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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

## NOTICE

The following Agreements have been certified by the Commission:

No/s	Title	Date certified	Cancelling
CA342/02	Hume Masterpanel Pty Ltd - Certified Agreement 2002 for Maintenance Employees	22/8/02	CA60/00
CA345/02	Charters Towers City Council - Certified Agreement	22/8/02	CA468/96
CA346/02	Hervey Bay City Council Enterprise - Certified Agreement No. 4	22/8/02	CA452/99
CA347/02	Boonah Shire Council Enterprise Bargaining - Certified Agreement 2002	22/8/02	CA545/00
CA224/02	DESA Australia (Qld) Pty Ltd Certified Agreement - 2001/2002	23/8/02	
CA225/02	Impulse Electrical Pty Ltd Certified Agreement - 2001/2002	23/8/02	
CA326/02	I & C Instrumentation and Electrical Pty Ltd - Certified Agreement – 2002-2005	23/8/02	
CA285/02	Call A Cleaner - Certified Agreement	26/8/02	

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Industrial Registrar

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**The Australian Workers' Union of Employees, Queensland (for Charles Bellchambers)  
And Mount Isa Mines Limited (No. B573 of 2002)**

COMMISSIONER BLADES

22 August 2002

Unfair dismissal – Underground miner – 30 years service with employer – Effect of dismissal significant upon employee and family – Serious breach of safety procedures – Consequences in underground mine could have been disastrous – Employee accepting the seriousness of the conduct – Employee showing remorse and admitting guilt – Employee seeking a second chance – Employer claiming loss of faith in employee – Serious misconduct at common law – Whether dismissal harsh unjust or unreasonable – Held serious misconduct – Dismissal not harsh, unjust or unreasonable – Dismissal not an unfair dismissal – Application dismissed.

## DECISION

Charles Bellchambers and Donald Wright were dismissed by the respondent Mount Isa Mines Limited on 11 March 2002 for allegedly breaching barricade and signage procedures by passing through an area where tele-remote operated equipment was working in the mine without obtaining authorisation directly from the tele-remote operator. Initially, joint trials were scheduled but at the last moment, Mr Bellchambers was granted a separate trial with the consent of the parties. Mr Bellchambers alleged in the application that the problems arose due to system failures which were not attributable to him. Mr Wright's case remains to be heard.

Mr Bellchambers was a long time employee of Mt Isa Mines, having commenced work in 1971. At the time of his dismissal, he was a Jumbo Miner earning about \$120,000.00 p.a. There is no doubt that the dismissal has had serious ramifications for him and his family.

An incident occurred on 2 March 2002. Mr Bellchambers clearly regrets what occurred. In his affidavit he says:

*"I admit that what I did on 2 March 2002 was a clear breach of the procedures that we are all expected to follow. At the end of the day, I have no excuse for what I did. I know that things could have gone terribly wrong and that people could have died or been injured. I cannot apologise enough for what I did on that day."*

In an emotive address on his behalf, Mr Swan made an impassioned plea for a second chance and highlighted the applicant's contrition, regret and unreserved acceptance of his wrongful conduct.

So what did occur at Mount Isa Mines on that day?

In the letter of dismissal, the respondent said:

*"Those investigations and discussions with you and others involved in the incident have established that as a result of your direct actions, you put yourself and a fellow worker at grave risk when you entered and then waved your fellow worker through a barricade without having authorisation from the operator. A direct consequence was a near-miss (sic) with a 1700 mucking unit that was being operated via tele-remote as was signed on the barricade. In addition to your failure to follow correct barricade and signage procedure, you removed equipment involved in the incident and failed to remain at the site and you also failed to report this incident to your supervisor. Lead Mine management considers this incident to be a serious safety breach.*

*Given the seriousness of your safety breach, Lead Mine management have lost all faith in your ability to act safely in your role without risk of injury to yourself or others. Accordingly, you are hereby advised that your contract of employment is terminated effective 4.00pm 11 March 2002."*

The matter was investigated and a fair treatment appeal was conducted. There appears to be no complaint with that procedure. The issue appears to be whether the dismissal was an over-reaction to the breach in the light of the applicant's personal circumstances which include his age, his meritorious service of 30 years with Mt Isa Mines, his inability to obtain any other work in Mt Isa where he has lived for the last 35 years and raised his family, that he is untrained for any other activity, that his education extended only to year 8, that he is paying some \$400 per week maintenance for children of a former marriage, that he is supporting a wife and married daughter and her daughter, that he has a mortgage and that his present wife, although employed from time to time, is suffering from breast cancer. Mr Swan described the dismissal in these circumstances as cataclysmic for Mr Bellchambers. The issue is not whether there was a valid or proper reason for the dismissal but whether the dismissal was, in all of the circumstances, harsh unjust or unreasonable.

The respondent alleges that on 2 March 2002, a remote operated Mucking Unit was being operated on Level 10 Underground. There are three access points to the mucking area, the M73 upside access point, the M73 downside access point and the 10 Level access point. The tele-remote cabin was located on Level 9. While this remote unit was being operated, each of the access points to the mucking area was barricaded off by a chain and by an infra-red beam which, if interrupted, is designed to cause the power supply to the remote unit to trip, bringing the unit to a stop. There were two signs on the chain at each barricade stating "Danger, Telemucking in Progress, Strictly No travelling Without Authorisation from Operator" and "Danger, No Travelling Unless Authorised". At each barricade was located a clear-call which is a communication line between the barricade and the tele-remote cabin where the operator was operating the remote unit. Use of this clear-call permits anybody wishing to enter the mucking area to contact the remote unit operator to request permission to enter the mucking area.

On the date referred to, the applicant together with Mr Wright and a Mr Tony Kvaternik were to undertake tasks in the 10 Level Underground Mine Headings. To access the 10 Level Underground Mine Headings from where they were, they had to pass through one of the M73 upside or M73 downside barricades, through the mucking area and out through the 10 Level barricade.

At various times and with the permission of the tele-remote operator, Messrs Bellchambers, Wright and Kvaternik proceeded through the bottom barricade, through the mucking area and out through the Level 10 barricade into the 10 Level Underground Mine Headings area. While they were attending to their tasks in the area, unidentified mobile equipment travelling along the decline on Level 9 caught part of the four pair cable connecting the clear-call and infra-red beam at each barricade with the tele-remote cabin on Level 9. This resulted in a number of copper wires within the cable being exposed causing a number of circuits to short. The infra-red beams and clear-call systems at all three barricades were rendered inoperative.

After about 20-30 minutes, the applicant, Mr Wright and Mr Kvaternik decided to return. They proceeded to the Level 10 barricade in order to pass back through the mucking area. The applicant proceeded to the clear-call at the Level 10 barricade to contact the tele-remote operator to obtain permission to return but it was not working. He then proceeded to the infra-red beam and sought to trip it by waving his hand through the beam. The infra-red was not working. He saw the remote unit operating in the mucking area and assumed that it was being operated manually. The chain barricade was still in place with the signs on it stating "Danger, Telemucking in Progress, Strictly No Travelling Without Authorisation from Operator" and "Danger, No Travelling Unless Authorised". He then removed the chain barricade with the warning signs attached and waved Mr Wright through. Mr Wright was driving a charge care loaded with explosives. He drove into the path of the remote unit and was seen by the operator on Level 9 who immediately applied the park brake bringing the remote unit to a stop. (Mr. Kvaternik, who had stalled his vehicle, did not proceed through).

Mr Bellchambers' initial statement was not at variance with that account. When asked why he went past the barricade he said that the nearest phone was back around the corner and there was no communication where they were. He relied on the fail-safe to tell him something was wrong. He did not see anybody operating the loader but he thought it was being driven by somebody. He did not realise until next day that nobody was on it, hence the reason he failed to report the "near-miss" incident.

After the Fair Treatment process, Mr Simpson, the General Manager of Mining Lead Zinc who conducted that process, wrote to Mr Bellchambers which included the following:

*"After reviewing all of the information, including information provided by you, I have found that you breached barricade and signage procedures by passing through an area where the tele-remote operated equipment was working without obtaining authorisation directly from the tele-remote operator. These procedures are in place for the safety of all personnel working in the underground environment.*

...

*This breach is extremely serious and it is very fortunate that fatalities did not occur. In addition to passing through a restricted area without authorisation, you then breached another procedure when you removed equipment involved in a serious safety incident and failed to remain at the site. You then breached a third procedure when you failed to report this immediately, and in fact, failed to report it at all, to the tele-operator or to your supervisor.*

*I believe you were aware of the gravity of the situation. You had two discussions at the bottom barricade directly after this incident. Firstly with Don Wright, who had seen that there was no operator on the unit and who advised you to report this incident to the tele-remote operator. Secondly, with Tony Kvaternik, who had just had discussions with the tele-remote operator at the incident site. This leads me to believe that you have been less than honest with me in regards to what you knew about this incident.*

*You had several opportunities to report this incident to your supervisor and you failed to do so. Our investigations revealed that there was radio contact at the bottom barricade where you should have contacted your supervisor and the tele-remote operator. Instead, you made the choice to leave the area without reporting the incident at all.*

*I consider your several failures to follow fundamental company procedures to be serious misconduct. Given the severity of your failures to follow company safety procedures, I am not prepared to overturn the decision to terminate your employment."*

I thought that Mr Bellchambers' reaction to a question at the Fair Treatment process expressed an unfortunate attitude about barricades and which probably explains why he acted as he did. He said "Who gets the sack over a barricade. I haven't had a problem in 20 years and the first time in 30 years I get the sack."

That attitude is inconsistent with the emphasis placed upon safety in modern times. Safety was, since 1964 governed by the *Mines Regulation Act 1964* and the *Metalliferous Mining Regulations*. This legislation was replaced in 1999 by the current legislation, the *Mining and Quarrying Safety and Health Act 1999* and the *Mining and Quarrying Safety and Health Regulation 2001*. The provisions of that Act relating to safety commenced on 16 March 2001. The Regulation also commenced on that date. When the *Mines Regulation Act 1964* was repealed, penalties for a breach ranged from \$1,500 to \$3,000 for an individual and \$7,500 to \$15,000 for a company. Under the *Mining and Quarrying Safety and Health Act 1999* the fines for an individual range from \$30,000 to \$60,000 or two years imprisonment and for a company from \$150,000 to \$300,000. The provision for these maximum penalties brings into stark reality the emphasis placed upon workplace health and safety in mining operations since 16 March 2001. (It is of course conceded that the penalty on a person where death or grievous bodily harm is not occasioned by the conduct is one of a maximum fine of \$30,000 without any liability to imprisonment.). These requirements for workplace health and safety are forced upon employers and employees alike and significant penalties are imposed for failure.

Commensurate with its obligations to ensure safety at the mine, the employer issued various safety instructions of which the applicant was well aware. There was a Safety Policy issued 2 April 2001 which contained Policy Guidance Notes and Key Expectations for Success. It exhorted everybody to be personally accountable for their safety and health performance and for the safety and health performance of those they manage or supervise. It exhorted all employees to understand what was expected of them and to actively participate in the successful improvement of Mt Isa Mines' safety performance. In a refresher course conducted by the employer on 7 August 2001, Mr Bellchambers answered the following questions in the manner indicated:

"Q. Who may go beyond a "NO TRAVELLING" sign and barricade?

A. No one.

Q. Who may go beyond a "NO TRAVELLING UNLESS AUTHORISED" sign and barricade?

A. A person authorised by the area responsible supervisor."

In a Lead Mine Safety Focus Assessment in March 2000, Mr Bellchambers was asked to "Name 1 important safety rule when working near or approaching mobile equipment". Mr Bellchambers answered "Never assume the operator has seen you". On 9 September 1997 in another questionnaire, he indicated he was aware of what to do to ensure that accidents be prevented. On 4 March 1998, he indicated that lack of knowledge, lack of training, not following procedures and attitude was a direct cause in almost all accidents. On 13 April 2000, in another document, he indicated that 96% of workplace injuries were caused by unsafe acts. He also indicated in a document on 30 July 2001 that he was aware of what was meant by acceptable risk.

The employer issued to each employee an annual Safety Diary. Copies of these diaries for 1996, 1997-1998, 1998-1999, 2001 and 2002 were exhibited. They contained such statements as:

- . Safety is a condition of employment.
- . It is a condition of your employment that every accident, no matter how minor, is reported to your Supervisor.
- . Report all near hit incidents to your Supervisor so they can be investigated and action taken to prevent a recurrence.
- . It is essential to obey all safety rules, signs and signals.
- . Defacement or removal of any safety device, sign or signal could lead to instant dismissal.
- . All employees, contractors and visitors shall:
  - . Observe all safety rules as a condition of employment or lease entry;
  - . Respect safety signs and keep all safeguards in place;
  - . Follow isolation and clearance procedures and secure barricading in its place;
  - . Report all injuries, hazards or potential hazards immediately.
- . Failure to comply with Site Safety Rules is a Category 3 event under PEEPB and may warrant final warning or dismissal.
- . Never ignore a barricade or barrier.

