt with the suggested blurring of the distinction between facilities known as “nursing homes” and those known as “hostels”. We adopt the views expressed in paragraphs 24 and 25 of that decision. In our view a clear distinction can be drawn between a “nursing home” and a “hostel”.

[20] The Applicants further submit that there is often an over-lap between the two types of establishments and consequently this causes the employer difficulty when having to apply two or three different awards in relation to employees performing similar duties. The Applicants state that “there is no justification for maintaining separate and quite different award coverage for employees engaged in providing personal care work to frail residents in an aged care facility, depending upon whether the facility itself is characterised as a nursing home, or some other kind of aged care facility”. Further, the Applicants state that:

“An employer should not be required to maintain quite different awards for similar employees performing similar work depending upon the particular building in which the work might be performed, in circumstances where employees can and do move from one such facility to another on the same site.

...

If the Award conditions are markedly different, as they are in many respects, and the work is the same or very similar, then by definition one or other set of wages and conditions is not fair.”

[19] In effect, it is claimed, the existence of two awards covering non-nursing employees has led to a demarcation of duties performed which is unable to withstand reasonable contemporary industrial relations scrutiny.

[20] The Applicants cite elements of the proposed Award that they believe the Full Bench should consider when determining the question of whether the proposed Award should be made. In summary, these include the following:

- the need for a single award to cover most employees engaged within the residential aged care facilities operated by the Applicants;
- the proposed Award contains a competency-based progression structure as opposed to the annual increment basis of the *Nurses' Aged Care Interim Award – State*, and according to the Applicants, the “almost complete absence of a progression structure in any other award”. To this end, the Applicants drew the Full Bench’s attention to the competency-based structure within the *TriCare Certified Agreement* that had recently been renegotiated with all of the unions represented in this proceeding. The Applicants further contend that the fact that the *TriCare Certified Agreement* contains a competency based classification structure of the kind sought in this proceeding shows that such a competency based classification structure is workable and acceptable to employees;
- the proposed Award introduces a greater facility for multi-skilling and the acquisition of a wider range of skills, by the abolition of the present award-based work demarcations, and the abolition of any impediments by way of differential work conditions between areas of work in a single residential aged care facility; and
- the proposed Award provides for pay increases above those in existing awards. Importantly, the proposed Award eliminates substantial and inequitable anomalies in the penalties payable at weekends and on public holidays as between employees engaged under different awards. Within this context, the demand is for a rationalisation of those disparate conditions.

Respondents’ Argument

[19] Those persons who gave evidence for the unions opposing the application are listed in Schedule 3.

[20] There was overwhelming union opposition to the application. In fact no union supported the application. The unions argue that the position of unions is important in the scheme of industrial regulation in Queensland. They contend that no special circumstances were identified in the course of the proceedings to warrant the creation of a separate award to have application to no more than 10% of the residential aged care industry in Queensland.

[21] The unions also submit that the Applicants have not demonstrated the threshold requirements for the making of an award that would cover a small segment of the industry. The unions point to the fact that the Applicants desire some form of further flexibility in their business operations and argue that such things should, in accordance with the objects of the Act and the *Wage Fixing Principles*, be sought by way of certified agreements, either individually or through the mechanism of a multi-employer agreement. The positions of the unions opposing the application is summarised below:

1. Rationalisation of Awards

[19] The AWU and the ALHMWU strongly submit that much has already been done to rationalise industrial instruments in the residential aged care industry. They point to the application by the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI) on behalf of Aged Care Queensland in B669 of 2000. The AWU, ALHMWU and the QCCI had been in negotiations since 1997 attempting to rationalise four industrial instruments into one award. They submit that the application in B669 of 2000 seeks a comprehensive and modern new common rule award to apply in residential aged care facilities. The industrial instruments sought to be rationalised in B669 of 2000 are as follows:

- *Private Hospitals and Nursing Homes Industry (Interim) Award – State*;
- *Award for Accommodation and Care Services Employees for Aged Person – South-Eastern Division – State (Excluding South-East Queensland)*;
- *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division*; and
- *Diversional Therapy – The Australian Workers’ Union of Employees, Queensland – Industrial Agreement*

[20] The AWU believes that application B669 of 2000 will “achieve rationalised, modern and relevant common rule award coverage for the aged care industry.” That matter is before a Full Bench of the Commission as constituted for this application.

[21] The ALHMWU submit that while it is argued by the Applicants that should the proposed Award be made a considerable number of industrial instruments would not apply to the Applicants’ operations, much of the Applicants case in these proceedings was concentrated upon only four industrial instruments i.e. the three awards sought to be rationalised in B669 of 2000 and the *Nurses' Aged Care Interim Award – State*. The two Accommodation Awards currently mirror each other and apply in designated geographical areas.

[22] Those opposing the application question the Applicants assertion that a rationalisation of conditions was necessary. The unions argue that the Applicants case in this regard was generally limited to annual leave, statutory holiday provisions and, to a lesser extent, weekend penalties. Whilst there were some assertions contained in the Affidavit material the unions contend that when cross-examined the witnesses for the Applicants could point to no real disputes amongst staff over any differential conditions. Some perceived dissatisfaction amongst staff had been overcome through education. Further, the unions point to the fact that a rationalisation of such conditions had not been dealt with in Mercy Aged Care Certified Agreements and extrapolate from that they must not have been an issue worth pursuing in the enterprise bargaining process.

2. No evidence of widespread confusion or dissatisfaction about award coverage in the residential aged care industry

[19] Each of the unions opposing the application strongly contest the Applicants assertion that there is widespread confusion within the industry about the current range of award coverage.

[20] In addressing the Applicants claim that confusion now exists within the industry as a result of the enactment of the *Aged Care Act 1997* as to whether an establishment is "high care" or "low care", The AWU states that these facilities have for many years been co-located sites. Traditionally, nursing homes were dedicated to high care residents and hostels were predominantly for low care residents, with some occasional high care residents. If there has been any confusion (and one exception is noted), it has not been to a degree that has involved demarcation disputes between unions.

[21] In support of its contention The AWU states that:

"Despite the fact that nursing homes and hostels may not currently be recognised under the Commonwealth Aged Care Act 1997 as separate and distinct for funding purposes, the industrial reality is that aged care facilities in Queensland continue to operate on the basis of caring for predominantly either high care residents, or predominantly low care residents, and that while there may be some variances as to the proportions under the current legislative framework it has still not departed from the same broad arrangements that have historically operated and have helped delineate as between the Nurses Award and the other AWU and LHMU awards in the Queensland aged care industry."

[19] The ALHMWU stated that the evidence did not support the contention of confusion. It was submitted that those representatives of Fleming Health Care, Ballycara, Forest Place, CNC, Amarina, Francis of Assisi or Earle Haven establishments who gave evidence, expressed no suggestion of confusion about the applicability of certain awards. Where areas of confusion did arise, it was contended that the representatives appeared not to have sought any advice about these difficulties for some period of time: see for example the evidence of the representative from Kepnock Grove.

3. Evidence of Certified Agreements in the residential aged care industry

[20] The Applicants themselves submit that a "number of major employers in the industry, including the majority of the larger individual employers, such as TriCare and Blue Care, have introduced certified agreements which depart substantially from the terms and conditions of the existing common rule awards". In fact, according to the Applicants, this application if granted, would result in a set of terms and conditions in those residential aged care facilities operated by the Applicants which would have a "marked similarity to the uniform terms and conditions of employment applied throughout all of the facilities operated by TriCare".

[21] Those opposing the application submit that the evidence demonstrates that two of the Applicants, TriCare and Mercy Aged Care, are parties to certified agreements. The ALHMWU asserts that TriCare itself employs approximately 1,350 – 1,400 staff. On that basis it is said that TriCare employs between 45% and 47% of the employees sought to be covered by the proposed Award. There is a Certified Agreement applying at all TriCare residential aged care facilities. It is said that Mercy Aged Care employs some 8.5% of the total employees to be covered by the proposed Award. Whilst the *TriCare Certified Agreement* is an extensive certified agreement the *Mercy Aged Care Services – Rockhampton Diocese Certified Agreement* does not contain many "award" type conditions.

[22] It is contended by those opposing the application that most of the other Applicants saw the proposed Award as delivering the types of flexibilities or outcomes that they would otherwise seek under a certified agreement. Generally, the evidence revealed that enterprise bargaining negotiations had been put on hold pending the outcome of this application.

[23] The AWU submitted that as at the end of 1998, the majority of employees for whom it has constitutional coverage in the residential aged care industry were employed under enterprise agreements. Those agreements, covering ten of the largest aged care providers in Queensland, were as follows:

- Blue Care;
- The West Moreton Aged Care Home Council Inc Brassall Village;
- The Lutheran Church of Australia;
- The Gracehaven Aged Care, Bundaberg;
- The Churches of Christ in Queensland;
- TriCare;
- The Baptist Community Services;
- The RSL (QLD) War Veterans Homes;
- Anglican Aged Care;
- The Department for Social Mission Presbyterian Church of Queensland;
- The Carinya Home for the Aged;
- The Mount Isa Memorial Garden Settlement;
- Villa Vincent Aged Care, Townsville;
- The Central and Upper Burnett District Home for the Aged;
- The Good Shepherd Home, Townsville;
- The Mercy Aged Care Services – Rockhampton Diocese;
- Carramar Noosa Homes for the Aged;
- Salvation Army Aged Care; and
- St Vincents Community Services.

[19] It was submitted that generally the industry has a good record of achieving enterprise agreements between unions and employers.

- [20] The AWU and ALHMWU submit that they have been able to secure clear understandings with regard to coverage within the aged care industry and this has led to joint enterprise bargaining agreements with employers. Most of those certified agreements adopt a similar approach to creating a classification structure that rationalises The AWU and ALHMWU awards into a single structure. The exception to this has been the TriCare agreement.

4. Disruption of the current award prescription

- [19] The ALHMWU contends that the granting of the application would “radically disrupt” the current award prescription in the residential aged care industry and lead to fragmentation within the industry.
- [19] In circumstances where Aged Care Queensland, The AWU and ALHMWU were seeking to rationalise conditions for employees in the residential aged care industry via the application in B669 of 2000, The AWU expressed concern at the prospect of having a small group of employers within an industry having their own award.
- [20] The ALHMWU contends that the Commission should not, other than in exceptional circumstances, fragment the industrial regulation of a large industry by introducing a discrete award for a small section of the industry, thereby placing that award alongside a common rule award. In this regard the Commission was referred to the decision of Williams P in *Queensland Independent Education Union of Employees v Study Group Australia trading as Lorraine Martin College*. The system in Queensland is, according to the ALHMWU, one that is predicated upon common rule awards forming the benchmark for enterprise bargaining.