There was an Operations Note sent to Supervisors about 6 March 2001 whereby they were to advise crewmembers, in respect to the apparent unclear understanding of Tele-mucking practices that:

*“Any person wishing to access an area where tele-remote operations are being conducted **MUST** contact the Tele-mucker by clear-call, Telephone or radio and obtain permission to enter the area. Where a group of people is in the same vehicle then the driver of the vehicle becomes responsible to ensure that all actions occur.*

*No one is to pass beyond the chain barricade until permission has been obtained from the Tele-mucker.*

*When permission has been obtained then the visitor to the area shall ensure the chain barricade is re-hung immediately after passing beyond it.”.*

On 13 June, 2001 in response to an incident involving the replacement of barricades, a memorandum was sent to Lead Mine employees:

*“If you wish to enter a telemuckers area you must make contact with the telemucker by either **clear calls, radio** or by **signalling the driver to stop**. You must not proceed into the telemuckers area unless you have communicated with him and he has given you permission to be there. Upon completion of your task, you must again notify the operator to tell him you are now leaving his area and have replaced the barricade.”.*

Finally in August 2001, there were toolbox talks on signs and barricades and dealing with signs such as “Danger No Travelling” and “Danger No Travelling Unless Authorised”.

These instructions and warnings go to show the seriousness with which safety issues are regarded by the employer and the extent to which the company goes to ensure that its workforce is acquainted with safety issues and follows the procedures set out. This is nothing less than as required by the Legislation. There is no doubt that a breach of safety procedures in an underground mine could result in very serious consequences for many.

Mr Swan drew the Commission’s attention to an apparent inconsistency between the treatment of Mr Solomon, the Supervisor to whom the incident was reported by Mr Cunningham the tele-remote operator. Mr Solomon did not report the incident to his Superior until a day later and for his breach of the reporting requirement, he was given a first warning. Mr Swan submitted this was inconsistent with the penalty handed out to Mr Bellchambers. The culpable conduct cannot be compared. That Mr Solomon also received a first warning for much less significant conduct exemplifies the seriousness with which the employer regards breaches of its safety policy.

Whether Mr Bellchambers was truthful in his claim that he failed to report the incident because he was unaware of an incident until the next day was not tested by evidence at the hearing. It was clear that when Mr Simpson conducted the Fair Treatment Appeal, he had other evidence than the denial of Mr Bellchambers at his disposal and he came to the conclusion, vide his letter to the applicant dated 25 March, that the applicant was not telling the truth about his failure to report the incident. That information also formed the basis of the letter of termination of 11 March. The employer was entitled to act upon the evidence it had garnered if it honestly and reasonably believed that evidence, after a proper investigation. It did not have to accept the applicant’s denial and was entitled to act on the basis that the applicant was not truthful. Although the applicant swore in the written material provided to the Commission that his version was correct, the other participants Donald Wright, the other person dismissed and Tony Kvaternik were not called and what was contained in the letter of dismissal and in the Fair Treatment process determination was not otherwise challenged. Both parties had ample opportunity to call either witness. However, in his opening statement to the Commission, Mr Swan said that Mr Bellchambers did not deny proceeding through the barricade without authorisation, that he admitted he took his vehicle out of the vicinity after the near-hit and that he squarely accepted responsibility for the failure to immediately report the incident. These admissions would seem to dispense with the need for evidence and must be taken as admissions as to the respondent’s allegations.

But what I find to be most significant in this matter is not the failure to report but the removal of the barricade. Of course, if Mr Bellchambers was unaware of any incident, there was nothing to report. If he was unaware of an incident, he could hardly have removed equipment involved in a serious safety incident and to have failed to remain at the site. But the real issue is the removal of the barricade. He knew he should not have removed it. He knew he should not have assumed the tele-mucker was being operated manually and he had no reason to make that assumption. The three fail-safe devices were there to prevent an accident. Two of them failed. The most obvious device was still there, namely the barricade which indicated that tele-mucking was in progress and that there was no travelling without authority. Mr Bellchambers simply set aside the barriers. There was no excuse for that, even if the other two fail-safe methods were not operating. The failure to remain and the failure to report exacerbated the original dangerous act.

The conduct did not result in injury to anyone. Like acts of dangerous driving or driving under the influence of liquor where no injury has occurred, Mr Bellchambers’ act had the potential to cause serious injury and this makes it none the less serious. The danger of a remote-operated tele-mucker weighing 30 tonnes with a possible load of another 10 tonnes crushing a vehicle loaded with explosives was real, not remote.

There was no attack upon the fairness of the procedure adopted and indeed, there was no evidence to suggest anything other than fairness was shown to the applicant. The only criticism that was made was that the employer did not probe the employee’s personal circumstances prior to making the decision to terminate. There is no evidence before the Commission of what occurred at that time and what information was put before the employer. The employer however, knew that the applicant was a long term employee. Because of the unique situation in Mount Isa with the one employer controlling virtually all of the employment in and about the mine, it can be readily inferred that the employer knew of the difficulty likely to be experienced by the employee in securing further employment. It is also readily inferred that the employer knew of the age of the employee. In *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20, Gray J held (at p. 35) that the employer is required to ascertain whether there are any mitigating factors, either associated with the alleged ground for dismissal, or arising from the employee’s past record and future prospects. In the Fair Treatment process, the applicant had the company of a Union Representative. The applicant’s length of service was mentioned and it was also pointed out that he had a family. But no one brought forward the unusual personal circumstances of the applicant to inform the hearing of any exceptional matters that existed. The circumstances of the applicant’s wife having cancer was solely within his knowledge as was his peculiar financial circumstances and in my view, while there is an obligation on the employer to seek mitigating circumstances, there is also an obligation on the employee to bring unusual matters to the employer’s attention for consideration. That opportunity was provided, presumably in the dismissal proceeding, but certainly in the Fair Treatment process which was akin to a “show cause” hearing.

It has not been specifically argued by the applicant that Mr Bellchambers’ actions did not amount to serious misconduct as alleged although it may be presumed that that is the contention. It was clearly conduct which provided a ground for dismissal for it was “conduct which in respect of important matters was incompatible with the fulfilment of his duty” – *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66 at 81. The employer claimed the right to dismiss for – breach of company policy; untruthfulness and breach of trust; duty of care to others; failure to follow lawful directive; failure to follow fundamental procedures; removing equipment involved in an incident; failing to remain at the scene; failing to report a near-hit. But it is not any misconduct which entitles an employer to summarily dismiss an employee, that is, dismiss without notice or payment of wages in lieu and without regard to the provisions of s. 77(c) of the Act, i.e. whether the employee has been warned or given an opportunity to respond. I am not told whether Mr Bellchambers was paid notice in lieu although an inference may be drawn to that effect from the written submissions. The *Mining Area – Mount Isa Mines Limited – Certified Agreement 1996* provides in clause 4.3(d) that the process to ensure effective personal behaviour and the three step process therein provided for does not affect the right of the employer to summarily dismiss for “serious or wilful misconduct”. The “right” referred to is the common law right. Conduct which is merely “misconduct” is not sufficient at common law to justify the summary dismissal of a long term employee of prior good record. In *Bruce v A W B Ltd* (2000) FCA 594 Sundberg J, in dealing with a clause using the phrase “serious misconduct” said:

*“Two conditions must be satisfied at common law in order to justify a summary dismissal. First, there must be a breach by the employee of the terms of the contract or a demonstrated intention not to be bound by those terms. Secondly, the conduct must be sufficiently serious to allow summary termination. ... The words ‘serious misconduct’ reflect the common law position that mere misconduct is not sufficient. The conduct must be serious enough to justify summary dismissal. It must constitute a repudiation of the contract or one of its essential conditions.”.*

His Honour cited Lord Evershed MR in *Laws v London Chronicle (Indicator Newspapers) Ltd* (1959) 2 All ER 285 as follows:

*“... that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; and ... therefore ... the disobedience must at least have the quality that it is ‘wilful’; it does (in other words) connote a deliberate flouting of the essential contractual conditions.”.*

Wootten J in *Scharmman v APIA Club Ltd* (1983) 6 IR 157 at 163 said:

*“A breach by one party will give the other party a right to terminate the contract if the breach evinces an intention not to perform the contract or if the term of the contract which has been broken is of vital importance. ... There is no fixed rule of law defining the degree of misconduct which will justify dismissal ... . The right will arise if something is done by the employee which impliedly or expressly is a repudiation of the fundamental terms of the contract ... . If an employee by wilful disobedience to a lawful and reasonable order shows a determination to disregard an essential term of his contract, then this may amount to a repudiation of the contract entitling the employer to elect to treat the contract as at an end ... . The type of conduct which can amount to a repudiation must necessarily depend on the circumstances of each individual case.”.*

As an example, in a Workers’ Compensation case, Conybeare J in *Levin v Moulhis* (1965) 39 WCR (NSW) 177 held that a worker who, having the opportunity to stop, deliberately drove his taxi cab through a red traffic control light at high speed was guilty of serious and wilful misconduct. In *Transport Commission (Tas) v Neale Edwards Pty Ltd* (1954) 92 C.L.R. 214 Webb J said that:

*“To establish wilful misconduct it was necessary for the respondent to point to evidence that the driver knew and appreciated that it was wrong conduct on his part to do or to fail or omit to do a particular thing, and yet intentionally did or failed to do or omitted to do it, or persisted in the act, failure or omission regardless of consequence: ... Or that the driver acted with reckless carelessness, not caring what the results of his carelessness might be.”.*

I would also refer to what Cook J said in *Re Dispute; Re Dismissal of Union Delegates at Homebush Abattoir* (1966) AR (NSW) 371:

*“... the question of whether the conduct of an employee amounts to misconduct justifying instant dismissal would generally depend upon whether or not the act complained of can properly be regarded as deliberate or wilful or of such a nature as to strike at an essential element in the contract of service, namely, obedience to the lawful commands of the employer and the right of the employer to enforce discipline.”.*

To that I would add “and the right and obligation of the employer to enforce safety and protect other workers”.

The potential consequences to the safety of employees was referred to by Macken J in *Elcom v Electrical Trades Union of Aust., NSW Branch* (1983) 5 IR 267 as “tipping the scales” in the case of a single instance of misconduct. Lawson C in *Kovacevic v Pirelli Cables Australia Limited* Print S2575 thought that workplace fighting, in the context of a cable-making factory which carried inherent risks due to the heavy plant and equipment used and the danger both to the participants and otherwise uninvolved employees, would justify summary termination. In *Stone v Broken Hill Pty Ltd (960133)* Farrell JR held that leaving the work site where there was some risk to the safety of others was misconduct and a valid reason for termination, but because the risk was relatively small and the circumstances in which it could arise were rare, the conduct could not be described as serious misconduct. In *Peluso v Cadbury Schweppes Limited* Q0665 Foggo C ordered a reinstatement of a long term employee (23 years) because the company did not itself believe that summary dismissal was appropriate. However, the Commissioner made some remarks which are particularly apt in this case, viz:

*“There is nothing more important than the safety of employees and the employee’s responsibility to look after themselves and to expand that responsibility to others. There is only one issue to be considered. You only get one chance ... .”.*

I am satisfied that it was made clear that safety observance was a condition of the employment. It was of vital importance and Mr Bellchambers knew that. It was an essential term of the employment contract. Mr Bellchambers’ actions constituted a deliberate and serious disregard of an essential condition of which he was well aware and he was initially dishonest in his responses to his employer. He seemed unconcerned with any consequences. There was an absence of willingness to perform vital contractual obligations. Consideration must also be given to the public interest in safety in the workplace, but more importantly in this case, in the inherently dangerous operation of mining. The applicant, by deliberately removing the safety barricade and failing to report the incident in breach of clear instructions on safety acted inconsistently with those safety policies and in doing so, repudiated his obligations under the contract – *Liston v Cobbity Farm Bakeries Pty Ltd (1998) 158 QGIG 454*. He acted with “reckless carelessness, not caring what the results of his carelessness might be”. Other workers must be able to have confidence in their mates.

The issue is whether the dismissal was harsh, unjust or unreasonable. That requires a consideration of the issues identified in s. 77(a), (c) and (d) of the *Industrial Relations Act 1999* (the Act), that is, whether the employee was notified of the reason, whether the employee had been warned and given an opportunity to respond and any other matters considered relevant. It is the “other matters considered relevant” which assumes importance.