5. Section 126 and the terms of the proposed Award

- [19] The QNU submits that the proposed Award does not meet the criteria set out in s. 126 of the Act. It contends that if deficiencies are to be found in the existing common rule awards they must be found in respect of matters contained in s. 126 of the Act. Further it submitted that the Commission must necessarily come to the view that those deficiencies are unable to be addressed through the normal arbitral processes for amending awards before it could grant an application for a new award which would supersede a number of existing common rule awards.
- [19] The QNU point to a number of sub-sections of s. 126 in this regard.
- [20] Section 126(d) of the Act requires awards to provide for secure, relevant and consistent wages and employment conditions while s. 126(f) requires awards to provide fair standards for employees in the context of living standards generally prevailing in their community. The QNU point to the evidence of Mr Fleming who agreed that the only real change between the proposed Award structure and the existing one for registered nurses was that nationally accredited competencies are to be replaced by competencies set by the employer. The nationally accredited competencies for registered nurses are the standards generally prevailing in the community. The QNU submits that any competencies developed by the respective employers could not be relied upon by the community to ensure that the quality of care provided by nursing staff is of a safe and acceptable standard.
- [21] Section 126(g) of the Act requires an award to be suited to the efficient performance of work according to the needs of particular enterprises, industries or workplaces. The QNU contends that the nursing profession had struggled long and hard to be recognised professionally for the complex and difficult work that nurses undertake. According to the QNU the “professional rates cases in the late 1980’s and early 1990’s which gave rise to the existing classification structures for registered and enrolled nurses achieved considerable progress towards these objectives”. The QNU further point to recent pay equity inquiries by both the Queensland Industrial Relations Commission and the Industrial Relations Commission of New South Wales that identified further issues around the valuing of women’s work. The QNU submit that it would be an “extremely retrograde step to abolish the professional structures existing for this female dominated workforce”.
- [22] The vast majority of the workforce employed, particularly under the *Nurses’ Aged Care Interim Award – State*, are women. The QNU contend that currently those female employees enjoy a classification structure that for registered and enrolled nurses is based on nationally accredited competencies that give those nurses a level of professional recognition across the country and, indeed, internationally. The proposed Award seeks to do away with those structures and replace them with a structure based on competencies set by the employer. The QNU argue that it would be discriminatory, and thus contrary to the objects in s. 3(c) and (e) of the Act to remove the recognised professional structure of registered nurses and replace it with some other arrangement developed by individual employers.
- [23] The QNU further submit that along with the introduction of “professional rates” there has been developed nationally accredited competencies and training courses for unregulated workers in aged care. The QNU point to the fact that the new structure for assistant nurses inserted into the *Nurses’ Aged Care Interim Award – State* by a Full Bench of this Commission in B1019 of 1998 was based on those national standards prevailing in the community.
- [24] The QNU also point to the fact that the *Nurses’ Award – Domiciliary Nursing Services – State*, one of the awards sought to be superseded by the proposed Award, has provision for paid maternity leave which it is argued is consistent with balancing work and family life. No such provision is contained in the proposed Award.
- [25] It was asserted by the Applicants that the proposed Award would deliver enhanced training opportunities. Negating this assertion the ALHMWU drew the Commission’s attention to the evidence of witnesses for the Applicants who conceded that the current award structure did not in anyway inhibit provision of relevant training for all categories of staff.
- [26] One of the principle premises relied upon by the Applicants in support of the proposed Award is the introduction of a competency-based system. The AWU questioned the evidence given by witnesses for the Applicants when it appeared clear that they had little real knowledge of competency based training principles (see, for example, pages 563, 564, 574 and 984, 1036 and 1064 of the transcript).
- [27] The QNU submitted that witnesses for the Applicants, whilst “throwing the term competency about with considerable abandon, demonstrated little or no understanding of either the established structures for the development and approval of competencies or a theoretical basis upon which competency development and competency progression rests”. Ultimately, a number of witnesses for the Applicants acknowledged that the recognition of established competencies was already a feature of the *Nurses’ Aged Care Interim Award – State*. According to the QNU the evidence reveals that registered nurses will not be able to progress to more senior levels than six in the proposed Award other than by appointment. In this regard it should be noted that a Full Bench of this Commission in B1019 of 1998 approved a reduction in the number of incremental steps between the top and bottom pay-points within each of the five registered nurse levels in the *Nurses’ Aged Care Interim Award – State*.
- [19] The ALHMWU led evidence to the effect that, firstly, the majority of aged care providers with certified agreements had not sought to include competency based structures in those agreements and, secondly, the majority of enterprise agreements in the aged care area had not adopted the

TriCare model which has a competency based structure. The ALHMWU also point to the evidence of Leisa Sargent, an organisational psychologist and senior lecturer at QUT, who indicated that there was a risk of putting in place biases when competency based assessment was introduced and further that the “jury is out on using that as a mechanism for progression”. The ALHMWU also point to the new structure for assistant nurses approved by a Full Bench of the Commission in B1019 of 1998 and the proposed structure for personal care attendants or personal carers that is currently before a Full Bench in B669 of 2000.

- [20] The ALHMWU also responded to the Applicants’ assertion that the current award structure had been productive of rigid demarcations between classifications and that this problem could be resolved by the facilitation of multi-skilling in the proposed Award. According to the ALHMWU the evidence suggests that the multi-skilling sought by the Applicants was limited to the unregulated care providers and the domestic workforce at their establishments. It was pointed out that each of the industrial instruments that have application to such employees contain clauses dealing with incidental or peripheral tasks. The evidence of any demarcations between classifications was, according to the ALHMWU, non-existent.

6. Applicants’ assertion that they had undertaken a major review of their employment arrangements

- [19] The Full Bench was referred to paragraph 3 of the Statement of Material Facts contained within the application that provided as follows:

“Each of the ... organisations listed in Schedule 1 of the attached Award ... have conducted a major review of their employment arrangements, particularly in light of significant changes to funding arrangements and the fact that up to seven Awards can apply to one or more facilities.”.

- [20] Each of the Applicants, during the course of the hearing, filed affidavit material conceding that there were no documents in existence regarding the “major review of their employment arrangements”.
- [21] The unions contend that a review of the evidence given by witnesses for the Applicants would indicate that none of the Applicants had conducted a major review of their employment arrangements, or anything like it, particularly in light of the significant changes to funding arrangements as was asserted in the Statement of Material Facts relied upon to support the application. Further, it was submitted that the Applicants had not established that up to seven awards applied to their facilities, as claimed.

7. Objects of the Act

- [19] Those opposing the application submitted that the application could not be supported by the objects of the Act found in s. 3 of the Act. The QCU submitted that the current industrial legislation gives no pre-eminence to either awards or certified agreements but recognises both as viable industrial vehicles for the regulation of employment conditions: see s. 3(j). The QCU referred the Full Bench to the Second Reading Speech of the then Minister for Industrial Relations wherein he stated:

“The Bill removes the current legislative restrictions which establish agreements as the primary vehicle for wage movements, and creates a real choice between awards and a range of agreements to suit particular industries and workplaces, employers and employees.”.

- [20] The QCU contends that the current legislation endeavours to strengthen existing awards by requiring them to undertake an extensive review process: see s. 130 of the Act. Under s. 130(4) of the Act the Commission must, in reviewing an award, “do what is required by sections 126, 127 and 128”. Further, by virtue of s. 129 of the Act, certified agreement outcomes could be included in awards. The QCU submitted that neither the provisions of the Act nor the then Minister’s Second Reading Speech supports the view that “existing well-established awards would be supplanted by new awards”.
- [21] The QNU submits that the application is inconsistent with the principal object of the Act. The QNU referred the Full Bench to s. 3(h) and (i) of the Act submitting that those sub-sections encourage responsible representation of employees and employers by democratically run organisations and associations and the participation in industrial relations by employees and employers. The proposed Award does not envisage any role for employees. This is to be contrasted with the current industrial coverage where industrial organisations of employees are parties to the various industrial instruments. Further, there is no mechanism for approval of the proposed Award by employees – unlike the various provisions of the Act requiring a majority of employee support for a certified agreement before approval by the Commission.
- [22] The QNU also contend that s. 3(c) and (e) would not be satisfied by the proposed Award. It cites the example of the superseding, by the proposed Award, of the *Nurses’ Award – Domiciliary Nursing Services – State* which has provision for paid maternity leave which is consistent with the objects found in s. 3(c) and (e) of the Act. This condition is not contained within the proposed Award.

8. Wage Fixing Principles

- [19] The Full Bench’s attention was drawn to Principle 11(3) of the current *Wage Fixing Principles* that provides as follows:

“The proposed award or extension to award is not a device to circumvent the requirements which the parties would have to comply with in the event they had sought to have an existing certified agreement amended, or a new agreement certified or an award amended to give effect to a certified agreement.”.

- [20] Those opposing the application contend that when considering whether, in principle, an award should be made, the Commission must ensure that such processes are not being pursued to circumvent the alternate processes outlined in Chapter 6 Part 1 of the Act.
- [21] The QCU submits that the current application does not conform to Principle 11(3) of the *Wage Fixing Principles*. The QCU argues that the majority of Applicants see the proposed Award as a substitute for enterprise bargaining and that the Applicants are seeking to circumvent the requirements with which they would otherwise have to comply in seeking a certified agreement, including the requirements of ss. 143, 144, 145 and 156 of the Act. This is in circumstances where the Act now allows for the certification of multi-employer agreements.

Conclusion

- [19] This is a rather unusual application. It involves an application by a number of employers in the residential aged care industry in Queensland seeking the making of an award to apply to their operations. The Applicants operate some 44 residential aged care facilities and employ approximately 2,965 employees. It is estimated that the proposed Award, if granted, would apply to something like 10% of employees in the residential aged care industry in Queensland and approximately 10% of the residential aged care facilities in Queensland.