Even if there are grounds for terminating the contract of employment, it is still open to the tribunal to examine the severity or otherwise of the step of dismissal – *Metropolitan Meat Industry Board v Australasian Meat Industry Employees’ Union NSW Branch (1973) AR (NSW) 231*.

That the personal circumstances of the applicant are relevant to a determination of whether a termination was harsh, unjust or unreasonable, is without doubt – *Byrne and Another v Australian Airlines Ltd (1995) 61 IR 32*. At p 72 McHugh and Gummow JJ said:

*“It may be that the termination is harsh but not unjust or unreasonable, unjust but not harsh or unreasonable, or unreasonable but not harsh or unjust. In many cases the concepts will overlap. Thus, the one termination of employment may be unjust because the employee was not guilty of the misconduct on which the employer acted, may be unreasonable because it was decided upon inferences which could not reasonably have been drawn from the material before the employer, and may be harsh in its consequences for the personal and economic situation of the employee or because it is disproportionate to the gravity of the misconduct in respect of which the employer acted.”.*

But that statement does not mean that if a dismissal is found to be harsh in its consequences for the personal and economic situation of an employee yet is otherwise not unjust or unreasonable, it is not unfair. With respect, I do not agree with that proposition which is to be found in cases such as *Stevens v Adesu Engineering Pty Ltd* Print R0792; *Cannon v McPhee Transport* Print R4532 and *Foti v Morris Productions Pty Ltd* Print R3837, all decisions of the Australian Industrial Relations Commission and which are referred to in the respondent’s submission. In my respectful view, if a dismissal is found to be either harsh, unjust or unreasonable, if the dismissal fits any of those epithets, it is unfair – s. 73(1) of the Act.

However, before there can be a finding that a dismissal operates “harshly” upon an employee as that term is used in the Act, the whole of the circumstances must be considered, not just the effect upon the employee. Thus in *Bostik (Aust) Pty Ltd*, Sheppard and Heerey JJ said at 28:

*“Any harsh effect upon the individual employee is clearly relevant but of course not conclusive. Other matters have to be considered such as the gravity of the employee’s misconduct.”*

In *Gregory v Phillip Morris Ltd* (1988) 80 ALR 455 at 462, Jenkinson J said:

*“It is not enough that the termination causes the employee to suffer injustice, or that the termination may be considered harsh in its effects on the employee. ... It is in my opinion not to be supposed that the draftsman of the sub-clause was intending to impose on the employer an obligation to abstain from terminating his employees’ employment whenever the termination would operate harshly on the employee, or would subject the employee to injustice, without regard to the identity of the person on whom lay moral responsibility for bringing about that harsh effect or that injustice. It is in my opinion only a termination which it is harsh of the employer to impose, as well as being harsh in its effect on the employee, that contravenes the sub-clause. And it is only a termination which it is unjust of the employer to impose, as well as working injustice to the employee, that effects such a contravention.”*

Von Doussa J said in *Sangwin v Imogen Pty Ltd* (960073):

*“In virtually every situation of termination of employment, hardship to a greater or lesser degree is likely to come to the employee. Often the economic and personal hardship to the employee and to his family will be considerable. But in considering the application of ... the Act, it must be recognised that its provisions are intended to operate in the practical arena of commercial activity, and that in the endeavour to achieve industrial fairness it is necessary to balance the interests and well being of an individual employee against the interests of the employer, and also to have regard to matters of wider public interest which may be involved. The construction of the Act is not to be considered only from the viewpoint of the employee.”*

In *Byrne and Another v Australian Airlines Ltd*, the primary Judge, Hill J said that length of service (20 years and 25 years) could not have acted as a justification to prevent dismissal once involvement in pilfering was established and that view was upheld by McHugh and Gummow JJ at p. 75.

The *Mining and Quarrying Safety and Health Act 1999*, which had input from Unions as well as Government and mining industry representatives, imposes obligations for safety and health on a number of persons, including workers and the employer. There is also a common law obligation on employers to prevent accidents in the workplace. This is referred to in *Kennelly v Incitec Ltd* (1998) 1470 FCA where Spender J cited the High Court in *McLean v Tedman* (1984) 155 CLR 306 at 313:

*“The employer’s obligation is not merely to provide a safe system of work; it is an obligation to establish, maintain and enforce such a system. Accident prevention is unquestionably one of the modern responsibilities of an employer. ... and in deciding whether an employer has discharged his common law obligation to his employees the Court must take account of the power of the employer to prescribe, warn, command and enforce obedience to his commands.”*

Over the years, there have been a number of incidents involving safety at Mount Isa Mines. In one of those, *Kiss v Mount Isa Mines Limited* (1998) 158 QGIG 451, Hall CC, as he then was, said that the applicant had a duty to take reasonable care of his employer’s machinery and to take reasonable care for the safety of his fellow employees. Although in that case the applicant had a poor safety record, it was pointed out that the mine was an inherently dangerous place, the machinery was expensive and of daunting proportions. The Chief Commissioner accepted that termination was an entirely sensible result of a loss of confidence in the applicant’s judgment.

The danger in mining was highlighted by the Honourable the Minister in the second reading speech to the introduction of the *Mining and Quarrying Safety and Health Act 1999*, reported in Hansard 24.3.99 p. 734:

*“The inescapable fact is that the safety record of the mining industry is not good. There have been four major coalmine disasters in 23 years. Over the past 20 years there have been 56 deaths in the mining and quarrying industry and 49 deaths in the coal industry.*

...

*We can never become complacent about safety in mining.”*

In the Warden’s Court of Queensland in two Mining Enquiries conducted by the Mining Warden with Reviewers following incidents involving fatal injuries at Mount Isa Mines, it was recommended, first in the case of Jackson (incident 6.10.96) that:

*“Formal auditing procedures should be implemented to ensure that the Standard Work Instructions are soundly established, maintained and observed.”;*

and secondly, in the case of Martin (incident 26.1.91) that:

*“We consider there are adequate rules and procedures in relation to signs and barricades, but it is imperative that personnel be instructed to observe those rules and procedures at all times.” (my emphasis).*

There is no doubt that the personal circumstances, future prospects and long term employment of Mr Bellchambers attract sympathy. He has admitted his guilt and expressed sincere regret. But he brought his dismissal upon himself by a serious breach of safety procedures of which he was well aware. The employer had gone to considerable lengths to explain, inform and direct employees in this regard. The workplace is clearly a dangerous operation. The employees cannot be personally supervised at all times and are required to be responsible for their own tasks, behaviour and accountability. The employer owes a duty of care not only to the applicant but also to other employees to protect them from irresponsible conduct and to enforce safety procedures. It alone has the power to prevent future transgressions. Breaches of the relevant Legislation could have produced significant penalties. That no one was injured by the conduct is fortunate but irrelevant. Placing a vehicle loaded with explosives into the path of a remote-operated heavy machine in direct breach of obvious instructions was dangerous. Even after the warnings and exhortations by the employer regarding safety issues, by his replies it would appear that the applicant was dismissive of his actions and he then exacerbated his conduct with dishonesty. After all of the training, he seems to have regarded safety with a certain detachment. There is thus some objectivity for the employer’s evidence that it has lost faith in applicant’s ability to carry out his duties in a manner which ensures not only his own safety but also the safety of others and that objectivity makes the employer’s evidence of loss of faith more acceptable.

There was no real alternative to dismissal. There is no point in waiting until after an event before endeavouring to enforce safety. An attitude of "who gets the sack over a barricade" must be changed. The effect upon Mr Bellchambers of the dismissal has to be balanced against the rights and obligations of the employer and the other employees. A line must be drawn and the observance of important safety procedures recognised and enforced.

It is emphasised that it is not every breach of Mount Isa Mines' safety instruction which would fall within the classification of serious or wilful misconduct and Isaacs J in *Adami* on p. 149 rejected the proposition that it matters not how isolated and trivial the occasion may have been, how unimportant the disobedience in relation to the employer's affairs, how doubtful in fact or law the legality of the order may have been and other matters. The cases show that a termination for one act of serious misconduct by a long serving employee is nothing but exceptional. The proposition put by the respondent that the favouring of long-term employees over employees with lesser service when dismissal is being considered could amount to discrimination is left to another day.

The employer has the onus to prove serious misconduct and the applicant must prove that the dismissal was harsh, unjust or unreasonable. I am satisfied on the balance of probability that Mr Bellchambers committed an act of serious misconduct. Bearing in mind the provisions of s. 77(a), (c) and (d) of the Act, particularly the seriousness of the conduct balanced against the effects on Mr Bellchambers, in all of the circumstances, I am not satisfied that the dismissal was harsh, unjust or unreasonable. I am not satisfied that the dismissal was unfair.

The application is dismissed.

B.J. BLADES, Commissioner.

*Appearances:*

Mr B. Swan, The Australian Workers' Union of Employees, Queensland, for Mr C. Bellchambers.

Mr D. Wright on his own behalf.

Hearing date: 5 August 2002

Released: 22 August 2002

Mr J. Murdoch, Senior Counsel, instructed by Mr D. O'Brien, for Mount Isa Mines Limited.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – unpaid wages*

**Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch  
Union of Employees AND Vassallo Constructions Pty Ltd (No. W197 of 2001)**

COMMISSIONER ASBURY

23 August 2002

*Industrial Relations Act 1999 s. 278 – Application for unpaid wages – Leave sought to amend application to include claim for redundancy payments – Issue subject of amendment arising during cross-examination of respondent's witnesses – Commission required to act in a judicial manner and afford natural justice to parties – Case law in relation to judicial fairness – Amendment to application late in proceedings would be unfair to the respondent – Leave to amend the application refused – Applicant at liberty to make further application for redundancy payments – *Civil Construction, Operations and Maintenance General Award – State* – Clause 3.5(3) wet weather – Standing down of employees – *Industrial Relations Act 1999 s. 98* – History of legislative provisions dealing with rights of employers to stand-down employees without pay – Interaction between s. 98 of the *Industrial Relations Act 1999* and clause 3.3(3) of the *Civil Construction, Operations and Maintenance General Award – State* – Rights of employers to stand employees down due to wet weather not entirely removed by s. 98(2) of the *Industrial Relations Act 1999* – Consideration of requirements for stand-down of employee to be permissible under s. 98 of the *Industrial Relations Act 1999* – Case law in relation to standing down employees without pay – Onus on employer to establish that stand-down in particular circumstances was permissible under s. 98 of the *Industrial Relations Act 1999* – Stand-down of employee in this case not permissible under s. 98 of the *Industrial Relations Act 1999* – Flexi-time system implemented by respondent not permissible under the *Civil Construction, Operations and Maintenance General Award – State* or the *Family Leave Award* – Employer made and employee accepted payment in lieu of annual leave – Breach by both employer and employee of clause 5.1(3) of the *Civil Construction, Operations and Maintenance General Award – State* – Employee not entitled to claim benefit for breach of Award – Application granted in part – Respondent to pay employee for stand-downs during periods of wet weather – Offset granted for payment made for annual leave and sick leave – No offset for leave loading or flexi-time.*

DECISION

**The application**

This is an application under s. 278 of the *Industrial Relations Act 1999* (the Act) by the Federated Engine Drivers' and Firemens' Association of Australasia, Queensland Branch, Union of Employees (FEDFA) on behalf of Mr Allen Sommerfield (the employee). The application seeks an order for unpaid wages in the amount of \$10,288.40 against Vassallo Constructions Pty Ltd (the respondent). Mr Price represented the FEDFA. The respondent was represented by Mr Joy of the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI). The application was heard on 9 May 2002. Submissions were made in writing by the FEDFA on 22 May 2002 and for the respondent, on 31 May 2002. Submissions in reply were received from the FEDFA on 7 June 2002.

The FEDFA claims the amounts of:

- \$ 705.00 – unpaid meal allowances when overtime was worked by the employee;
- \$3,280.00 – for periods when the employee was stood down; and
- \$4,145.34 – for annual leave and loading;

**Leave to amend the application**

The application in its original form, did not include a claim for redundancy payments. The matter of redundancy payments arose during cross-examination of the respondent's witness, and in submissions the FEDFA sought to amend the application to include a claim of \$2,158.06 for redundancy payments. The grant of leave to amend the application was opposed by QCCI on behalf of the respondent. Mr Joy contended that it was not known that this claim would be made until the hearing of the application, and as a result of the amendment being sought after the respondent's witnesses had given their evidence in chief, the respondent was unable to provide instructions or to call evidence in relation to this point.

In my view, there is the additional difficulty, that there was no evidence from the employee about the matter of redundancy payments. It is true that the Commission is not strictly bound by the rules of evidence, but rather must perform its functions in a way that furthers the objects of the Act, avoids

unnecessary technicalities and facilitates the conduct of proceedings (s. 173(2)). It is also true that s. 329 of the Act provides wide procedural powers including the power under s. 329(d) to allow claims to be amended. However, that power is to be exercised in a manner which appears to be fair and just.