- [20] Unlike most applications to this Commission for the making of an award, the proposed Award does not seek to apply throughout an industry or to a particular craft. In fact the application proposes that, if granted, the proposed Award would supersede a considerable number of common rule Awards.
- [21] Section 320(3) of the Act requires us to consider, *inter alia*, the interests of the “persons immediately concerned”. In this instance that is the interests of the Applicants and the interests of the employees of those Applicants.
- [22] As to the **interests of the Applicants** we acknowledge that:
- changes have occurred in the residential aged care industry in recent years. The enactment of the *Aged Care Act 1997* and the introduction of “ageing in place” have resulted in change. A consequence of this has been that the resident profile of some “hostels” has varied with an increasing number of high care residents being provided with care in hostels. Further there is a greater incidence of co-location of nursing homes and hostels at the one site;
 - there are a number of industrial instruments having application to employers in the residential aged care industry; and
 - the different conditions of employment particularly in regard to annual leave, statutory holiday provisions and weekend penalties do create some concern for some of the Applicants. Should the proposed Award be granted there would still remain variations in these conditions as registered and enrolled nurses would continue to be entitled to annual leave, statutory holiday provisions and weekend penalties different to the entitlement of assistant nurses. The proposed Award seeks only to rationalise these conditions insofar as the unregulated employees are concerned.
- [19] One of the grounds relied upon by the Applicants was that uncertainty existed as to the actual application of certain awards in the industry. The evidence did not reveal the existence of any widespread uncertainty amongst operators of residential aged care facilities who are Applicants in this proceeding. Where uncertainty did arise it seems that the particular operator had not sought any advice in relation to the applicability of awards.
- [20] A further ground for seeking the rationalisation of conditions in the proposed Award was the inability to clearly draw a distinction between “nursing homes” and other facilities, particularly “hostels”. A Full Bench of this Commission in paragraphs [24] and [25] of the decision in *Queensland Nurses’ Union of Employees v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others* (2002) 169 QGIG 769 dealt with the so-called blurring of the distinction between facilities known as “nursing homes” and those known as “hostels” since the introduction of the *Aged Care Act 1997*. We adopt those comments. As a general rule the blurring of the distinction between “nursing homes” and “hostels” is non-existent.
- [21] The Applicants also contend that they should not be required to maintain different awards for employees performing similar work depending upon the particular building in which the work might be performed, especially where employees can and do move from one such facility to another on the same site. The evidence of such movement of employees was rather limited although we acknowledge that some employers chose not to allow employees to move between facilities for a variety of reasons, including different award coverage.
- [22] The proposed Award does not seek to cover all employees currently covered by industrial instruments of this Commission. Even if the application were to be granted a number of industrial instruments would still have application to the Applicants’ establishments eg. The *Physiotherapists’ Award – State* and those applying to speech therapists, occupational therapists, music therapists or leisure therapists who hold a recognised degree in that discipline from a university. We accept, however, that the employment of such therapists who hold a recognised degree in that discipline from a university is somewhat limited in the private sector residential aged care industry where predominately such therapists are engaged on a contract basis.
- [23] One of the benefits of the proposed Award is said to be the move to a competency-based progression structure. The application in this regard seeks a competency-based progression structure of a kind similar to that contained in the *TriCare Certified Agreement*. We have dealt at length with the unions’ response to the Applicants’ case in this regard. We found the evidence of witnesses for the Applicants to be lacking somewhat in their understanding of a competency-based progression structure. It is also apparent that such competency-based progression structures have not been sought by the majority of those providers of residential aged care services in the certified agreements negotiated to date.
- [24] The Applicants also point to the fact that the proposed Award introduces, through the abolition of both the present award-based work demarcations and the differential work conditions, a greater facility for multi-skilling and the acquisition of a wider range of skills. The unions contend that any proposal by the Applicants for multi-skilling is limited to the unregulated care providers and the domestic workforce at their respective establishments. The evidence before us of the operation of the *TriCare Certified Agreement* would suggest that predominately employees remain within their particular stream of employment.
- [25] Each of the abovementioned arguments for the making of the proposed Award could be achieved through the enterprise bargaining process. TriCare has successfully obtained an extensive certified agreement by working with its employees and the unions that actively participated in this proceeding. The evidence from James Toohey, the Chief Executive Officer of TriCare, was that the certified agreement was providing that organisation with substantial benefits. Mercy Aged Care has also negotiated a certified agreement with the respective unions.
- [1] The evidence of The AWU of certified agreements having been negotiated with operators of residential aged care facilities indicates that there is no great obstacle to the negotiation of such agreements in this industry. It seems that the remainder of the Applicants have not really attempted to negotiate a certified agreement with the unions. There is no evidence of any of the Applicants seeking assistance, for example, under s. 148 of the Act to assist them to negotiate a certified agreement. Generally, the evidence before us was that the Applicants were awaiting the outcome of this application before they commenced to genuinely try to negotiate a certified agreement to overcome the difficulties they claim to currently face in the industrial regulation of their enterprises.
- [2] Another important consideration in determining whether, in principle, to make an award generally of the type sought by the Applicants, is the **interests of the employees** concerned.
- [3] Although over half of both the facilities and the employees to be covered by the proposed Award currently have the benefits of negotiated certified agreements, these employees have had the benefit of a say in the determination of the terms and conditions contained in those certified agreements. The evidence indicates generally that employees of the Applicants were not consulted about the terms and conditions contained in the proposed Award. Nor were the unions consulted. Unions in Queensland are given an important role in the industrial regulation of enterprises via certain provisions of the Act.

[4] As we have already indicated there was overwhelming opposition to the application from unions. The traditional voice of employees in applications coming before this Commission, has been the voice of the respective unions. The ALHMWU and The AWU have, through extensive negotiations with the QCCI on behalf of Aged Care Queensland, been able to lodge an application (B669 of 2000) for the rationalisation of four industrial instruments sought to be subsumed by the current application. The proposed Award, arising out of that application, is currently before a Full Bench of this Commission. That proposed Award is intended to be a common rule award applying throughout the residential aged care industry in Queensland. The efforts of the parties to produce that award indicate that where a need for rationalisation can be substantiated the unions have been willing to address that need.

[5] In Part 1 of Chapter 6 of the Act the legislature has given employees a substantial role in the making of a certified agreement. Employees of TriCare and Mercy Aged Care have been afforded the opportunity of an involvement in negotiating the content of their respective certified agreements. This opportunity has largely been denied to employees of the Applicants in the current application.

[6] Some examples of the adverse effects of the proposed Award on employees are:

- the removal of the nationally accredited competencies for registered and enrolled nurses and their replacement with competencies set by individual employers;
- the abolition of the professional classification structures for registered and enrolled nurses contained in the existing award when these structures evolved from the professional rates cases and apply to the nursing profession generally;
- the abolition of the nationally accredited competencies for registered, enrolled and assistant nurses reduces the potential for such employees to gain professional recognition both within Australia and overseas. The proposed Award replaces those competencies with ones developed by the individual employers; and
- the removal of an entitlement to paid maternity leave for those employed pursuant to the *Nurses' Award – Domiciliary Nursing Services – State*.

[19] The abovementioned first three issues have implications for the community generally in that the accredited national standards and competencies go a long way to ensure that the quality of care provided by such employees is of a safe, consistent and acceptable standard. It is doubtful that standards and competencies developed by individual employers would ensure the same qualities..

[20] Section 320(5) requires us to consider the public interest. In so doing we must consider the objects of the Act and the likely effects of the decision on the community and the residential aged care industry.

[21] The **objects of the Act** are found in s. 3. Section 3 of the Act provides as follows:

“(3) Principal object of this Act

The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by –

- (ddd) providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers; and
- (eee) providing for an effective and efficient economy, with strong economic growth, high employment, employment security, improved living standards, low inflation and national and international competitiveness; and
- (fff) preventing and eliminating discrimination in employment; and
- (a) ensuring equal remuneration for men and women employees for work of equal or comparable value; and
- (b) helping balance work and family life; and
- (c) promoting the effective and efficient operation of enterprises and industries; and
- (d) ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community; and
- (e) promoting participation in industrial relations by employees and employers; and
- (f) encouraging responsible representation of employees and employers by democratically run organisations and associations; and
- (g) promoting and facilitating the regulation of employment by awards and agreements; and
- (k) meeting the needs of emerging labour markets and work patterns; and
- (l) promoting and facilitating jobs growth, skills acquisition and vocational training through apprenticeships, traineeships and labour market programs; and
- (m) providing for effective, responsive and accessible support for negotiations and resolution of industrial disputes; and
- (n) assisting in giving effect to Australia’s international obligations in relation to labour standards.”.

[19] The Applicants referred the Full Bench particularly to sub-sections (a), (b), (f), (g), (j), (k), (l), (m) and (n) of s. 3. In so doing they submitted that:

“... the Act now requires that awards of this Commission be relevant and up-to-date and that they ensure wages and employment conditions provide fair standards in relation to living standards prevailing in the community, they promote the effective and efficient operation of enterprises and industries, meet the needs of emerging labour markets and work patterns, and promote and facilitate jobs growth, skills acquisition, and vocational training, and provide for effective responsible and accessible support for negotiations and resolution of industrial disputes. They are no longer to be regarded as a mere safety net of basic terms and conditions of employment, deliberately left in a form and condition such that employers who wish to obtain acceptable and appropriate regulation for their particular enterprise are compelled to engage in enterprise bargaining, or suffer the consequences of an inferior and inappropriate award regulation.”.

[20] Those opposing the application also took heart from the objects of the Act. We have dealt with their submissions in this regard earlier in this decision.

[21] All parties accept that the current industrial legislation gives no pre-eminence to either awards or certified agreements but recognises both as viable industrial vehicles for the regulation of employment conditions: see s. 3(j) of the Act. There are however competing objects to those referred to by the Applicants e.g. sub-sections (c), (d), (h), (i).

[22] We do not consider that the industrial instruments to be superseded by the proposed Award are mere safety net awards. The Unions parties to these industrial instruments have sought to maintain their relevance to the residential aged care industry. Two recent applications before the Commission are testimony to that e.g. B1019 of 1998 and B669 of 2000. The parties to The AWU and ALHMWU Awards have been involved in considerable negotiations in recent years in arriving at the proposed Award that is currently before the Commission in B669 of 2000.

[23] The existing industrial instruments appear to:

- ensure wages and employment conditions which provide fair standards in relation to living standards prevailing in the community;
- generally promote the effective and efficient operation of the residential aged care industry albeit that the Applicants may wish to achieve a more effective and efficient operation of their particular facilities. [As we have already indicated the application only involves some 10% of the residential aged care industry. It can be assumed that the remainder of the industry are relatively happy with the industrial regulation];
- promotes and facilitates jobs growth, skills acquisition, and vocation training through apprenticeships traineeships and labour market programs. There was evidence before us of the attainment of Certificate III by many of the unregulated employees given in the course of this proceeding. Clearly the current industrial regulation is no impediment to the aim of this object; and
- provides for effective, responsive and accessible support for negotiations and resolution of industrial disputes. The evidence before us suggests very little, if any, industrial disputation in the facilities operated by the Applicants. In any event the current industrial regulation provides for dispute settlement procedures and for a role for unions.

[19] All matters considered we do not see that the current industrial regulation of the residential aged care industry to be in any way contrary to s. 3 of the Act.

[20] The **effect of the proposed Award on the residential aged care industry** is another matter to be considered in the determination of this application. Should the application be granted the result would be two different types of industrial regulation of the Queensland residential aged care industry. There was no evidence in the remaining 90% of the industry of any problems.

[21] We have considered all of the evidence adduced in this proceeding and the substantial submissions made by the respective parties. In so doing we have concluded that, on balance, the Applicants have not demonstrated that the alleged problems exist to any such degree as to warrant the removal of the current award/agreement structures in respect of the Applicants' facilities and their replacement with an award of the type proposed by the Applicants. This is particularly the case where over 50% of the facilities and employees to be covered by the proposed Award already operate under certified agreements and where the remainder of the Applicants do not appear to have genuinely explored that avenue.

D.M. LINNANE, Vice President
A.L. BLOOMFIELD, Commissioner.
D.A. SWAN, Commissioner.