Members of the Commission are required to act in a judicial manner and the principles of natural justice are applicable to hearings before the Commission: *R v The Commonwealth Conciliation and Arbitration Commission and others; Ex parte Angliss Group* (1969) 122 CLR 546; *Re: Australian Bank Employees Union; Ex parte Citicorp Australia Limited* (1989) 167 CLR 513. The term “natural justice” in the context of administrative decision making can be equated to an obligation to act fairly or to accord procedural fairness. The requirements of natural justice or procedural fairness are not fixed and in any given situation, depend on the circumstances: *Mobil Oil Australia Pty Ltd v Federal Commissioner for Taxation* (1963) 113 CLR 475 at 504 per Kitto J:

The High Court in *Re: Australian Bank Employees Union; Ex parte Citicorp Australia Ltd* (1989) 167 CLR 513 at 519, pointed out that one aspect of the duty to act judicially is the duty to hear a party and allow that party a reasonable opportunity to present a case. Further, the duty to act judicially includes a duty to consider the cases put by parties. It follows that the provision to parties of an opportunity to present their cases, requires that they be given notice of the time and place of a hearing, and the issues to be considered. An application should provide information about the case to be met by the respondent: *R v North; Ex parte Oakey* [1927] 1 KB 491 at 502 per Scrutton LJ.

In *P&J Trucking Pty Ltd v Toll Transport Pty Ltd v/a Toll Logistics*, (2001) 166 QGIG 434 at 437, Blades C highlighted the importance of proper pleadings in applications under s. 276 of the Act. In my view, the comments made in that decision are equally applicable to applications under s. 278, which typically involve claims based on the application of award or legislative provisions to particular facts and circumstances. To permit late claims to be made in such cases, particularly during submissions, is like a “trial by ambush”. Further, in this case, the lateness of the claim made it impracticable to stand the matter over to enable an appropriate response to be formulated and necessary evidence called. In the circumstances, it would be unfair to the respondent if the FEDFA were allowed to pursue the matter of redundancy payments in these proceedings. I decline leave for the FEDFA to amend the application in respect of the claim for \$2,158.06 for redundancy payments. I note that this does not preclude the pursuit of the claim for redundancy payments on behalf of the employee by way of a separate application.

#### **Matters Conceded by the Parties Prior to or During Proceedings**

It appears that the respondent conceded the aspect of the claim in relation to meal allowances, prior to the commencement of the hearing into the application. Rather than formally advising of this concession, Mr Joy of QCCI forwarded a number of pieces of correspondence between himself and Mr Price offering to settle this aspect (and other aspects) of the claim, to the Commission. Mr Joy persisted in copying correspondence between himself and Mr Price to the Commission, notwithstanding my specific advice at a directions hearing on 17 April 2002, that this was inappropriate. On a number of occasions, Mr Joy attached correspondence to Mr Price detailing offers of settlement, to material forwarded to the Commission in response to the Directions Orders for the conduct of the application. This caused great difficulty, as I was required to disregard the correspondence detailing settlement offers, while attempting to extract relevant information, such as witness statements required by the Directions Orders, from that correspondence.

During the hearing of this matter it appeared that witnesses for the respondent conceded that the provisions of the Award with respect to the payment of meal allowances when overtime was worked had been misapplied. The FEDFA claim for meal allowances was also reduced due to a miscalculation in relation to the payment of meal allowances for overtime worked on Saturdays. In the submissions filed by QCCI for the respondent, no mention is made of meal allowances. Accordingly, I have concluded that this aspect of the claim has been conceded by the respondent, and that an order for the amount of \$705.00 with respect to this aspect of the application should be made against the respondent.

Further, during the hearing of this matter, Mr Joy for the respondent appeared to concede that the employee was entitled to be paid for any day when he had reported to work and held himself in readiness to perform work, but had been sent home by a supervisor or manager of the respondent due to wet weather. That this concession is made can also be deduced from the rather convoluted written submissions of Mr Joy for the respondent.

Suffice to say that the hearing and determination of this application could have been significantly streamlined, if Mr Joy had complied with the directions issued by the Commission at a preliminary hearing of the application on 17 April 2002, to the effect that the respondent was to file a formal response to the application, and that instead of inappropriately relaying offers of settlement to the Commission, should formally concede any aspects of the claim which were not contested.

During the hearing into the application, Mr Price conceded that the claim was not pressed for payment with respect to days when the employee had been absent on paid sick leave, as evidenced by pay slips tendered by the respondent.

#### **The Facts**

There are a number of facts upon which the parties agree (or which were not contested by the respondent). The employee was employed by the respondent under the terms of the *Civil Construction, Operations and Maintenance General Award – State* (the Civil Construction Award) as an Excavator Operator classified at Level CW7. The employee was employed by the respondent from May 1999 to 6 February 2001. (The employee said in his witness statement that he commenced employment on 25 May 1999, but the first entry in the time docket book used by the employee is dated 5 May 1999).

The respondent’s business was impacted from time to time, by the occurrence of wet weather, which would lead to situations where the respondent decided that work could not be performed because of that wet weather. When the respondent formed such a view, the employee would be stood down without pay.

There is conflicting evidence about how such a stand-down would be effected. For the respondent it was contended that employees were contacted by telephone and told not to come to work, or alternatively, had a standing instruction during extended periods of wet weather, to contact their supervisor each day, to ascertain whether work was available. The employee on the other hand, contended that there was only one occasion when he was contacted by a supervisor of the respondent and told not to report for work, and approximately two occasions when he had contacted a supervisor and been told not to report for work. On all other occasions the employee said that he had reported for work each day for which a claim for payment was made, and held himself in readiness to perform work.

To enable employees to maintain 38 hours payment for any week in which wet weather occurred, the respondent established a system where time worked in excess of forty hours per week was accumulated or “banked” and employees were paid banked time during periods where the respondent determined that work could not be performed because of wet weather. This time was referred to by the respondent as “flexi-time”. Initially, the employee agreed to bank overtime and to access that time as flexi-time during periods when work was not available, due to wet weather. This agreement was oral. At some point during the employee’s employment, he requested payment at overtime rates for work in excess of forty hours per week. When the employee’s banked hours had been exhausted, the employee accessed accrued annual leave, to cover periods of wet weather when the respondent determined that work could not be performed.

The employee kept a series of time docket books covering the period from 30 April 1999 to 6 March 2001. These books have the respondent's business name and contact details printed on each docket. The employee used the dockets to record days upon which he performed work and days when he claimed to have been stood down due to wet weather. The respondent did not produce any other time and wages records to the Commission. The respondent did produce a number of pay slips which had been provided to the employee, indicating that he was absent on annual leave or sick leave, or was paid "flexi-time", on a number of days for which he was now claiming payment on the basis of the contention that he had been stood down due to wet weather.

### The Issues for Determination

The FEDFA claim is based on the assertion that the employee was entitled to be paid for all time lost due to wet weather, provided that the employee met the requirements of clause 3.5(3) of the Civil Construction Award. The FEDFA maintains that the employer did not have the right to stand the employee down without pay for the reason that work was unable to be performed due to wet weather and claims payment for such stand-downs. It was also contended by the FEDFA that the employer's system of flexi-time was outside the provisions of the Award, and that the employee was entitled to be paid at ordinary rates, for periods when he was stood down due to wet weather. Accordingly, the use by the respondent of a system of flexi-time to provide payment to the employee for periods when he was stood down, did not meet the respondent's obligations to pay the employee for ordinary time lost due to wet weather.

Further the employee accessed annual leave payments only to avoid being stood down without pay for periods of wet weather, and was not on annual leave. The employee was therefore entitled to reimbursement of annual leave payments including leave loading, used to cover periods when he would not otherwise have been paid, due to the actions of the respondent in standing him down, because of wet weather.

For the respondent, it was contended that on many of the days for which payment was claimed by the employee, he was absent on sick leave or annual leave, and was not subject to a stand-down. Further, it was contended that the respondent had the right at all times to determine that work was unable to be performed due to wet weather on a particular day, and to advise employees prior to them reporting for work on that particular day, that work was not available due to wet weather, and that they were to be stood down without pay for that particular day. The respondent maintains that on a number of occasions during the period subject to the claim, the employee reported for work after having been lawfully directed not to do so, and is not entitled to payment for any day upon which this occurred.

The manner in which this case was argued has made the identification of the issues for determination difficult. However, in my view they are as follows:

1. What right did the respondent have to stand the employee down without pay for the reason that work was unable to be performed due to wet weather?
2. If the respondent had the right to stand the employee down for the reason that work was unable to be performed due to wet weather, did the Civil Construction Award operate to require the employer to pay the employee for the period he was stood down for this reason?
3. If the respondent had the right to stand the employee down without pay for the reason that work was unable to be performed due to wet weather, was the right exercised in a manner which was permissible under the legislative or award provision from which the right was derived?
4. Were the payments of flexi-time and annual leave made to the employee by the respondent sufficient to meet any legislative or award obligations which the respondent may have had to pay the employee during periods when the employee was stood down due to wet weather?

### Legislative and Award provisions

The FEDFA's case depends on the operation of the provisions of the Act and the Civil Construction Award with respect to payment for periods during which employees are stood down. The provisions of the Act dealing with this matter are contained in s. 98, in the following terms:

#### "98. Permissible stand-down of employee

- (1) An employer may stand-down an employee on a day, or for part of a day, when the employee cannot be usefully employed because of something that happened –
  - (a) for which the employer is not responsible; or
  - (b) over which the employer has no control.
- (2) The employer may stand-down the employee without pay, unless an industrial instrument provides otherwise.
- (3) This section does not apply to an apprentice or a trainee."

The Civil Construction Award provides as follows at clause 3.5(3):

"(3) *Wet Weather* – subject to the stand-down provisions contained within section 11.5 of the *Industrial Relations Act 1990-1991*, all time lost through wet weather shall be paid for, provided the employees turn up on the work and hold themselves in readiness. The supervising officer or other person under whose direction the employees are working shall decide whether or not it is too wet to work.

*Waterproof Clothing* – Employees who are compelled to work in rain shall be supplied with oilskin coats or other suitable covering.

When employees are prevented by wet weather from following their usual avocation, unless the employees are willing to undertake training as directed by the employer or to perform during such wet weather any work the employer may direct them to do they shall not be entitled to payment for such time lost.

When an employee is required to perform work in the rain and by doing so gets wet clothes, the employee shall be paid double rates for all work so performed. Such payment shall continue until such time as the employee finishes work or is able to change into dry clothing:

Provided that employees entitled to payment under this clause shall not be entitled to payment under subclause 21 of this clause."

Subclause 21 of clause 3.5 provides allowances for employees working from a swing scaffold. In all probability the Civil Construction Award contains a typographical error, and the intention is that employees will not be entitled to payment under clause 23 – Wet Places when they are being paid additional rates for working in the rain. However, this proviso is not relevant to the matter I am required to determine.

The Act, in its various manifestations, has provided for employees to be stood down without pay in similar circumstances to those currently provided for in ss. 98(1)(a) and (b). The *Industrial Conciliation and Arbitration Act 1961-1987* provided at s. 21A(1) that notwithstanding anything in that Act or in

any award or industrial agreement, an employer could stand-down an employee without pay, for any day or part of a day on which the employee could not be usefully employed because of the occurrence of anything for which the employer was not responsible or over which the employer had no control.

Section 11.5 of the *Industrial Relations Act 1990* (which is referred to in clause 3.5(3) of the Civil Construction Award) was in almost identical terms to the previous s. 21A(1). Following further amendments to the *Industrial Relations Act 1990* stand-down provisions were contained in s. 224. That section was in almost identical terms to the former provisions, except that reference to certified agreements and enterprise flexibility agreements was included, so that the Act provision operated notwithstanding the provisions of awards and the various forms of agreement which then existed.

The provisions with respect to stand-downs subsequently appeared in the *Workplace Relations Act 1997* at s. 231, as follows:

**“Permissible stand-down of employee**

**231.(1)** An employer may stand-down an employee without pay on a day, or for part of a day, when the employee can not be usefully employed because of something that happened –

- (a) for which the employer is not responsible; or
  - (b) over which the employer has no control.
- (2) This section applies despite another provision of this Act or an industrial instrument;
- (3) This section does not apply to an apprentice or a trainee.”.