Schedule 1

Applicants

- Mercy Aged Care Services;
- TriCare (Annerley) Pty Ltd – Annerley Nursing Centre;
- TriCare (Kawana Waters) Pty Ltd – Kawana Waters Nursing Centre and Hostel;
- TriCare (Mermaid Beach) Pty Ltd – Mermaid Beach Nursing Centre;
- Netanya Noosa Pty Ltd – Pimpama Nursing Centre;
- TriCare (Stafford Heights) Pty Ltd – Stafford Heights Private Nursing Centre;
- TriCare (Hostels) Pty Ltd – Mt Gravatt Private Hostel (Agay St);
- TriCare Limited – Jindalee Nursing Centre;
- TriCare Limited – Runaway Bay;
- TriCare Limited – Mt Gravatt Nursing Centre;
- TriCare (Country) Pty Ltd – Bundaberg Nursing Centre;
- TriCare (Country) Pty Ltd – Cypress Gardens Nursing Centre;
- TriCare (Country) Pty Ltd – Labrador Nursing Centre;
- TriCare (Country) Pty Ltd – Pt Vernon Nursing Centre;
- TriCare (Country) Pty Ltd – Toowoomba Nursing Centre;
- Clanwilliam Pty Ltd;
- Hibernian (Qld) Friendly Society Limited (Bally Cara Retirement Living Complex);
- Hibernian (Qld) Friendly Society Limited (Hibernian Nursing Home)
- Jomal Pty Ltd;
- Amarina Investments Pty Ltd;
- Forest Place Group Limited;
- Fleming Health Services Pty Ltd;
- C.N.C. Pty Ltd;
- People Care Pty Ltd;
- Roman Catholic Trust Corp for Diocese t/a Kepnock Grove;
- Corporation of the Franciscan Sisters of the Heart of Jesus Queensland (Francis of Assisi Home); and
- Quality Aged Care Pty Ltd.

Schedule 2**Applicants' Witnesses**

| | |
|----------------------------|--|
| James Patrick Toohey | Chief Executive Officer of TriCare Limited (Exhibits 3 and 16) |
| David Gerard Bowman | Chief Executive Officer of Mercy Aged Care Services, Rockhampton (Exhibits 4, 5 and 6) |
| Anthony Leo McPhillips | Registered General Nurse and Director of Nursing of Mercy Aged Care Services Rockhampton (Exhibit 20) |
| Desma Van Rosendal | Registered Nurse and Chief Executive Officer of Kepnock Aged Care Services, Bundaberg (Exhibits 21, 22 and 23) |
| Susan Frances Radecker | Training Facilitator and Registered Nurse at Toowoomba Nursing Centre, TriCare (Exhibits 24 and 25) |
| Elizabeth Donlevy McKibben | Team Leader in Environmental Services at Stafford Heights Nursing Centre, TriCare (Exhibit 26) |
| Shirley Ursula Strachan | Personal Carer at Labrador Nursing Centre, TriCare (Exhibit 27) |
| Lynette Myra Corcoran | Personal Carer at Labrador Nursing Centre, TriCare (Exhibit 28) |
| Mark Errol Fleming | Director of Fleming Health Services Pty Ltd (Exhibits 29, 30 and 32) |
| Cynthia Ann Geissler | Administrator at Toowoomba Nursing Centre, TriCare (Exhibit 37) |
| Marcus Vincent Riley | General Manager at BallyCara (Exhibits 40, 41 and 42) |
| Samantha Teresa Privitera | Human Resources Administrator at Forest Place Group Ltd (Exhibits 44 and 45) |
| Raymond Michael O'Shea | Managing Director of CNC Pty Ltd t/a Coorparoo Nursing Centre (Exhibits 46 and 47) |
| John Elizabeth Hooper | Administrator at Amarina Nursing Home (Exhibits 48 and 50) |
| Sister Pauline Bonavia | Registered Nurse and Director of Nursing at Francis of Assisi Home, McKay (Exhibits 52, 53 and 54) |
| David John Lucas | Group Company Secretary and Acting General Manager, Arthur Earle Pty Ltd (Exhibits 55, 56 and 57) |
| Margaret Jean Walker | Registered Nurse and Director Jomal Pty Ltd and Nursing Administrator Sunnymead Park Managed Estate (Exhibits 58 and 59) |

Schedule 3**Respondents' Witnesses**

| | |
|----------------------|--|
| Karen Anne Prins | Organiser for ALHMWU with duties including recruitment and servicing of members in Aged Care Industry (Exhibit 62) |
| Maria Vidovich | Registered Nurse and Policy and Research Officer, Peel Health Campus, Western Australia (Exhibit 63) |
| Leisa Sargent | Organisational Psychologist and Senior Lecturer in Psychology, Queensland University of Technology (Exhibit 64) |
| Ronald William Harry | Personal Care Attendant at Salvation Army, Riverview Aged Care Facility (Exhibit 65) |
| Wendy Gayle Cummings | Aged Carer at Churches of Christ, Fassifern Retirement Village (Exhibit 66) |
| Stephen Watts | Assistant in Nursing at Salem North Ridge Nursing Home, Toowoomba (Exhibit 67) |
| Jeanette Doran | Registered Nurse at Francis of Assisi Home, McKay (Exhibit 68) |

Appearances:—

Mr A. Herbert of Counsel, instructed by McCullough Robertson with Ms A. Fitzpatrick and Mr T. Longwill for the Applicants.
 Mr S. Howells of Counsel, instructed by the Queensland Nurses' Union of Employees with Mr S. Ross and Ms J. Jeffrey.
 Mr R. Reed of Counsel, instructed by the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees with Ms J. Billingsley.

Ms D. Ralston and Mr C. Barrett of the Queensland Council of Unions.
 Mr C. Simpson and Mr G. Crompton for The Australian Workers' Union of Employees, Queensland.
 Mr B. Mann for The Queensland Public Sector Union of Employees.
 Mr S. Nance for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.

Released: 7 June 2002

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 125 – making, amending and repealing awards***Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers AND
Queensland Nurses' Union of Employees and Others (No. B669 of 2000)**VICE PRESIDENT LINNANE
COMMISSIONER BLOOMFIELD
COMMISSIONER SWAN

6 June 2002

Application for new award "Aged and Community Care Workers Award – State" to rationalise the terms and conditions contained in four existing industrial instruments – Application seeks to repeal all or part of existing industrial instruments – Decision concerned with application and operation of proposed Award – Whether proposed Award goes beyond present scope of existing industrial instrument coverage – Whether proposed Award classifications could adversely affect interpretation and application of assistant nurse classification in *Nurses' Aged Care Interim Award – State* – Assurance by parties to proposed Award that it is intended only to codify existing industrial instruments and develop new classification structure and there is no intention to extend the scope of existing coverage – Held scope of proposed Award has the effect of extending its application beyond coverage of existing industrial instruments – Insert specific exclusion from scope clause in proposed Award for persons performing duties as personal care attendant duties in "nursing homes" – deletion of the term "aged and community care and/or" from scope clause in proposed Award – *Industrial Relations Act 1999 s. 125*.

DECISION

[19] This is an application by the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI) for a new award titled "Aged and Community Care Workers Award – State" (the proposed Award). The application also seeks the repeal of all or part of the following four industrial instruments:

- *Award for Accommodation and Care Services Employees for Aged Persons – South-Eastern Division* (the ALHMWU Award);
- *Queensland Award for Accommodation and Care Services Employees for Aged Persons – State (Excluding South-East)* (the AWU Award);
- *Diversional Therapy – AWU – Industrial Agreement* (Diversional Therapy Agreement); and
- Part C of the *Private Hospitals and Nursing Homes Industry (Interim) Award – State* (Private Hospitals Award) and other parts of that Award where they relate to employees and employers in aged care facilities.

- [1] The Australian Workers' Union, Queensland (AWU) and the Australian Liquor, Hospitality and Miscellaneous Workers, Queensland Branch, Union of Employees (ALHMWU) consent to the making of the proposed Award. These are the industrial organisations of employees which the proposed Award recognises: see definition of "Unions" in clause 1.5 of the proposed Award and the Union Encouragement Clause found in clause 7.7 of the proposed Award.
- [2] The Queensland Nurses' Union of Employees (QNU) applied pursuant to s. 329 of the *Industrial Relations Act 1999* (the Act) to be a party to the proceedings or alternatively for a right to be heard in the proceedings. This Full Bench granted the QNU the right to be heard on the extent of the applicability of the proposed Award. This decision is concerned with Part 1 of the proposed Award only i.e. the Application and Operation of the proposed Award.
- [3] The following clauses in the proposed Award are particularly relevant insofar as the extent of the application of the proposed Award is concerned:

"1.2 Scope

This Award shall apply throughout the State of Queensland to all persons engaged in the callings and classifications set out in this Award, employed in or [in] connection with the provision of aged and community care and/or accommodation in nursing homes, hostels, retirement villages, garden settlements or any other residential accommodation (including clients' own home); and short and long term respite and day respite care; and to their employers. The Award also applies where care is co-ordinated from nursing homes and/or hostels. This award applies to contractors and/or subcontractors to the said establishments and their employees performing work to which this Award is ordinarily applicable.

19.1 Exemption from Scope of Award

This Award shall not apply to –

- (s) Employees of the Government of Queensland.
- (t) Persons who are in holy orders or volunteers.
- (u) Employees engaged by Spotless Services Australia Limited (formerly Spotless Catering Services Limited) in the provision of catering services.
- (v) Provided that the terms of this Award shall not apply to the following categories of persons: Site facility Managers, Managers and Assistant or Relief Managers thereto, employed in or in connection with the industries and/or operations associated with independent living units, services apartments and/or retirement villages.

1.4 Relationship with other Industrial Instruments

Without limiting its scope, this Award supersedes the Award for Accommodation and Care Services Employees for Aged Persons – South Eastern Division; the Award for Accommodation and Care Services Employees for Aged Persons – State (excluding South-East Queensland); the Diversional Therapy – AWU – Industrial Agreement; and part C of the Private Hospital and Nursing Homes Industry Award and other parts of that award where they relate to employees and employers of aged care facilities."

[19] The existing application clauses in the ALHMWU Award and the AWU Award are relevantly in the following identical terms:

“2. This Award shall apply to all employees, for whom classification and rates of pay are prescribed herein, employed in or in connection with the provision of accommodation for aged persons in hostels, retirement villages, garden settlements or any other residential accommodation facility (including clients [own] home); and short and long term respite and day respite care; and to their employers, and to contractors and/or sub-contractors to the said establishments and [to] employees performing work to which this Award ordinarily is applicable. The Award also applies where care is coordinated from [a] hostel or aged care facility as outlined above.”.

[20] The existing Award Coverage clause in the Private Hospitals Award is as follows:

“1.2 Award Coverage

This Award shall apply to employees for whom rates of pay are prescribed in wages clauses and to their employers at private hospitals and nursing homes throughout the State of Queensland, and to contractors and/or subcontractors to the said private hospitals and nursing homes and their employees:

Provided that this Award shall not apply to members of religious orders.”.

[21] The classification structure in the Private Hospitals Award is set out in clause 1.1 of Part D of the Award.

[22] The existing Agreement Coverage clause in the Diversional Therapy Agreement is as follows:

“1.2 Agreement Coverage

This Agreement shall apply to employees who are engaged as diversional therapists and for whom classifications and rates of pay are prescribed by this Agreement in the provision of activities which are designed to enhance the psychological, spiritual, social and physical well being of individual aged persons accommodated in nursing homes, hostels, retirement villages and garden settlements:-

Provided that this Agreement shall not apply to:

(19) Members of religious orders.

(20) Employees covered by the Nurses’ Aged Care Interim Award – State who shall be deemed to include employees who do not possess an Associate Diploma or higher qualification in Diversional Therapy or similar, and who develop and/or provide Nursing and therapeutic activities for residents and whose work is immediately supervised by a Registered Nurse.

(21) Furthermore persons employed at the date of this Agreement pursuant to the Aged Care Interim Award – State performing work that may be encompassed by this Agreement shall not be transferred to this Agreement except by mutual consent.

(22) Qualified Recreational Officer who holds an Associate Diploma in Recreation or leisure studies higher qualification.

(23) Unqualified Recreational Officer, at the time of the making of this agreement, who held a position of recreational officer.”.

[1] Clause 3.1 of the Diversional Therapy Agreement outlines the definitions and classification structure for Diversional Therapists.

[2] The QNU submits that the proposed Award seeks to extend the work performed under the existing ALHMWU and AWU Awards to nursing homes. However, the existing application clauses in both the ALHMWU Award and the AWU Award do not extend to employees in nursing homes. Further, whilst the application clause in the Private Hospitals Award does include a reference to nursing homes the QNU submits that the classification structure in the Award does not include any classification such as personal care attendant, personal carer or personal care worker. The QNU contend that the scope of the proposed Award goes well beyond the present scope of the ALHMWU and AWU Awards respectively.

[3] The QNU also contend that the proposed Award seeks the inclusion of classifications such as “Aged and Community Care Worker Level 1” with indicative tasks/skills of this classification including “personal care” work, “Aged and Community Care Worker Level 2” with indicative tasks/skills also including “personal care” work and “Aged and Community Care Worker Level 5” which is an employee who may primarily be engaged in the planning, developing and implementing of workplace documentation or engaged in identifying and catering for the complex needs of clients, volunteers and other employees. The QNU says such classifications describe work not presently covered by the ALHMWU and AWU Awards. We note the concerns of the QNU in the description of the classifications sought in the proposed Award.

[4] Currently the ALHMWU and AWU Awards include a classification of “personal care attendant”. The proposed Award describes a classification of “personal carer” as meaning an employee “who is not qualified and who undertakes, with limited supervision, a range of ... duties that assist in the care of a client or resident” as well as a classification of “personal care worker” as meaning an employee “who is not a nurse, who is multi-skilled and undertakes a range of duties that assist in the care of a client or resident and holds an AQF level III Certificate in this field.”. The QNU submit that the inclusion of those two classifications in the proposed Award go beyond the existing ALHMWU and AWU Awards and have the potential to adversely affect the interpretation and application of the assistant nurse classification in the *Nurses’ Aged Care Interim Award – State* (the QNU Award). It is argued that this is particularly so when the terms “nurse” and “nursing duties” are not defined in the proposed Award.

[5] Given that the members of this Full Bench have also heard B1019 of 1998 and B994 of 1999 and the different views expressed regarding what the terms “nurse” and “nursing duties” mean we can understand the concerns of the QNU in this regard. Those concerns already expressed by the QNU will, however, be considered by the Full Bench when the content of the proposed Award is being considered.

[6] In response to the QNU submissions the QCCI sought to amend clause 1.2 and 1.4 of the proposed Award by adding a paragraph to clause 1.2 so that it would read as follows:

“1.2 Scope

This Award shall apply throughout the State of Queensland to all persons engaged in the callings and classifications set out in this Award, employed in or [in] connection with the provision of aged and community care and/or accommodation in nursing homes, hostels, retirement villages, garden settlements; aged care facilities; domiciliary centres; other residential accommodation (including clients’ own residence); respite centres and short and long term respite and day respite care; and to their employers. The Award also applies where care is co-ordinated from nursing homes and/or hostels. This award applies to contractors and/or subcontractors to the said establishments and their employees performing work to which this Award is ordinarily applicable.

This Award shall not apply to persons who work in a Nursing Home and who perform the duties/functions referred to as “Personal Carer” and described in the Classification Structure of Schedule 1 to this Award.”.

[19] The amendment to clause 1.4 is the deletion of the words “[w]ithout limiting its scope” so that the proposed clause 1.4 would read as follows:

“1.4 Relationship with other Industrial Instruments

This Award supersedes the Award for Accommodation and Care Services Employees for Aged Persons – South Eastern Division; the Award for Accommodation and Care Services Employees for Aged Persons – State (excluding South-East Queensland); the Diversional Therapy – AWU – Industrial Agreement; and part C of the Private Hospital and Nursing Homes Industry Award and other parts of that award where they relate to employees and employers of aged care facilities.”.

[20] The QCCI emphasised that the proposed Award did not seek to cover employees engaged in the provision of personal care in nursing homes. The QCCI has, on a number of occasions, reiterated its position that the proposed Award does “not extend beyond the application of those current industrial instruments which it is to replace” and, further, that “Aged Care Queensland will not allow the classification of ‘personal care worker’ or what ever name is given to them, such as ‘personal care attendant’ or ‘personal carer’, to be transported into nursing homes”. According to the submissions of the QCCI the status quo that currently exists will continue and the proposed Award will not alter that situation i.e. assistant nurses will be employed in the same manner and perform the same work that they currently perform.

[21] The Australian Nursing Homes and Extended Care Association Queensland Limited (ANHECA) and St Luke’s Nursing Service in their submissions supported the thrust of the QCCI submission.

[22] Reference was made by a number of the parties, including the QCCI, to paragraph 25 in *Queensland Nurses’ Union of Employees v Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Ors* (2002) 169 QGIG 769 i.e. B1019 of 1998. The Members of the Commission as currently constituted were the same Members of the Commission that decided B1019 of 1998. Paragraph 25 of that decision is as follows:

“In light of the evidence before us and the decision of the President in *Queensland Nurses’ Union of Employees v Churches of Christ t/a Churches of Christ Care* (2000) 164 QGIG 192 we are of the view that the terms ‘nursing home’ and ‘hostel’ clearly identify the facilities to which the various awards of this Commission have application in the residential aged care industry.”.

[19] Those comments of the Full Bench in B1019 of 1998 were made because the parties in B1019 of 1998 and B994 of 1999 regularly made reference to the fact that with the enactment of the *Aged Care Act 1997*, the introduction of “ageing in place” and the describing of establishments by terms other than “nursing homes” and “hostels” there was a “blurring of the distinction between facilities known as ‘nursing homes’ and those known as ‘hostels’”. This Full Bench found that there was no real confusion about what was a “nursing home” and what was a “hostel”. Our comments in paragraph 25 were intended simply to reinforce the fact that the terms “nursing home” and “hostel” clearly identify the facilities to which Awards of this Commission apply.

[20] The Full Bench in B1019 of 1998 did not make any finding about the applicability of any Award of this Commission to either “nursing homes” or “hostels”. B1019 of 1998 did not require us to make any such finding although we were invited to do so by some of the parties in that matter. Whether the work performed by employees of either nursing homes or hostels is “assistant nurse” work or “personal care attendant” work was not a matter to be decided by that Full Bench. Nor is it a matter for this Full Bench in this decision.

[21] It may be that the issue of the work performed by personal care attendants is something to be considered when the content of the Award is being looked at, given the change to the classification names in the proposed Award.

[22] The QNU Award has application to both “nursing homes” and “hostels” insofar as the classification of “assistant nurse” and other classifications are concerned. The ALHMWU and the AWU Awards have application to “hostels” insofar as the classification of “personal care attendant” and other classifications are concerned.

[23] The AWU submits that the intent of the proposed Award is to codify four existing industrial instruments and to develop a new classification structure with the parties having no intention to extend the application clause of the proposed Award beyond the current industrial instruments. However, the QNU submitted that the proposed Award went well beyond a codification of the existing industrial instruments. It said the proposed Scope Clause purported to extend the industrial instruments’ coverage to work not previously covered by the existing industrial instruments.

[24] According to the submissions of the ALHMWU the proposed Award represents a proper amalgamation, rationalisation and updating of the existing industrial instruments. Nonetheless the ALHMWU proposed the following amendment to satisfy the QNU concerns i.e. the inclusion of an additional paragraph in the proposed clause 1.2:

“Provided that this Award shall not apply to an employee while performing ‘personal care’ work (as defined in Schedule 1) in nursing homes.”.

[19] The ALHMWU then proposed a definition of “personal care” be placed in Schedule 1 of the proposed Award. That proposed definition is as follows:

“(1) The provision to, or in respect of, a resident/client of one or more of the following:–

(s) Assistance with:–

- (i) bathing, showering or personal hygiene;
- (ii) toileting;
- (iii) dressing or undressing;
- (iv) mobility;
- (v) transfer;
- (vi) meals and refreshments;
- (vii) sensory communication or the fitting of sensory communication aids.

(t) A special diet where required;

(u) Assistance with self administration of medication prescribed by a pharmacist, subject to legal restrictions on the provision of such services;

(v) Rehabilitative support, where required, to meet a professionally determined therapeutic need;

(w) Assistance where the resident/client contracts a short term illness;

(x) Where required, basic treatment such as assistance with eye drops, back rubs, dressings, and the like, subject to legal restrictions on the provision of such services;

- (y) Long term emotional support and direct supervision for a resident/client diagnosed as suffering from a form of dementia or a functional psychotic condition requiring long term medication;
- (z) Emotional support to a resident/client suffering from an emotional needs condition such as grief or depression;
- (1) Completion of necessary documentation concerning the above, within the limits of the employee's skill and qualifications;
- (2) Necessary observation and assessment of the resident/client and reporting on same within the limitation of the employee's skill and qualifications."

- [1] The ALHMWU contends that the proposed Award with the inclusion of these amendments would not extend the scope of the existing industrial instruments, whether considered individually or in combination. According to the ALHMWU, the inclusion of the proviso to clause 1.2 of the proposed Award makes clear its intention not to extend the application of the proposed Award to "personal care" work performed in nursing homes.
- [2] The ALHMWU also addressed the inclusion in clause 1.2 of the proposed Award of the reference to "provision of aged and community care and/or accommodation". The existing ALHMWU and AWU Awards merely have a reference to the "provision of accommodation". The ALHMWU submits that with the inclusion of "diversional therapists" there is an element of "care" included. The ALHMWU also submits that the proposed Award covers employees who provide "personal care" to residents and therefore the addition of the words "of aged and community care and/or" were warranted. The position is, however, that whilst the ALHMWU and the AWU Awards include the classification of "personal care attendant" the application clause of those awards extended only to the "provision of accommodation".
- [3] Further, the classifications to which the Private Hospitals Award has application in nursing homes do not extend to classifications that cover "personal care" work.
- [4] We are of the view that the original clauses 1.2 and 1.4 in the proposed Award did have the effect of extending the application of the proposed Award beyond the coverage of the existing four industrial instruments. Although the QCCI's amended clauses 1.2 and 1.4 generally deal with the objections raised by the QNU the issue has not been fully addressed. Whilst the second paragraph of the proposed clause 1.2 refers to "Personal Carer" as described in the classification structure we refer the parties to our earlier comments about the change from "personal care attendant" to "personal carer" or "personal care worker" and the need to be addressed on that issue at the time that the content of the proposed Award is before us. In those circumstances we will revisit the second paragraph of the proposed clause 1.2 when submissions on the content of the proposed Award are made.
- [5] We make it clear, however, that we are not prepared to include the terms "aged and community care and/or" in the proposed clause 1.2. We see no need to expand the scope of the application of the proposed Award beyond "the provision of accommodation" in circumstances where the only classification that appears to extend beyond the "provision of accommodation" is the diversional therapist and that coverage is currently in an industrial agreement. If the QCCI wishes to amend the proposed clause 1.2 to specifically cater for diversional therapists in the provision of aged and community care we are prepared to consider any such amendment.
- [6] As to the definition of the work to be performed by "personal care attendant", or whatever the classification may ultimately be referred to in the proposed Award, we have decided not to deal with that matter at this time. We are of the view that the parties may not have had sufficient time to consider the ALHMWU's proposed definition at the time of hearing submissions on the application of the proposed new award. The parties may, however, wish to consider the insertion of a definition of "personal care attendant" in the proposed Award and if so the parties can address us on that issue when the content of the proposed Award is before this Full Bench.