In relation to s. 21A of the *Industrial Conciliation and Arbitration Act 1961-1983*, then President of the Industrial Court of Queensland, His Honour Justice R. H. Matthews in *The Australian Workers' Union of Employees, Queensland v Mt Isa Mines Limited* (1983) 114 QGIG 41, considered a situation where an award contained a stand-down provision introduced before the enactment of s. 21A, which was inconsistent with that section. His Honour held that:

“The Award has the force of law (section 29(1)(b) of the Act) but, whether considered from the point of view of inconsistency or variation, is necessarily limited by the Act provisions. The two sets of provisions are not wholly inconsistent, but it is obvious that they may become inconsistent in their application to particular cases and the Act, not only because of its overriding legislative effect is to be given operation, but also because of the more recent enactment of it; (cf. *Goodwin v Phillips* (1908) 7 CLR 1 per Griffiths CJ at p. 7).”.

It will be noted that this is no longer the case. The principal point of difference between s. 98 of the current Act and s. 231 of the former *Workplace Relations Act 1997*, is the impact of an inconsistent provision of an award or industrial instrument on the right of the employer to stand the employee down without pay.

The current Act, (as did its 1997 and 1990 predecessors) provides at s. 344 for an appeal against a stand-down under s. 98, to be made to the Commission. Given that the FEDFA's case was that s. 98 did not have application because the Award dealt exclusively with wet weather stand-downs, s. 344 of the Act was not addressed by the applicant. However, despite the fact that the respondent's case was that s. 98, had some application in this case, Mr Joy's submissions completely ignored s. 344 and the question of whether the application should have been brought under that section. The application by the FEDFA was brought under s. 278 of the Act.

After giving consideration to this matter, I have determined to deal with this application under s. 278 for the following reasons. Section 344 provides that an employee who is stood down may appeal to the Commission either during the period of the stand-down or subsequently. There is no indication that s. 344 is the only mechanism by which an employee may seek payment of wages for periods during which the employee was stood down without pay. In this case, the FEDFA is claiming that annual leave to cover periods during which the employee was stood down should be re-credited, and that the respondent has incorrectly applied the provisions of the Civil Construction Award with respect to the method for working a 38 hour week and payment of overtime. In my view, these are equally matters which might be dealt with by way of an application seeking an order for unpaid wages, under s. 278.

**The operation of the Act and Civil Construction Award provisions with respect to wet weather stand-downs**

The case for the FEDFA relied on clause 3.5(3) of the Civil Construction Award contending that it requires all time lost through wet weather to be paid. Mr Price for the FEDFA argued that this is a positive statement, which removes the capacity of employers to stand-down employees under the Civil Construction Award without pay, for the reason that work is unable to be performed due to wet weather. The FEDFA also relies on s. 98(2) of the Act, which provides that the right of an employee to stand-down an employee without pay, operates subject to the provisions of an award.

It was contended by the FEDFA that the combined effect of clause 3.5(3) of the Civil Construction Award, and s. 98(2) of the Act, is to remove the rights of employers to stand-down employees covered by the Award, when work is unable to be performed due to wet weather. Mr Price argued that this is the case even where the employer advises the employee prior to the commencement of work, that work is not required due to wet weather. In support of this proposition, Mr Price referred to the decision of Bloomfield C in *AMIEU v McClymonts Holdings Pty Ltd* (2001) 167 QGIG 253 where it was noted that s. 98(2) of the Act is in different terms to predecessor legislation (at 254), and that “the employer's statutory right to withhold payment is defeated if an industrial instrument provides otherwise.”.

It was also argued by Mr Price that the respondent did not have the right at common law to stand the employee down without pay, during periods when he could not be usefully employed.

The respondent's argument on the other hand was directed at demonstrating that s. 98 of the Act still had some application to standing down employees. The argument appeared to be that if the right to stand employees down existed under the Act, that the employee in this case would not be entitled to payment for any full day upon which he was stood down. In this regard, Mr Joy for the respondent put a somewhat convoluted argument about the interaction between s. 98 of the Act and clause 3.5(3) of the Civil Construction Award.

Essentially, the argument was that notwithstanding s. 98(2) of the Act, s. 3.5(3) of the Civil Construction Award provides that it operates subject to the provisions of the Act with respect to stand-downs. This means that the right to stand employees down without pay under the Act is still available, and the Civil Construction Award does not totally override the Act. Mr Joy argued that the combined effect of the Civil Construction Award provision, requiring that employees are to be paid for time lost through wet weather, subject to turning up to work and holding themselves in readiness for work, and s. 98(2) of the Act, is that the employer is not permitted to use the provisions of s. 98(2) of the Act to stand an employee down for part of a day. Mr Joy argued that by virtue of the Award provision dealing with stand-downs operating subject to the provisions of the Act, that the employer retained the right to notify employees prior to the commencement of work, that they were to be stood down without pay, due to wet weather.

Accordingly, the respondent was entitled to determine that work was not possible due to wet weather, and to issue an instruction to employees on the preceding day, not to report for work. Such an instruction would constitute a lawful direction, and any employee who had wilfully failed to comply, would not be entitled to payment.

In my view, the starting point for the determination of this issue, is s. 98 of the Act. That section establishes the right of an employer the right to stand an employee down on a day or part of a day, when the employee cannot be usefully employed. That right is subject to something happening necessitating the stand-down, for which the employer is not responsible, or over which the employer has no control. Section 98(1) does not give the employer the right to withhold payment from the employee for the period of the stand-down. (c.f s. 231(1) of the previous *Workplace Relations Act (1997)* which provided for the right to stand an employee down without pay).

The right for the employer to withhold payment from the employee for the period of the stand-down, is now found under s. 98(2). By virtue of s. 98(2) the employer may not withhold payment from an employee stood down under s. 98(1), when an industrial instrument provides for payment, in the circumstances which give rise to the stand-down.

The difficulty that I have with the arguments in this case, is that the FEDFA contends that clause 3.5(3) deals with the stand-down of employees when work is unable to be performed during periods of wet weather, to the exclusion of the provisions of s. 98 of the Act. The QCCI contends that the Civil Construction Award deals with stand-downs for part of a day, to the exclusion of s. 98(2) of the Act, but that s. 98(2) applies to stand-downs for full days. In my view, neither argument is correct.

Clause 3.5(3) of the Civil Construction Award does not deal with stand-downs, but rather the circumstances in which employees must be paid for periods when they are stood down. Similarly, s. 98(2) deals only with payment for a period when an employee is stood down, and provides that employees must be paid when an industrial instrument requires payment in the circumstances in which the employee is stood down. In this regard, I agree with the decision of Bloomfield C who held in *AMIEU v McClymonts Holdings Pty Ltd* (2001) 167 QGIG 253 that:

“Section 98 of the Act deals with an employers right to withhold payment to an employee – who is otherwise ready willing and able to work – if certain conditions are met. It thus overrides an employee’s common law right to be paid whilst s/he is ready willing and able to work (see “The Law of Employment” Macken, O’Grady and Sappideen, 4<sup>th</sup> Edition, p. 159-160). By virtue of s. 98(2) the employer’s statutory right to withhold payment is defeated if an industrial instrument provides otherwise.

For that to occur, the industrial instrument, in my view, would need to specifically and intentionally deal with the matter of payment in circumstances which would otherwise permit the employer to stand employees down.”.

The right to stand an employee down, is still found within s. 98 of the Act and not in clause 3.5(3) of the Civil Construction Award. In my view, this case was not about the right of the respondent to stand the employee down in the circumstances which occurred. The respondent had the right to stand the employees down under s. 98(1) of the Act for any reason, including the occurrence of wet weather, provided that the conditions in subsections (a) and (b) were met. The real issue in this case, is whether the industrial instrument applicable to the employee provided an entitlement to payment, in the circumstances under which the employee was stood down.

To resolve this question, consideration must be given to the terms of the Civil Construction Award, and whether the employee had the right to be paid under that Award for the period where the respondent stood him down without pay. Clearly, in circumstances where an employee covered by the Civil Construction Award reports to work or commences work on a particular day, and is prevented from working by wet weather, clause 3.5(3) of that Award entitles the employee to be paid for that day, provided that the other conditions in the clause are met. The Civil Construction Award therefore provides otherwise than s. 98(2) of the Act. Thus, notwithstanding that the employer may have the right to stand the employee down under s. 98(1) of the Act, the employee is entitled to payment for the period of the stand-down, by virtue of the combined operation of s. 98(2) and clause 3.5(3) of the Civil Construction Award, provided that the conditions in clause 3.5(3) are met.

If employees hold themselves in readiness to perform work, and a supervisor decides that it is too wet to work, and does not require the employees to undertake training or alternative work, they will be entitled to payment for the remaining ordinary hours work which would, but for the occurrence of wet weather have been performed on the day in question. I am also of the view, that an employer could not avoid payment by simply doing nothing, when employees turned up ready to work, or by failing to have a supervisor present to provide direction to employees. The fact that an employer does not exercise its rights under clause 3.5(3) to determine whether or not work can be performed, or to provide alternative work or training, will not mean that an employee who is ready to work, will become disentitled to payment.

The additional question which arises in this case, is whether, as the FEDFA submits, clause 3.5(3) of the Civil Construction Award precludes an employee from being stood down in circumstances where the employer notifies of the stand-down due to wet weather, prior to the employee reporting for or commencing work. I am unable to accept this submission. When clause 3.5(3) is considered as a whole, it is clear that what Mr Price referred to as the “positive statement” that all time lost through wet weather shall be paid for, is subject to the provisos which I have referred to above. Further, clause 3.5(3) is to operate subject to the stand-down provisions in the Act.

At first glance, it appears that this is a circular argument, in that clause 3.5(3) of the Civil Construction Award operates subject to the stand-down provisions in s. 98 of the Act, and s. 98(2) of the Act makes the stand-down provisions of the Act subject to clause 3.5(3) of the Award. On closer examination, this is not the case. As I have stated above, clause 3.5(3) of the Civil Construction Award does not give employers the right to stand-down employees without pay for any reason, including wet weather. The right to stand employees down without pay does not exist at common law. Rather, to the extent that the right to stand employees down without pay exists, it is established by s. 98(1) of the Act. The effect of clause 3.5(3) of the Civil Construction Award is to give employees stood down under the Act, due to wet weather, the right to be paid, when the conditions in clause 3.5(3) are met. Otherwise, clause 3.5(3) of the Award does not have any application in circumstances where employees are stood down pursuant to s. 98 of the Act.

In my view, the rights of the employer to stand employees down without pay under ss. 98(1) and (2) of the Act, in situations where work is not able to be performed due to wet weather, are not entirely displaced by clause 3.5(3) of the Civil Construction Award. The right of an employer not to pay an employee stood down under s. 98 of the Act, is only displaced to the extent that it does not apply when the circumstances in s. 3.5(3) are met. Employers are still entitled under ss. 98(1) and (2) of the Act to stand-down employees covered by the Civil Construction Award, without pay, by determining that work is not available due to wet weather, or for some other reason beyond the employer’s control, and advising employees of this prior to them reporting to site.

This does not mean that employers have *carte blanche* to stand-down employees whenever it rains. There is no over-arching right at common law to stand an employee down without pay, when the employee cannot be usefully employed.

It should be noted that s. 98(1) of the Act imposes obligations upon employers before the right to stand-down employees is exercised, and employees have rights to challenge the validity of the stand-down. When an employee claims payment for a period when the employer purported to stand the employee down, the onus is on the employer to establish that the stand-down was permissible in terms of s. 98 of the Act.

The difficulty I have in this case, is that the focus on behalf of the respondent has been directed to establishing that s. 98 of the Act applied to the circumstances in which the employee was stood down, and has not focused on the equally important question of whether the stand-down was effected in a manner and for the reasons permitted by that section.

#### Case law in relation to standing down employees under the Act

The circumstances where a stand-down will be permissible under the Act (and its earlier manifestations) have been well established. While much of the case law relates to s. 21A of the *Industrial Conciliation and Arbitration Act 1961-1987*, much of it is still relevant to the current provisions of the Act, notwithstanding the amendment reflected in s. 98(2). A very useful discussion of the case law relating to stand-downs can be found in Hall and Watson, *Industrial Laws of Queensland Second Edition*, (Government Printer Queensland 1998).

As pointed out by the authors of that publication, the case law establishes that an employee stood down is entitled to have his or her individual circumstances considered and not to be treated as part of a "bloc" in determining whether a stand-down in particular circumstances was permissible: *The Australian Workers' Union of Employees v Cattle Creek Co-operative Sugar Milling Association Limited* (1987) 125 QGIG 891. It has also been held that in order to determine whether useful work is available, the employer must first determine whether there is work which would occupy the particular employee on the day in question, and then whether that work would be of net benefit to the employer's business: *Federated Clerks Union of Employees v Mary Kathleen Uranium Ltd* (1980) 104 QGIG 5. In that decision at 104 QGIG 6, a Full Bench of the Commission noted:

"The evidence in this case is that the employer continued the clerks in employment for some time after the production unions went on strike and that before making a decision [to stand-down employees] the employer caused heads of departments and supervisors to investigate and report on whether useful work was available to the clerks. In our opinion, a decision of that nature is one which should not be set aside unless the adjudicator is satisfied that the decision was capricious or one which was not substantiated by the facts."