We order accordingly.

D.M. LINNANE, Vice President.
 A.L. BLOOMFIELD, Commissioner.
 D.A. SWAN, Commissioner.

Appearances:-

Mr A. Horneman-Wren of Counsel, with Mr S. Nance for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers for Aged Care Queensland and for Mercy Aged Care Services, TriCare Group, Clanwilliam Pty Ltd, Hibernian (Qld) Friendly Society Limited (Ballycara Retirement Living Complex), Hibernian (Qld) Friendly Society Limited (Hibernian Nursing Home), Jomal Pty Ltd, Amarina Investments Pty Ltd, Forest Place Group Limited, Fleming Health Services Pty Ltd, CNC Pty Ltd, People Care Pty Ltd, Catholic Diocese of Rockhampton (Kepnock Grove Retirement Centre), Corporation of The Franciscan Sisters of the Heat of Jesus Queensland (Francis of Assisi Home), Alchera Park Pty Ltd and Quality Aged Care Pty Ltd earlier represented by Ms A. Fitzpatrick of McCullough Robertson.

Mr S. Howells of Counsel instructed by Mr S. Ross of Reidy and Tonkin with Ms J. Jeffrey, Ms G. McCaul and Mr M. Healy, for the Queensland Nurses' Union of Employees.
 Mr R. Reed of Counsel, with Ms K. McGill for the Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees.
 Mr A. Herbert of Counsel, with Mr C. Simpson, Ms Y. D'Ath and Mr J. Van Leent for The Australian Workers' Union of Employees, Queensland.
 Dr N. Timo, Mr P. Varendorff and Mr S. Lucas of Miles Witt Partnership for the Australian Nursing Homes and Extended Care Association of Queensland Limited.
 Mr J. Patti and Mr M. Patti of Employer Services Pty Ltd for St Luke's Nursing Service.

Released: 7 June 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Peter Morrow AND Hollpark Pty Ltd (No. B161 of 2002)

COMMISSIONER FISHER

11 June 2002

Dismissal – Accidents in company vehicles – Offer of employment – Offer declined by applicant – Applicant seeking only compensation – Respondent admits dismissal harsh, unjust and unreasonable – Case law – Reinstatement not practicable – Compensation denied.

DECISION

Peter Morrow commenced employment with Hollpark Pty Ltd as a Mobile Patrol officer on 4 August 2001. On 10 January 2002 Mr Morrow learnt that he would need to undergo day surgery the following day and advised his employer Andrew Leonard, a Director of Hollpark Pty Ltd, accordingly. On 12 January 2002 Mr Leonard informed Mr Morrow, before he commenced his evening shift, that he was being dismissed for the reason of a downturn in work. It appears Mr Morrow was given one week's notice, which was intended that he work out. Mr Leonard told Mr Morrow he was looking for static guard work for him.

While on his shift on the evening of 12 January 2002 Mr Morrow discovered that a person was being trained in his position. He contacted the Company and spoke to Mrs Leonard. It subsequently transpired that the reason Mr Morrow was dismissed related to his having been involved in a number of accidents in Company vehicles. Mr Morrow was unable to perform work after his shift finished on 13 January 2002 because of effects of the surgery.

On 16 January 2002 Mrs Leonard contacted Mr Morrow to ask whether he would like his job back as they would give it to him if he would. Mr Morrow indicated that he would like to go back.

On reflection and after seeking advice from family and Wageline, a division of the Department of Industrial Relations (DIR), Mr Morrow forwarded a letter to Mr Leonard that day setting out six requirements for him to return to work. One of these requirements was a written employment agreement. Mr Morrow said in evidence that Wageline had suggested this in light of the events surrounding his dismissal. The letter referred to Mr Morrow being advised to seek the six requirements but the source of that advice, especially that from Wageline, and the reason an agreement was being sought was not disclosed to Mr Leonard. Mr Morrow did not have an obligation to provide the background to his requests but such information could have averted the events of later that day.

On receipt of the letter Mrs Leonard contacted DIR and was advised there was no obligation to provide a written employment agreement as Mr Morrow was employed under the terms of an award.

Mr Leonard telephoned Mr Morrow later on 16 January 2002 to say that advice had been received from DIR that a written employment agreement was not necessary. The job was still available and it was for Mr Morrow to decide whether he wished to resume work. Mr Morrow did not query DIR's advice and declined the offer. The reason a written employment agreement was not being offered and none of the other five conditions set out in Mr Morrow's letter of 16 January 2002 were discussed between Mr Leonard and Mr Morrow.

Mr Morrow filed an application for reinstatement but at no stage since the filing of the application has he sought reinstatement. Compensation is the only remedy sought.

At the commencement of proceedings, Ms Callaghan of Counsel, who appeared for the respondent, admitted that the dismissal of Mr Morrow was harsh, unjust or unreasonable. The Commission accepted the respondent's admission. Evidence was heard from Mr Morrow, Erina Weil, Mr Morrow's partner and Mr Leonard, however, that evidence was limited. It mainly touched on the events of 12 and 16 January 2002 and efforts by Mr Morrow since 13 January 2002 to mitigate his loss.

In closing submissions Ms Callaghan argued that Mr Morrow could not be awarded the remedy of his choice as compensation is only available in the event that reinstatement is impracticable. It was her submission that given reinstatement was offered on 16 January 2002 on the same terms and conditions that Mr Morrow was employed on at the time of his dismissal, Mr Morrow did not have the option to pursue compensation. In support of her argument, Ms Callaghan referred the Commission to the *Serratore v Doyles Construction Lawyers* (2001) 168 QGIG 9 where the principles of compensation were explained and to *Rawlings v Aloha Real Estate Pty Ltd t/a Ray White Burleigh Heads* (2001) 169 QGIG 10 where a dismissal application was rejected on the grounds that reinstatement had been offered by the employer and refused by the employee. Support for the decision in the *Rawlings Case* was drawn from a decision of de Jersey P in *Auto Logistics and Auctions Pty Ltd v Kovacs* (1997) 155 QGIG 320.

Mr O'Donnell, who appeared for the applicant, argued that given that Mr Morrow had been initially misled about the reason for his dismissal, and that he had experienced other difficulties with his employment, Mr Morrow was mistrustful of the offer of reinstatement. Accordingly, Mr Morrow sought to have terms and conditions of his employment clarified and reduced to writing before he would consider returning to work. When Mr Leonard would not meet what Mr O'Donnell considered to be a reasonable request, Mr Morrow did not feel any confidence that trust in the employment relationship could be restored. For those reasons Mr Morrow refused the offer of reinstatement and now seeks compensation.

Hollpark Pty Ltd is not a sophisticated business. Mr and Mrs Leonard operate it from their residence. It appears to have only basic systems in place and there seems to be little understanding of the employment and dismissal requirements under the *Industrial Relations Act 1999* (the Act).

While the Commission declined to hear much evidence about the reason for the dismissal in light of the admission that was made by the respondent at the commencement of proceedings, it seemed that Mr Leonard misled Mr Morrow about the reason for this dismissal in order to let him down gently. Mr Leonard would not be the first employer to mislead an employee in this manner but taking the easy way out in a difficult situation often creates later problems.

The issues raised by Mr Morrow in his letter of 16 January 2002 were:

- (xix) a written employment contract;
- (xx) details of his superannuation;
- (xxi) reimbursement of an unauthorised deduction;
- (xxii) payment of sick leave;
- (xxiii) pay slips to be signed to the effect that correct tax deductions have been made; and
- (xxiv) pay slips to be provided on pay days.

Except for item (i), none of these issues were controversial for Mr Leonard. He did not necessarily agree with all of Mr Morrow's complaints, for example, Mr Leonard said the Company was awaiting advice from Mr Morrow regarding his superannuation fund before making payment. In relation to item (iii) Mr Leonard said that Mr Morrow had agreed with Mrs Leonard to have \$350 deducted from his pay to reimburse the Company for repairs to a vehicle damaged by Mr Morrow. Mr Leonard said that Mr Morrow had used up his entitlements to sick leave and was thus unable to be paid for the most recent sick leave taken as a result of his surgery. In relation to pay slips, Mr Leonard said employees were advised they were available at their request.

While it is the case that not all of Mr Leonard's responses complied with industrial relations law, his responses cannot be construed as totally opposing Mr Morrow's requests. His opposition to a written employment contract was based on advice from DIR that such a contract was unnecessary as Mr Morrow was employed under an award. It is unfortunate that Mr Morrow and Mrs Leonard did not seek advice from the same DIR staff member. Conflicting advice contributed to the situation that confronted the parties. The Commission acknowledges, however, that advice is often given without all of the relevant information being disclosed.

The overarching concerns about this case are that Mr Leonard and Mr Morrow did not discuss the reasons for the dismissal and more importantly in terms of the matter before the Commission, the issues contained in Mr Morrow’s letter of 16 January 2002 and their contrary advices from DIR. Had discussions on the latter two issues been held it appears likely the concerns of Mr Morrow would have been addressed and his employment with Hollpark Pty Ltd would have resumed.

It is the case that reinstatement on the same terms and conditions was offered and refused. From the time of filing his application, Mr Morrow has not sought reinstatement, only compensation. Reinstatement is the primary remedy available under the Act and compensation is only available in the event that reinstatement is found to be impracticable.

Mr Morrow’s desire to seek clarification of various matters relating to his employment in light of his being misled about the reason for his dismissal is understandable. However, it remains the case that reinstatement to his former position on the same terms and conditions was offered to the employee by the employer. Reinstatement was seen to be practicable by Mr Morrow on 16 January 2002 when Mrs Leonard initially proposed the idea. It was only when Mr Leonard did not agree to the first condition sought in his letter that Mr Morrow changed his mind. Mr Morrow did not query the advice given to Mr Leonard by DIR even though it was apparently contrary to the advice he had received from the same source. In the circumstances a logical question to ask would have been why DIR had said a written agreement was unnecessary. Mr Leonard could have easily answered. It was not as though Mr Leonard was aware that Mr Morrow had sought advice from DIR. Mr Morrow chose not to seek clarification and hence threw away his chance of reinstatement.