Case law also establishes that "gainfully" and "usefully" are not synonymous, but the distinction is very fine. In this regard, in *The Australian Workers' Union of Employees, Queensland v Mt Isa Mines Limited* (1983) 114 QGIG 41 at 42 the then President of the Commission, His Honour Justice Matthews, said:

"Both 'gainfully' and 'usefully' in the context necessarily refer to the business of the employer. 'Gainfully' to my mind introduces the concept of profit to the employer, whilst 'usefully' is more general in its scope but still carries with it the idea that some sort of advantage for the employer is possible."

The financial position of the employer is relevant to the determination of whether the employee can be usefully employed: *The Australian Workers' Union of Employees v Cattle Creek Co-operative Sugar Milling Association Limited* (1987) 125 QGIG 891 at 893.

#### Were the stand-downs permissible?

The FEDFA contends that the employer purported to stand the employee down without pay on each of the days listed in the last schedule to the application, some 63 in total (disregarding the occasions upon which the employee was stood down for part of a day). The evidence of the employee was that on each of those days, he reported for work and he was ready. The employee said that on some occasions he was sent home by a supervisor, and on other occasions, there was no supervisor on site to provide any direction to him. Under cross-examination, and in response to questions from the Commission, the employee maintained that there was only one occasion when he had been contacted by a manager of the respondent and told not to come to work due to wet weather. Further there were only two occasions when he had contacted the respondent before reporting to work, and been told not to report for work due to wet weather. The employee maintained that on all other occasions he had reported to work ready to perform work. Even on days when he had subsequently used annual leave to obtain payment because of being stood down by the respondent, the employee maintained that he had reported for work, and been ready to work.

It was submitted by Mr Price that the respondent had not put any evidence before the Commission to contest the employee's assertion in this regard, and the employee's evidence should be accepted. Further, there was no evidence that the employee had been subject to any direction about alternative work or training, or that the employee had refused to comply with such a direction.

Very little evidence about the circumstances in which the employee was stood down was called by the respondent. Indeed much of the evidence in this regard, was in response to questions from me, rather than being elicited during evidence in chief. Further, the evidence that was put before the Commission consisted of general statements about what would have happened, rather than what actually did happen, on days when the employee was stood down. Essentially the evidence of Mr and Mrs Vassallo was that the employee should have known that in extended periods of wet weather, work would not have been available for him, and that this was "common sense". Further, the employee should have known that he was required to contact his supervisor in the event of wet weather, prior to reporting to work, to establish whether work was available on each day when wet weather occurred. There was no direct evidence to counter the employee's contention that he had reported to work on each day for which payment was claimed.

The evidence for the respondent in this regard was limited to Mrs Vassallo stating under cross-examination, that on many of the days when the employee claimed that he had shown up at the work-site, there would have been no-one there to send him home. Mr Vassallo also said that most employees would not have shown up, and that Mr Sommerfeld may have read the Award, known of the provisions about wet weather and turned up at site simply to claim payment. Mr Vassallo said under cross-examination, that occasionally he would have been at a site where the employee was working, "probably more than so", and could not vouch for whether the employee had turned up for work every morning.

No direct evidence was called from either Mr or Mrs Vassallo about the process that was used to establish that no useful work was available due to the occurrence of wet weather on each of the days for which payment was claimed. Further there was no evidence upon which I could be reasonably satisfied that no useful work was available on days when the employee was stood down due to wet weather. In this regard evidence might have been called to establish matters such as:

- the size of the respondent's operations;
- the type of work performed by the respondent;
- procedures which the respondent had in place and had clearly articulated to employees about how stand-downs in the event of wet weather would be effected;
- that a supervisor of the respondent contacted the employee on all or even some of the days for which payment was claimed to advise him that work was not available on that day;
- the sites upon which the respondent was performing work on days when the employee was stood down;
- the nature and extent of the wet weather on those days;
- the process which was followed by the respondent in determining that work could not be performed on the days in question;

- the availability of alternative work such as maintenance; and
- the capacity of the respondent to provide such alternative work.

The only "evidence" before the Commission about any of these matters was put by Mrs Vassallo in response to questions from me. There was a lack of clarity and certainty about Mrs Vassallo's answers to these questions, and I did not find those answers particularly compelling.

The respondent in this case was facing a substantial claim by the employee involving a significant amount of money. The claim identified each day upon which the employee claimed to have been stood down without pay, in a manner which was not permissible. The respondent's defence to the claim was that s. 98 of the Act applied to the standing down of the employee. On the respondent's own case, the respondent carried the onus of demonstrating that the standing down of the employee in the circumstances in which it occurred was permissible. The respondent has not met that onus.

Mr Joy raised a number of matters in his submissions about the location of one particular site at which the respondent was working and the improbability of him having transported himself to that site on the days for which payment was claimed. It was further contended by Mr Joy that the employee had failed to prove that he had turned up on site on each of the days for which payment was claimed, and that a person with authority to act on behalf of the respondent, had sent him home, and that "considerable weight should apply to that deficiency."

Later in the submission, Mr Joy stated that the evidence showed that mostly, there would have been no person with authority to act on behalf of the respondent and to instruct employees to go home, present on site on wet days, and made the following submission about the conduct of the employee and his evidence:

"The applicant clearly admitted that he was aware of his instructions, being not to turn up on the job, but to ring to see if work was possible. He stated that he specifically chose to contravene that instruction, in order to create a liability on the employer to pay for such days on the basis that the Award says 'all time lost through wet weather shall be paid for provided that employees turn up on the work and hold themselves in readiness.'"

I reject those submissions, on the basis that the evidence did not demonstrate any of the matters contended by Mr Joy, and the employee made no such admission. Quite simply, there was no evidence about the sites the employee was working on or where they were located. There was no evidence from supervisors or other employees about the practices of the respondent when wet weather occurred. More significantly, the matters raised in Mr Joy's submission were not put to the employee during cross-examination.

There was no direct evidence upon which I could be satisfied that there was a standing instruction to employees to contact supervisors to ascertain whether work was available on days when wet weather occurred. No evidence in this regard was called from any supervisor or other employee. There was no evidence of any such direction in writing. Further, I am unable to be satisfied that the employee was ever advised not to report for work, on each of the days for which he is claiming payment.

I can accept that employers in the civil construction industry may have limited resources or ability to find alternative useful work for employees, particularly when there are extended periods of wet weather. However, when an employee appeals against a stand-down, or a claim is otherwise made for payment of the period during which an employee was stood down, it will not be sufficient for the employer to justify the stand-down simply on the basis of wet weather. The employer must establish with respect to each individual employee who was stood down under s. 98 of the Act, that there was no useful work available. The occurrence of wet weather will not in itself, be sufficient to establish this.

The employer will also be required to demonstrate that its operations were such that no useful work was available, and that reasonable steps were taken to investigate the possibility of useful alternative work, before the decision to stand the employee down was made. Where the employer contends that employees were contacted prior to commencing ordinary work and advised not to report for work, additional evidence will be required of the manner in which that advice was provided to employees, and the circumstances upon which the decision that useful work was not available, was made.

Further, the fact that an employer has contacted the employee the day before a stand-down will mean that the evidentiary requirements about the reasons for the stand-down – such as the impact of wet weather – may be more onerous, as the severity of the weather would need to be such that the employer could demonstrate that a view that no useful work was available, formed well in advance of the time that the stand-down would take effect, was reasonable in the circumstances.

I am also of the view that as s. 98 of the Act gives the employer the right to stand an employee down on any day or part of a day, that the question of whether useful work is available, must be determined on a daily basis. It is not open for an employer to decide at some point that work will not be available for a period in excess of a day and to advise employees of this at the beginning of that period. In my view, the employer should advise each employee of the need to effect a stand-down on the first day or part of a day, and then put in place a clearly understood and articulated process, to review the availability of useful work and the status of each employee in this regard, on each day that the employee is stood down, or at very least, for the following day.

In this case, due to lack of evidence from the respondent, the evidence of the employee about reporting to work on each day for which payment is claimed is essentially uncontested. I accept that the evidence of the employee, including the time docket books, demonstrates that he was stood down without pay for 500.25 hours during the period subject of the claim. I am further of the view that on days when the time docket books indicate that some work was performed before the employee was stood down, the employee was entitled to payment for the entire day, by virtue of clause 3.5(3) of the Civil Construction Award, and I note that this point appears to have been conceded by the respondent. On days when the employee was stood down and performed no work, I am also reasonably satisfied that the stand-down was not permissible under s. 98(1) of the Act and that the employee is entitled to payment for such days.

I am also of the view, that the question of whether or not the employee reported for work on days when no work was performed is not determinative of his entitlement to payment. What is determinative is whether the standing down of the employee on such days was effected in a manner which was permissible under s. 98 of the Act. For the reasons stated above, I am unable to be reasonably satisfied that it was. Accordingly for each of the 500.25 hours subject to the claim, I am satisfied that the employee was entitled to payment at ordinary rates.

#### **Payments for sick leave, annual leave, rostered days off and flexi-time made to the employee**

The respondent contends that for a significant number of days when the employee was stood down and for which he is claiming payment, the employee was accessing other paid leave entitlements such as sick leave, annual leave, rostered days off and flexi-time. The final issue for determination is whether such payments can be set off against the claim for underpayment of wages with respect to periods during which the employee was stood down.

I reject the submissions of Mr Joy that the system of flexi-time operated by the respondent was allowable under clause 4.1(5)(a) of the Civil Construction Award which provides for the banking of up to five rostered days off. The Award does not provide for the banking of hours, but rather for the banking of rostered days off. Rostered days off accrue by virtue of hours in excess of 38 per week being banked to enable a rostered day off to be taken periodically. Quite simply, the respondent did not operate such a system. This was conceded by both witnesses for the respondent. I fail to see how an employee

could be said to have agreed to bank rostered days off and take them at some future time to cover periods of wet weather, when the employee was not even aware that he had an entitlement to rostered days off in the first place, and the respondent did not operate a system of scheduled rostered days off in accordance with the Civil Construction Award.

I do not accept Mr Joy's argument that the terms of the *Family Leave Award* enabled the implementation of a system of flexi-time to provide payment for periods when work was unable to be performed due to wet weather. The time off in lieu of overtime provisions in the *Family Leave Award* clearly only apply where the employee elects with the consent of the employer, to take time off to discharge a responsibility to care for a member of the employee's immediate family or household: refer clause 3.4 and clause 3.15.

The employee was entitled to payment at ordinary time rates, for periods subject of this application, when he was stood down because of wet weather. The employee was also entitled to be paid overtime at overtime rates when overtime was worked. Overtime could not be banked and used to offset lack of payment for days when the employee was stood down due to wet weather. The result of the system of flexi-time introduced by the respondent, is that the employee has not been paid at ordinary rates, in circumstances where he was entitled to such payment. The employee has thus lost the benefit of overtime payments, and is entitled to be reimbursed at the ordinary time rate for the hours which he was paid under the flexi-time system.

The FEDFA also claims that the employee is entitled to be reimbursed for 240.16 hours of annual leave and loading on that leave of 17.5%, on the basis of "improper use of annual leave". The time docket books (Exhibit A2) and the time and wages slips (Exhibit R3) demonstrate that the employee was paid for 158.95 hours of annual leave during the period of his employment with the respondent. There is no evidence or any material to explain the discrepancy between the amount claimed and the amount paid during the period of employment. Accordingly, I intend to deal only with the 158.95 hours of annual leave in respect of which there is evidence before me.

That evidence shows that the employee "cashed in" some part of his annual leave entitlement. The employee did this to make up a full week's wage, during periods when he was stood down due to wet weather. Mr Vassallo giving evidence for the respondent, conceded that had the employee not used his annual leave entitlement to cover periods when he was stood down due to wet weather, he would not have been paid for those periods. There is also evidence that the employee actually took approximately ten days of annual leave during the period of his employment with the respondent.

Clause 5.1(3) of the Civil Construction Award makes it unlawful for the employer to give or the employee to receive payment in lieu of annual holidays. The conduct of both the respondent and the employee is in breach of the Award. This can be contrasted with other findings I have made in this case to the effect that the respondent alone has breached the Award and the Act. On the one hand, to order payment of annual leave in these circumstances could be seen as allowing the employee to benefit from his own breach of the Civil Construction Award. On the other hand, I accept that the employee, had no other option but to cash in his annual leave, if he was to be paid for the periods during which he was stood down. Further, I have found that the standing down of the employee was not permissible under the Act.