Once reinstatement has been rejected by the employee it is not open to the employee to come to the Commission seeking only the alternative remedy of compensation. Given the offer that was made by the employer on 16 January 2002 and the preparedness of the applicant to initially accept the offer, it seems that reinstatement was practicable. In those circumstances I cannot now find that reinstatement is impracticable and order compensation.

For these reasons the application is refused.

G.K. FISHER, Commissioner.

Appearances:
Mr J. O’Donnell for the applicant.
Ms B. Callaghan (Barrister) instructed by Patrick Murphy Solicitor on behalf of the respondent.

Released: 11 June 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Suzanne Rimland AND Queensland Health (No. B1164 of 2001)

COMMISSIONER BLADES

7 June 2002

Unfair dismissal – Lapse of application – Conciliation Conference – Certificate of Commissioner providing incorrect information – Reliance upon Certificate – Advice of time limitation included in Certificate not required by Act – No requirement on Commission to advise of limitation period – Parties informed at Conference of Commission’s assessment of merits and possible consequences of further proceedings – Time limitation commenced at that point – Limitation period does not commence upon issue of Certificate – No action taken within 6 months after applicant “informed” – Application lapsed.

DECISION

This is an application for a determination of whether an unfair dismissal application has lapsed under the provisions of s. 75(4) of the *Industrial Relations Act 1999* (the Act). The applicant Suzanne Rimland lodged, on 3 July 2001, an application alleging an unfair dismissal. It is common ground between both Ms Rimland and the respondent Queensland Health that a conciliation conference was conducted by a Commissioner on 18 July 2001.

It is also common ground that:

- . At the conclusion of the conference, the Commissioner informed the parties of an assessment of the merits of the application and the possible consequences of further proceedings.
- . A certificate under s. 75(3) of the Act was not issued until 5 November, 2001.
- . Further action was not taken by the applicant until 17 April, 2002 when a request was sent to the Registrar for the matter to be placed on the callover list.

Section 75(3) provides:

“If the commission is satisfied all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful so far as it relates to at least 1 ground of the application or because the applicant is a person to whom section 73(1) does not apply, it –

- (s) *must issue a written certificate stating that the commission –*
 - (xix) *is so satisfied for a stated ground; or*
 - (ii) *considers the applicant is a person to whom section 73(1) does not apply; and*
- (t) *inform the parties to the conciliation of –*
 - (i) *the commission’s assessment of the merits of the application in relation to the stated ground or in relation to how the applicant is a person to whom section 73(1) does not apply; and*
 - (ii) *the possible consequences of further proceeding on the application; and*

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

Section 75(4) provides:

“(4) *The application lapses if the applicant has not, within 6 months after the applicant has been informed by the commission under subsection (3) –*
 (s) *taken any action in relation to the application; or*
 (t) *discontinued the application.*”.

It is not clear why the certificate was not issued until 5 November 2001. It certifies that a conference was held on 18 July, 2001 and proceeds:

“*The Commission is satisfied that all reasonable attempts to settle the matter by conciliation are, or are likely to be, unsuccessful for the reason that the parties are unable to agree upon the facts in issue.*”.

The Certificate has a note appended which reads:

“*The applicant must, within six (6) months of 5 November 2001, take some action in relation to the application otherwise the application lapses.*”.

Ms Rimland’s former Solicitors wrote to her on 21 December 2001 and advised her that she had 6 months from 5 November 2001 to take action in relation to the application.

The way s. 75(3) is set out is not without error. By that I mean there is the phrase containing the words “it (a) must issue...”; “it (b) inform the parties (sic)...”; “it (c) may recommend...”. There is, clearly enough, a word missing in (b) before the word “inform”. Presumably it is either “must” or “may”. It would, however, appear to have no particular relevance in this case.

It was the applicant’s submission that for the purposes of s. 75(4), s. 75(3) of the Act requires or allows the Commission to “inform” the parties to a conciliation through several ways:

- . by a written certificate received from the Commission in accordance with s. 75(3)(a); and
- . by information which is communicated to the parties at the conference by the Commissioner in accordance with s. 75(3)(b); and
- . by information which is further communicated to the parties at the conference by the Commissioner, if he or she so chooses in accordance with s. 75(3)(c).

The applicant alleges that the 6 month period referred to in s. 75(4) does not start to run simply because the Commission has merely completed the step set out in s. 75(3)(b) of the Act.

The respondent maintained that the certificate issued under s. 75(3)(a) goes to the jurisdiction of the Commission to proceed further. Section 76 provides that the Commission may hear and decide the application, if the Commission considers all reasonable attempts to settle an application have been made. That satisfaction comes in the form of the certification by way of the certificate under s. 75(3)(a). That is the purpose of the issue of the certificate, not to inform the parties under s. 75(3)(b). The issue of the certificate is a separate and distinct step.

It was the applicant’s contention that the applicant was informed by the Commission for the purposes of s. 75(4) when she received the written certificate issued by the Commission under s. 75(3)(a) and that occurred some time in November.

While the respondent argued that the provisions of the Act were clear and reference to extrinsic material was not permitted in those circumstances, the applicant sought to rely upon the Explanatory Notes to the Act as provided for in s. 14B *Acts Interpretation Act 1999*. The Explanatory Note, so far as is relevant, reads:

“*The commission is required to issue a written certificate if it is satisfied that all reasonable steps to settle the matter by conciliation are, or are likely to be, unsuccessful.*

An application lapses if the applicant has not, within 6 months after receiving such a written certificate:

- . *taken any action in relation to the application; or*
- . *discontinued the application.*”.

It would seem that because of the different views of the parties, the provisions of the Act are open to debate and reference to the Note is therefore probably authorised. What the Note says is not what the Act provides. The Act makes no reference to an application lapsing after 6 months after the receipt of the certificate. Nor do I think that was what was intended for what would happen if an applicant never received the certificate? In my view, the Explanatory Notes also are not as clear as the applicant suggests. The explanation for the use of the words “within 6 months after receiving such a written certificate” might be that the Explanatory Note presupposes that the certificate will be issued on the same day as the conference (as probably was expected by the Legislature if regard be had to s. 74(8) mentioned later). In my view, the Explanatory Note does not assist the applicant’s argument.

Section 75(3) contains three separate paragraphs. Paragraph (a) deals with a written certificate which must state that the Commission is satisfied of certain things. Paragraph (b) requires (assuming the missing word is “must”) the Commission to provide certain information. Paragraph (c) provides for a discretionary recommendation. What s. 75(3) deals with are three discrete matters. Firstly, there is to be addressed the Commission’s satisfaction; secondly, there is a requirement to inform; and thirdly, there is a discretionary recommendation. It is only (a) which is required, upon a plain reading of the section, to be in writing. Had the Legislature intended that the Commission inform the parties in writing of the Commission’s assessment of the merits and of the possible consequences of further proceedings, it could quite easily have said so in plain words.

The Commission was satisfied that all reasonable attempts to settle were likely to be unsuccessful on the ground of the parties’ inability to agree upon the facts. The “ground” referred to in s. 75 can only relate to whether the dismissal was (a) harsh, unjust or unreasonable, or (b) for an invalid reason. There was no suggestion that the applicant was a person to whom the provisions of s. 73(1) did not apply. That certificate which appears to relate to the ground of whether the dismissal was harsh unjust or unreasonable, complies with the provisions of s. 75(3)(a).

The certificate did not address any issue raised by s. 75(3)(b) and there is no such requirement to be read into the paragraph. The Commissioner’s assessment of the merits of the application and the possible consequences of further proceedings has traditionally been recorded in a document which, after conference, is sealed and placed upon the file for reference later, most likely on the issue of costs. That was done in this case and the parties are *ad idem* that this assessment was made at conference.

The Honourable the Minister, in the Second Reading Speech to the Act, under the heading of "Dismissal Legislation" said:

"Under the new laws the commission will be required to deal with applications seeking a remedy for an unfair dismissal as quickly as possible."

That exhortation received statutory force in s. 74(8) of the Act which provides that "the commission and registrar must deal with an application as quickly as possible". It is inconsistent with that statutory requirement if the Commission, by delay in the issue of the certificate after a conference has been concluded could accidentally defeat the obvious need for speedy action. In other words, it is not the issue of the certificate which governs the commencement of the limitation period. The issue of the certificate is a preliminary to the operation of s. 76. The issue of the certificate some time after the conference has concluded does not comply with the scheme provided for in s. 74(8).

The applicant has urged that the Commissioner's Certificate was entitled to be relied upon by the applicant and her legal adviser as information that, for the purposes of s. 75(4), the limitation period did not commence to run until 5 November. The respondent argued that the applicant relied upon the note "at her peril". Although this is a "fair and equitable" jurisdiction as the applicant submits, all parties are bound by the provisions of the Act, as was the Commissioner. It is common ground that the Commissioner did not inform the parties on the date of the conciliation conference, that there was a time limit. There is no provision in the Act which requires a Commissioner to provide this information at any time. It has however, generally been the practice to do so. There is no form of Certificate under the Rules or Regulation and the note appended to the Certificate, informing the applicant of the time limit has no statutory basis. The note, which does not form part of the Certificate at all, is really irrelevant to the validity of the Certificate. In this application, unlike perhaps where an extension of time is sought, there is no discretion vested in the Commission. The issue is determined by what the Act provides.

Section 75(4) provides that the application lapses if action is not taken within 6 months after the applicant has been informed by the Commission under ss. (3). The Act does not require that information to be in writing and does not require an applicant to be informed of a time limitation. It is only s. 75(3)(b) which requires anyone to be "informed" and parties are not "informed" under s. 75(3)(a), nor for that matter under s. 75(3)(c).

I determine that the application has lapsed.

B.J. BLADES, Commissioner.

Hearing Date: 3 June 2002

Released: 7 June 2002

Appearances:

Ms J. Ryrie, Counsel, instructed by Mr J. Hodgens, Solicitor, Nicol Robinson Halletts, for the Applicant.

Mr C. Murdoch, Counsel, Crown Law, for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Anita Mughelli AND Coco's Trading Pty Ltd trading as Coco's 5 Star Supermarket (B1744 of 2001)

COMMISSIONER SWAN

7 June 2002

DECISION

This is an application made by Mrs Mughelli seeking relief from the Commission against her allegedly unfair dismissal by her former employer, Coco's 5 Star Supermarket at Loganholme.

Mrs Mughelli had been employed in the capacity of Supermarket Manager of this store from 8 May 2001 until 14 September 2001. Mrs Mughelli claims to have been dismissed by Mrs Coco (the wife of the owner of the store) on 14 September 2001. The respondent claims that Mrs Mughelli resigned her position after an incident involving Mrs Coco.

The "incident" in question, which took place on 14 September 2001, involved an altercation between Mrs Coco and Mrs Mughelli at the store.

The facts show that on the day in question, Mrs Mughelli was advised by a staff member that a Mr Dobby had arrived at the store and had commenced work involving stock matters. Mrs Mughelli introduced herself to Mr Dobby and enquired as to his presence at the store. She was advised that Mr McPhee (General Manager of the Coco's Group of Companies) had contacted Mr Dobby (an employee of Coco's) the previous day and had asked him to work at the shop because of some perceived stock control problems. Some time later, Mrs Mughelli claims she was advised that a woman had come into the store and was acting in a "very agitated manner" whilst commenting upon stock in the aisles. Mrs Mughelli was shortly thereafter advised that the person was Mrs Coco.

Prior to proceeding down to the aisle, Mrs Mughelli states that she telephoned Mr McPhee enquiring as to whether he was aware of what was occurring. Mr McPhee stated that he had asked Mr Dobby to go to the store and had been remiss in not advising Mrs Mughelli beforehand and that, in terms of Mrs Coco's presence, he was unaware of why she had come to the store.

Mrs Mughelli states that she then proceeded to the aisle and found Mrs Coco in an agitated state. Mrs Mughelli claims that because of Mrs Coco's raised voice, she asked her to discuss the issue away from the shop floor.

Upon proceeding to the tearoom to discuss issues, Mrs Mughelli claims that Mrs Coco was admonishing her for being very rude for walking away from her whilst stating that the shop belonged to her husband and that she could visit it at any time which suited her.

Mrs Mughelli responded by stating that Mrs Coco had been rude to her. Mrs Mughelli also told Mrs Coco that it would be "the polite thing to do" to announce her arrival in the store. Mrs Mughelli then claimed that Mrs Coco told her to collect her personal belongings and to leave the store. Mrs Mughelli then telephoned Mr McPhee and advised him of what had occurred. She claims that Mr McPhee told her to go home and he would contact her later in the day. During that later conversation with Mr McPhee, Mrs Mughelli asked whether her "job was finished" to which Mr McPhee said "yes".

The applicant called Mrs Phillipa Davies to give evidence. Mrs Davies had been employed by the store at the time of the incident. On the particular day, Mrs Davies had been informed by another employee that a lady was standing in the aisles and "going off like a two-bob-watch". Mrs Davies went to investigate and met Mrs Coco. A brief conversation ensued between the two and then "Mrs Coco... turned her back to me and walked off to continue her inspection of the stock with Mr Dobby". Mrs Davies then stated that some short time afterwards, Mrs Coco approached her and accused her of "walking off on her". Mrs Davies did not hear any direct conversation between Mrs Mughelli and Mrs Coco, however, she had heard Mrs Coco saying at one stage "this is my husband's store" and "you get out, you get out now". Mrs Davies stated that she had observed Mrs Mughelli's demeanour and stated that at all times she had remained composed.

Mr McPhee stated that he had previously received a resignation letter from Mrs Mughelli. This letter was written during July 2001. At that time, he and Mrs Mughelli discussed the issues raised in the correspondence and an understanding was reached between the two whereby Mrs Mughelli continued in her employment with the respondent.

Mr McPhee recalls his conversation with the applicant on the day in question and stated that she had appeared to have been in an agitated state, saying of Mrs Coco "If she doesn't leave the store, I will hand in my keys and leave". Mr McPhee stated that he did not react at this point in time to Mrs Mughelli's call as she had previously resigned. He was emphatic, however, that he had not advised her to go home on that day. When he spoke again to Mrs Mughelli, he claims she said the following words:

"I suppose it's a stupid question, but, is there any chance of my coming back?"

To which Mr McPhee stated "no".

Mr McPhee relied upon contemporaneous notes he had taken of those discussions on the day.

Ms Michelle Newson, an employee of the respondent working at the store on the particular day, stated that she had heard Mrs Mughelli say on the telephone (presumably to Mr McPhee) words to the effect:

"...if that lady doesn't leave the store I will hand in my keys and leave."

Mr Dobby, who had been present in the store with Mrs Coco, also gave evidence to the effect that Mrs Mughelli stated, after the altercation with Mrs Coco, that "if it's going to be like this I am resigning". Mr Dobby stated that at time of the incident, Mrs Mughelli had approached Mrs Coco stating:

"How dare you come into my store without first consulting me."

Mrs Coco's evidence was that she had a practice of entering Coco's stores as she chose to overview the manner in which the stores were operating. Mrs Coco stated that Mrs Mughelli had approached her saying "next time you come in announce yourself". After the two parties had determined to continue their discussion in the staff room, Mrs Coco claimed that Mrs Mughelli said "If this is how it is going to be, I am out of here, I quit". In the staff room, Mrs Coco claimed that Mrs Mughelli had "yelled" at her and had blocked her exit from the room. Mrs Coco claims that:

"...when I finally broke free I said 'get out' to which Mrs Mughelli replied "I am getting out of here right now."

In essence, the above represents the varying versions of the event.

From a consideration of all of the evidence, it appears that Mrs Mughelli took umbrage at the fact that Mr Dobby and Mrs Coco had entered her store unannounced. This is reasonably understandable in the case of Mr Dobby's appearance and work at the store. Mrs Mughelli should have, in the normal course of events, been advised of this occurrence. Certainly, Mr McPhee states that he would have advised Mrs Mughelli of this event but it had slipped his mind. Upon sorting that issue out with Mr McPhee, that explanation should have been sufficient for Mrs Mughelli. In terms of Mrs Coco's appearance at the store, that seems to have presented a different set of circumstances.

There is little doubt that Mrs Coco can and does visit stores owned by her husband on an *ad hoc* basis. That she does so is entirely the decision of Mrs Coco and her husband. Whether general courtesies in advising store managers about such visits are followed is also a matter for the Cocos. However, the lack of such courtesies has the potential to lend itself to outcomes similar to the one which occurred in this case. That being said, it appears that Mrs Mughelli took the issue too far with Mrs Coco.

I have formed the view that Mrs Mughelli was angered by this visit and did not deal with the situation in an appropriate manner. I have found that Mrs Mughelli did state words to the effect that if was going to be this way then she would "quit". I accepted the evidence of Mr McPhee as truthful. Mr McPhee, of course, did not hear Mrs Mughelli state these words to Mrs Coco, but he did hear her state those words to him. While I had some reservations about some of the evidence presented by respondent witnesses, on this point I believe those words were stated by Mrs Mughelli to Mrs Coco.

The reality is that the "event" (i.e Mrs Coco visiting stores) was going to reoccur and it appears from Ms Mughelli's words on that day that she was going to rile against that process.

I have found that Mrs Mughelli resigned her employment and that such resignation was accepted by the employer. I believe that Mrs Mughelli was aware of this when she had her later conversation with Mr McPhee. Mrs Mughelli had resigned once before during her very short period of employment with the respondent and it is not unreasonable for the employer to have formed the view that a second resignation should be accepted.

I dismiss the application.

Order accordingly,

D. A. SWAN, Commissioner

Released: 7 June 2002

Appearances:-
Ms K. Bow of Workplace Equity Consultants, on behalf of the Applicant.
Mr J. S. Wright of WAW Consultants, on behalf of the Respondent.

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Retailers' Association of Queensland Limited, Union of Employers (No. Q21 of 2001)

REGISTRAR EWALD

13 June 2002

Conduct of Election – Prescribed Information – Reason for Election – Electoral Commission to Conduct Election.

DECISION

On 6 and 11 June 2002 the Retailers' Association of Queensland Limited, Union of Employers lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* in relation to the conduct of an election for the following positions of Office:

| <i>Office</i> | <i>Number of Positions</i> |
|---------------------|----------------------------|
| President..... | 1 |
| Vice-President..... | 2 |
| Treasurer | 1 |
| Councillor | 11 |

Timing of Elections

Nominations are called by forwarding a notice to members at least 28 days prior to the Annual General Meeting which, this year is scheduled for 14 August 2002. Nominations are to be lodged with the Returning Officer 14 days prior to the Annual General Meeting.

Reason for Election

Rule 39 prescribes that all members of the Council retire annually and under rule 31 elections are held annually leading up to the Annual General Meeting.

Number of Councillors

Rule 31 prescribes that the number of Councillors is to be determined by the Association in general meeting and the Association advises that the number has been determined as 15 at the AGM on 16 August 2001.

Conduct of Election by Electoral Commission

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

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

Dated 13 June 2002.

E. EWALD
Industrial Registrar.

Released: 13 June 2002

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Australian Federated Union of Locomotive Employees, Queensland Union of Employees (No. Q20 of 2002)

REGISTRAR EWALD

11 June 2002

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

DECISION

On 4 June 2002 the Australian Federated Union of Locomotive Employees, Queensland Union of Employees lodged in the Registry under section 481 of the *Industrial Relations Act 1999*, the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* in relation to the conduct of an election by the Electoral Commission for the following positions of office:-

| <i>Office</i> | <i>Number of Positions</i> |
|---|----------------------------|
| State Secretary | 1 |
| Divisional Councillor - No. 7 Division | 1 |
| Proxy Divisional Councillor – No. 1 Division..... | 1 |
| Proxy Divisional Councillor – No. 3 Division..... | 1 |
| Trustee | 1 |
| Branch Secretary, Jilalan Branch | 1 |

Calling of Nominations

No date is prescribed for the opening of nominations by the Rules 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.

I am prepared to exercise my discretion and extend the prescribed time for filing of such information to 4 June 2002.

Reason for Election

The Industrial Organisation advises that the term of office for the State Secretary will expire on 31 December 2002. The other positions are notified as casual vacancies and unfilled positions.

Method of Election

The method of election for each of the positions of office is by a direct vote by secret postal ballot of members of the Industrial Organisation, Division or Branch as the case may be.

Electoral Commission to Conduct Election

I have considered the request, the Act and Rules, and I am satisfied that an election is required to be held for the positions of office set out above. The Organisation's rules are affected by s. 458 of the Industrial Relations Act 1999. By virtue of this section the Organisation's Rules are taken to contain the Model Election Rules.

Under section 482 of the *Industrial Relations Act 1999*, I am making arrangements for the conduct of the election for the above positions of the Australian Federated Union of Locomotive Employees, Queensland Union of Employees.

Dated 11 June 2002.

E. EWALD
Industrial Registrar.

Released: 11 June 2002

Filename: no.9 21.06.02
Directory: S:\QIRCDEV-BASE\qgig\2002\vol 170
Template: H:\NORMAL.DOT
Title: QGIG - Vol. 170 No. 9 21.06.02
Subject:
Author: Queensland Industrial Relations Commission
Keywords:
Comments:
Creation Date: 25/06/2002 11:30:00 AM
Change Number: 3
Last Saved On: 17/01/2008 2:01:00 PM
Last Saved By: TorrenVM
Total Editing Time: 2 Minutes
Last Printed On: 17/01/2008 2:02:00 PM
As of Last Complete Printing
Number of Pages: 30
Number of Words: 28,822 (approx.)
Number of Characters: 148,149 (approx.)