On balance, I have determined that the employee is entitled to recover the annual leave that he was paid for periods when he would otherwise have been stood down because of wet weather. The employee is not entitled to recover the payment for the period of annual leave which he concedes that he took as annual leave. Having reached this view, I have found support for it in a decision of a Full Bench of the Commission (Birch, Ashwood and McDonnell CC) in *The Australian Workers' Union of Employees, Queensland v Mount Isa Mines Limited* (1987) 126 QGIG 462, which is exactly on point.

In that case, the Full Bench was considering an appeal by The Australian Workers' Union of Employees, Queensland (AWU) against a decision of an Industrial Magistrate, ordering payment to employees of Mount Isa Mines Limited, under the former section 21A(4)(b) of the *Industrial Conciliation and Arbitration Act 1961-1987*, for a period when they had been stood down without pay. The Magistrate had held *inter alia* that where employees subsequent to the stand-down, elected to take annual leave, they were not stood down, but were on annual leave. In upholding the appeal by AWU the Full Bench stated at 462:

"We have reached the firm conclusion that where an employee is stood down and it is subsequently agreed between the employer and the employee that the whole or part of the period of the stand-down shall be taken as annual leave then that fact alone does not deprive the Industrial Magistrate of jurisdiction to make an order under Section 21A(4)(b). We find that in the circumstance the employee has lost remuneration because of his being stood down in that the period of his annual leave has been decreased by the period of the stand-down.

We find that the Magistrate was wrong in law insofar as he ruled that employees who were stood down and subsequently by agreement with the employer availed themselves of annual leave can no longer be regarded as being stood down."

In my view, there is nothing in the provisions of s. 98 of the Act or the facts of this case, which would enable me to distinguish the Full Bench Decision, and decline to follow it.

## Conclusions

Mr Price conceded that the claim was not pressed with respect to days when the employee had been absent on sick leave, and reduced the amount of the claim from 507.85 hours to 500.25 hours to reflect sick leave which the employee had taken. After reviewing the documentary evidence including the time docket books and the pay slips, I am satisfied that the employee was paid sick leave for an additional three days. I also accept the evidence of the employee that he took approximately two weeks of annual leave during the course of his employment. The pay slips (Exhibit A3) and the time docket books (Exhibit A2) show that in the week of 20 December 2000, the employee was paid 68.40 hours of annual leave. It is more probable than not that this is the period when the employee actually took annual leave. Accordingly, 68.40 hours are to be set off against the claim of payment for 500.25. I am also satisfied on the basis of the time docket books and the payslips that the employee took a total of 4 days of sick leave amounting to 30.4 hours (7-9 February and 14 February 2001). The FEDFA conceded that only 7.6 hours of sick leave had been taken and adjusted the claim by that amount. Therefore, a further 22.8 hours is to be set off against the 500.25 hours claimed by the employee.

There is to be no set off for annual leave loading paid by the respondent. The employee was paid annual leave loading at the time that he was paid for the annual leave. Consistent with the reasoning of the Full Bench in *The Australian Workers' Union of Employees, Queensland v Mount Isa Mines Limited* (1987) 126 QGIG 462 the loss to the employee was the benefit of the annual leave, not the loading on that leave which was paid to him by the respondent. The Award rate increased with effect from 1 September 2000. The hours for which an off set has been allowed fell after that date, and accordingly are to be off set at the rate of \$15.13 per hour.

I have recalculated the claim on this basis. The employee is entitled to be paid the amounts of \$705.00 for meal allowances and \$7,425.34 for periods when the employee was stood down without pay. The respondent is entitled to set off that amount by the amount of \$1,379.85 (22.8 hours of sick leave and 68.40 hours of annual leave calculated at the rate of \$15.13 per hour).

Accordingly, I order Vassallo Constructions Pty Ltd to pay to Allan Sommerfeld the amount of \$6,750.49. After considering the submissions of Mr Joy in relation to capacity to pay, and the fact that no evidence was called for the respondent on this point, I have determined that the amount ordered, is to be

paid in 4 equal instalments, with the first instalment being payable by 30 August 2002; the second instalment by 30 September 2002; the third instalment by 30 October 2002 and the fourth instalment by 30 November 2002. Any default on the part of the respondent in making payments of instalments in accordance with this order, will result in the balance of the total amount becoming immediately due and payable.

I.C. ASBURY, Commissioner.

*Appearances:*

Mr C. Price of the Federated Engine Drivers' and Firemens' Association of Australasia, Queensland Branch, Union of Employees.

Mr C. Joy of the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers for the respondent.

Released: 23 August 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 87 – severance allowance*

**Queensland Independent Education Union of Employees AND EDU Australia Pty Limited  
(in Creditors' Voluntary Liquidation) formerly trading as  
Queensland Commercial College (Nos. B326 and B327 of 2002)**

COMMISSIONER THOMPSON

27 August 2002

Applications for severance allowance – Provisional liquidation – *Corporations Act 2001* s. 471B – Extension of time – Applications granted.

DECISION

**Background**

Applications were filed under s. 87 of the *Industrial Relations Act 1999* (the Act) with the Industrial Registrar on 26 February 2002 by the Queensland Independent Education Union of Employees (QIEU) on behalf of Mr David Sinon (B326 of 2002) and Mr Salvatore Torrisi (B327 of 2002) seeking the payment of unpaid severance allowance from EDU Australia Pty Limited (in Creditors' Voluntary Liquidation) formerly trading as Queensland Commercial College.

It was determined that the matters be heard conjointly.

The amount sought in the applications was that of four (4) weeks' pay for Mr Sinon and eight (8) weeks' pay for Mr Torrisi.

The applications further sought that an extension of time under s. 88 of the Act be granted by the Commission to allow the application to proceed.

During the course of the application, there were, in total, four (4) separate hearings, the first occurring on 15 March 2002, concluding with the final hearing on 15 August 2002.

At the initial hearing, the Commission raised with the parties the matter of *Bosch v Project Constructions (Aust) Pty Ltd (No. 2)* (No. B1619 of 2002) before Blades C in which it had been determined that before an application relating to a company that is being wound up or is in provisional liquidation, can proceed, there needs to be leave granted by the Court.

The relevant legislation relied upon being the *Corporations Act 2001* (Commonwealth) s. 471B:

**“471B Stay of proceedings and suspension of enforcement process.**

While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:

- (a) a proceeding in a court against the company or in relation to property of the company; or
- (b) enforcement process in relation to such property;

except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.”.

On 20 May 2002, Justice Fryberg of the Supreme Court of Queensland determined that matters B326 and B327 of 2002 have leave “*nunc pro tunc*” to begin to proceed.

At a further hearing before the Commission on 18 July 2002, the parties were advised of the abovementioned outcome of the application to the Queensland Supreme Court and a date (15 August 2002) was set to hear the substantive matter.

During the proceeding of 18 July 2002, Mr Richard Rowley, on behalf of the joint liquidator (Woodgate and Co), in respect of his firm's non-opposition to the applications, at page 16, line 48, of transcript stated:

“Rowley: Look, we don't have any intention of imposing [opposing] the matter. I mean the summary position in regard to the company is documented in Mr Woodgate's letter of the 21st of June which is basically a re-statement of his letter of the 8th of March 2002. I take it that nobody is representing the Commonwealth Department of Employment and Workplace Relations at this proceeding.”.

Correspondence was received from Woodgate and Co on 7 August 2002 under the signature of Mr Giles Woodgate, in which the Commission was advised that as joint liquidators, they would not be participating in further hearings in respect of both applications.

The letter stated the reasons for non-attendance were related to “section 545(1) of the Corporations Law which states that a liquidator is not liable to incur any expense in relation to the winding up of a company unless there is sufficient available property. There are no funds available in the winding up.”.

**Extension of Time**

The issue of an extension of time was related to the requirements of s. 88 of the Act.

**“88 Time for making application under this division**

An application for an order under this division must be made –

- (a) before, or within 21 days after, the dismissal takes effect; or
- (b) within a further period the commission allows on an application made at any time.”.

Each of the employees subject of the applications ceased to be employed on 26 September 2001 as a consequence of the respondent being placed in voluntary liquidation.

The applications were filed some 127 days outside the 21 day statutory requirement which by any acceptable standard is on the side of excessive.

The circumstances relating to the delay were the same for each of the effected persons in that correspondence was received from Clout and Associates – Joint Liquidators (dated 31 October 2001) which indicated that all former employees of the respondent company would be paid all outstanding monies owing.

On the second page of that correspondence it stated:

**“GEERS**

Pursuant to the General Employee Entitlements Redundancy Scheme (“GEERS”), of the Federal Government’s Department of Employment, Workplace Relations & Small Business (“the Department”), 100% of the agreed claims of former employees in relation to wages, holiday pay, long service leave, payment in lieu of notice and up to 8 weeks of redundancy will be paid. We expect anticipate this payment to be made within 1 to 3 months once the Department has received the forms from the employees. The Department will forward your payment to us, which are then required to onward to you, after tax, within 2 weeks of us receiving the funds.”.

On or about 22 January 2002 further correspondence was received by Mr Torrissi and Mr Sinon, this time from Woodgate and Co which provided an advice of changed circumstances in respect of redundancy (severance).

At paragraph (f) of that correspondence it stated:

- “(f) the entitlement to redundancy has not been amended. Clout & Associates’ calculation of redundancy was based on the *Industrial Relations Act 1999* (Qld). Pursuant to section 87(1) of the *Industrial Relations Act 1999* former employees may have an entitlement to redundancy, if the Queensland Industrial Relations Commission makes an order to that effect.”.

Shortly thereafter both former employees contacted the Union and set in motion the chain of events that led to the filing of the applications.

On consideration of the evidence placed before the Commission I had little or no hesitation in accepting the reasons advanced for the delay in filing the applications as both genuine and reasonable and as such the extension requested in accordance with s. 88(b) was granted.

**Severance Allowance**

Mr Torrissi commenced full-time employment with the respondent on 5 September 1994 giving him some 7 years’ service at the time of ceasing employment.

The amount claimed in respect of Mr Torrissi was 8 weeks in accordance with the “Termination of Employment, Introduction of Changes, Redundancy” Policy of the Commission which equated to an amount of \$7,615.38.

Mr Sinon commenced his employment in March 2000 which was also of a full-time nature and at the time of the cessation of employment had some 18 months’ service.

The amount claimed was 4 weeks which equated to an amount of \$2,692.40.

**Conclusion**

On consideration of the evidence before the Commission in respect of the applications I am satisfied that sufficient reasons have been provided to make an order about severance allowance for the amounts sought in each of the applications.

The evidence before the Commission indicating that the number of employees in employment at the time the employment ceased was some 17, removed what could have been the only foreseeable obstacle that could have prevented the issuing of the orders as requested.

Accordingly it is ordered that unpaid severance allowances on behalf of Mr Torrissi to the amount of \$7,615.38 and Mr Sinon to the amount of \$2,692.40 be paid by EDU Australia Pty Limited (in Creditors’ Voluntary Liquidation) formerly trading as Queensland Commercial College 22 days after the release of this decision.

I order accordingly.

J.M. THOMPSON, Commissioner.  
Released: 27 August 2002

*Appearances:*  
Mr J. Spriggs of Queensland Independent Education Union of Employees, Applicant.

QUEENSLAND INDUSTRIAL REGISTRAR

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

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

REGISTRAR EWALD

20 August 2002

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

DECISION

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

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

**Timing of Election**

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

Rule 19(f) provides as follows:

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

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

**Number of Councillors**

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

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

**Term of Office**

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

**Method of Election**

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

**Conduct of Election**

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

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

Dated this twentieth day of August, 2002.

E. EWALD  
Industrial Registrar

Released: 20 August 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

David Carey AND Department of Justice and Attorney-General (No. 2) (No. B2054 of 2001)

COMMISSIONER BLOOMFIELD

27 August 2002

Application for reinstatement – Temporary employee – s. 113 of Public Service Act 1996 – Concession that termination unfair – Remedy – Impossible to order reinstatement or payment of compensation because of effect of s. 113 – Application dismissed.

DECISION

In a decision reported at 169 QGIG 804 I made certain determinations in respect of a preliminary point about whether Mr Carey had been terminated at the initiative of the employer or whether his employment ceased through the effluxion of time. I decided that the manner of the communication of Mr Carey's termination on 26 October 2001 caused the employment relationship to come to an end on that day at the initiative of the employer. I further indicated that if I was wrong in deciding Mr Carey's employment ceased on that date, and that in fact it did not cease until 2 November 2001, the termination would still have been at the initiative of the employer and not through the effluxion of time.

The first aspect of my decision was confirmed on appeal by the President, in a decision now reported at 170 QGIG 306. However, His Honour decided I erred in law in concluding that if Mr Carey's employment was not terminated until 2 November 2001 it terminated at the initiative of the employer. Rather, His Honour determined, subject to two caveats, that Mr Carey's employment would have terminated on 2 November 2001 upon the expiry of his temporary appointment pursuant to s. 113 of the *Public Service Act 1996*. The President remitted the question of whether Mr Carey's termination on 26 October 2001 was harsh, unjust or unreasonable to the Commission as presently constituted to be determined according to law.

When the matter resumed, Mr A. Horneman-Wren, Counsel for the Respondent, indicated that, in light of the Commission's earlier finding that Mr Carey had been terminated on 26 October 2001 and the President's overall decision on appeal, the Commission would be entitled to move to s. 78 of the *Industrial Relations Act 1999*. "That is to say, you would be satisfied that Mr Carey was unfairly dismissed (on 26 October 2001)" – (page 156 of transcript).

However, Mr Horneman-Wren stressed the making of that concession did not mean the Respondent accepted the Commission could order any remedy pursuant to s. 78.

Mr Horneman-Wren said the only basis for Mr Carey's employment was that of a temporary employee pursuant to s. 113 of the *Public Service Act 1996*. Mr Horneman-Wren said the Commission could not make any order reinstating Mr Carey to his former position. That former position no longer existed. It was formally constituted by his last appointment pursuant to s. 113 of the *Public Service Act 1996* and ceased to exist on 2 November 2001. As such, Mr Carey's reinstatement was not only impracticable, it was impossible. Mr Horneman-Wren said any order of the Commission which had the effect of creating employment, or rights associated therewith, beyond 2 November 2001 would be to confer upon Mr Carey rights which he previously did not have.

In relation to the only other possible remedy, *viz* compensation, Mr Horneman-Wren said Mr Carey was not only paid to the end of his contract period but also for a period of some 3 weeks thereafter. As such, Mr Carey had been remunerated well beyond the point in time at which any rights attaching to his former employment with the Respondent would have expired. Therefore the Commission should not be minded to make any order for compensation in respect of any alleged lost earnings.

In response to a position advanced by the Applicant, Mr Horneman-Wren acknowledged the Commission did have jurisdiction, pursuant to s. 79 of the *Industrial Relations Act 1999*, to order payment of compensation, if it was so minded, for any hurt and humiliation arising from the manner of Mr Carey's termination. However, Mr Horneman-Wren submitted that in assessing that matter, the Commission would have to take into account the amount which Mr Carey was paid upon termination which was not otherwise referable to any other employment entitlements he had.

Mr Bradley of Counsel, on behalf of Mr Carey, did not pursue either of the President's caveats (above). He accepted that Mr Carey had been legitimately engaged as a temporary employee pursuant to the provisions of s. 113 of the *Public Service Act 1996*.

Mr Bradley said Mr Carey was seeking reinstatement in the position he formerly occupied as a temporary employee, namely the position of PO3 Legal Officer in the Workplace Law Team. Mr Carey also sought an order requiring the Department to recognise his continuity of service from 2001 until the date he was reinstated, together with payment for remuneration lost between 26 October 2001 and the date of reinstatement.

Mr Bradley argued that the President's decision on appeal left open the question of Mr Carey's employment status at the time of his termination on 26 October 2001. In support of this submission he referred me to the President's decision at p. 310 where His Honour said (references to the parties have been reversed to reflect the current proceedings):

*"The correct proposition, or so it seems to me, is that the Respondent might appoint a person such as Mr Carey for a fixed term, for a purpose which will come to an end, or upon an indefinite hiring terminable by notice provided that, in the latter case, it is not the intention of the department (to), in fact, treat the engagement as a permanent or continuing one to be brought to an end only by supervening events such as misconduct or redundancy.*

*Determining the true nature of the engagement of an employee such as Mr Carey is a matter which is not without difficulty. To begin with, one temporary engagement may well be followed by another. One can well envisage a temporary employee engaged for the duration of an officer's long service leave being offered a further engagement for the duration of a trial. There is the additional difficulty that extension of the initial temporary engagement may be by variation as well as by fresh appointment. Additionally, there is nothing in the Public Service Act 1996 to require that each appointment or variation be made in writing. It follows that it will be necessary to take into account evidence of that which was said and, indeed, evidence of the conduct of the parties which may throw light upon the nature of an appointment. In this case, of course, because of the Commission's finding that the employment was terminated at the initiative of the Respondent on 26 October 2001, if the true nature of Mr Carey's engagement by the Respondent ever again becomes relevant in the proceedings before the Commission, the only issue will be the nature of the engagement which was on foot on 26 October 2001."*

Mr Bradley said Mr Carey's case rested on the following bases:

- (a) that Mr Carey had an employment relationship with the Department that gave rise to certain obligations on the part of both Mr Carey and the Department (and that the Commission has the power to remedy breaches of those obligations); and
- (b) it was not a term or condition of Mr Carey's employment that he was employed at the pleasure of the Department.

Mr Bradley said the power conferred upon the Director-General of the Respondent by s. 113(1) of the *Public Service Act 1996* must be exercised in accordance with Public Service Directive 19/97. That directive stipulates that a Director-General may employ a person only for so long as the initial "temporary circumstances" met by the employment of that person continue to exist.

Mr Bradley said that Direction 19/97 also stipulated that any letter of appointment/extension provided to Mr Carey must contain the "anticipated duration of the engagement" (see Directive 19/97). Mr Bradley said given the requirement to only provide an anticipated duration of the engagement it was not surprising that Mr Carey's engagement did not end when any of the dates stated in any of his letters of appointment/extension arrived. This was because the dates provided were merely the anticipated end of the temporary circumstances relied upon by the Director-General to appoint Mr Carey as a temporary employee. The letters of appointment/extension did not "fix" a period but merely stated the anticipated end date, as the Directive required.

Mr Bradley submitted there was no evidence before the Commission to suggest that the temporary circumstances met by Mr Carey's employment on 19 March 1999 (I think he actually meant 12 June 1999 - see letter 21, Attachment DC1 to Exhibit 11) had ceased to exist. He said such question was a matter of fact, rather than one of law. The existence of temporary circumstances involved some measure of objective analysis. Mr Bradley said it was for the Department to persuade the Commission that it was impracticable to reinstate Mr Carey. The only way to do that was to demonstrate that the "temporary circumstances" met by the employment of Mr Carey on 19 March 1999 (or 12 June 1999) no longer exist. There was no "*prima facie*" bar to the Commission ordering the Director-General to reinstate Mr Carey. Any order for reinstatement would not compel the Director-General to continue to employ Mr Carey beyond the existence of the "temporary circumstances" met by his employment on 19 March 1999 (or 12 June 1999) and extended on a number of instances since that time.

In the event the Commission ruled against him on the issue of reinstatement Mr Bradley sought payment of the maximum amount of compensation available under s. 79 of the *Industrial Relations Act 1999* comprising payment for lost earnings and payment for injury and embarrassment associated with the manner of Mr Carey's termination.

Section 113 of the *Public Service Act 1996* vests in a Chief Executive of a Department the discretion to employ a temporary employee to perform work of a type ordinarily performed by an officer of the public service. The exercise of that discretion is subject to any directive that may be made about the employment of persons as temporary employees. Directive 19/97 is such a directive.

Directive 19/97 provides, *inter alia*, that temporary employees may be employed only to meet temporary circumstances and that temporary engagements shall not be extended for any reason other than where there is a continued need to meet the temporary circumstance.

Two things are obvious from the provisions of s. 113 and Directive 19/97.

Firstly, a temporary employee can only be employed to accommodate temporary circumstances. If the temporary circumstances cease to exist so does the discretion otherwise available to a chief executive to appoint a person as a temporary employee. Secondly, the power to appoint is a discretionary one. Even if temporary circumstances exist, the Chief Executive is not required to appoint a temporary employee to satisfy the temporary circumstance if the chief executive is not minded to do so.

In his decision (at p. 311) the President made it clear that "*(I)t cannot be the effect of s. 113 that any employee other than a casual appointed to perform work of the type ordinarily performed by an officer is appointed for a limited term in the first instance with a right to relief if a failure to offer a further engagement may be shown to be unfair. What relief one may ask is the Queensland Industrial Relations Commission to grant? Is the Commission to order reinstatement or re-employment in circumstances in which there are no longer "temporary circumstances" to be met? Is the aggrieved ex-employee to be given compensation for loss of an engagement which he did not hold and which he could not have been given because s. 113 did not allow it?*".

In light of that decision, it is not open to the Commission, in my view, to require or direct the Chief Executive of the Department of Justice and Attorney-General to employ a person (i.e. Mr Carey) to cover any temporary circumstances which might exist which relate to Mr Carey's previous position (PO/20058). It would also be equally impossible for the Commission to require or direct the Director-General to employ Mr Carey in some other role (i.e. other than PO/20058) to meet any other temporary circumstances which might exist. In each instance to do so would be to require the Chief Executive to do things which s. 113 of the *Public Service Act 1996* does not require him to do. Reinstatement is thus not only impracticable, it is impossible.

For similar reasons the Commission could not order payment of any compensation to Mr Carey beyond that to which he is entitled according to his engagement pursuant to s. 113 and Directive 19/97 as reflected in his last letter of extension dated 30 August 2001. To do so would be to compensate him for loss of an engagement which he did not have beyond 2 November 2001 and which s. 113 of the *Public Service Act 1996* did not require the Chief Executive to extend (see the President's decision above).

The letter of extension dated 30 August 2001 advised Mr Carey that his period of engagement as a temporary employee had been extended until 2 November 2001 subject to the caveat that, except for misconduct, his services were terminable by either party at any time by the giving of two weeks' notice. In accordance with the terms of the letter of extension Mr Carey was entitled to be paid two weeks in lieu of notice upon the termination of his employment on 26 October 2001. As noted above, Mr Carey was paid until 2 November 2001 plus an additional 3 weeks of payment. He has thus been paid more than the payments required under the contract of employment in existence on 26 October 2001.

I am also not minded to award Mr Carey any other form of compensation. Whilst I was urged to award some compensation to reflect the hurt, humiliation and embarrassment allegedly visited upon Mr Carey in relation to the manner of his termination I am not persuaded that this is an appropriate case to award compensation of that type. Although, Mr Carey indicated in his statement (Exhibit 16), and under cross-examination, that he had suffered hurt, humiliation and embarrassment and that he had lost self-confidence as a result of his termination. The way he described the incident when the alleged hurt, distress and humiliation occurred leads me to conclude that Mr Carey, in a perverse way, enjoyed the whole experience and the chance to demonstrate his wit and intellect to those associated with his termination. Further, there was no evidence to suggest that he required the attention of any medical practitioners or any counsellors to help him deal with the alleged aftermath of the termination. The whole circumstances of this case are nothing like those considered in other instances where compensation of this type has been awarded by this Commission (see *Lade Oloyede v Sunshine Plantation Pty Ltd trading as the Big Pineapple* (1997) 156 QGIG 674, *Claudia Alvenie Sheedy v Farmers Arms Hotel* (1998) 160 QGIG 99, and *Carmela Serratore v Doyles Construction Lawyers* (2001) 168 QGIG 9).

For the above reasons, application No. B2054 of 2001 is dismissed.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

*Appearances:*

Mr T. Bradley, of Counsel, instructed by Mr C. Agnew, of Agnew Consulting Pty Limited, for Mr D. Carey the Applicant.

Mr A. Horneman-Wren, of Counsel, instructed by Ms A. Fitzpatrick, of McCullough Robertson, for the Department of Justice and Attorney-General.

Released: 27 August 2002

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 149 – arbitration if conciliation unsuccessful**Queensland Treasury Department AND Queensland Public Sector Union of Employees (No. B729 of 2002)**

COMMISSIONER BROWN

28 August 2002

## DECISION

This matter first came before the Commission in the form of a conference arising from a request lodged on 8 May 2002 by Queensland Treasury Department for assistance in negotiating a certified agreement pursuant to s. 148 (1)(a) of the *Industrial Relations Act 1999* (the Act) for the Queensland Office of Gaming Regulation (QOGR).

Following conferences held on 14 and 20 May 2002, both parties conceded that conciliation had failed, whereupon Queensland Treasury Department formally requested that the matter be arbitrated in line with s. 149 of the Act.

In line with s. 149(10) both parties agreed that the Commission as constituted for the conciliation (Brown C) could exercise the arbitration powers under s. 149.

The Commission determined that further conciliation would not be likely to settle the matter considering the history of the matter and the industry in which the issue occurred.

Significant events during the negotiations for a new certified agreement between the QOGR and the Queensland Public Sector Union of Employees (QPSU) covered correspondence, consultation sessions, “without prejudice” meetings and 2 ballots of all affected (39) employees between 14 May 2001 and 11 April 2002. The second ballot voted in favour of the certified agreement, however by letter to the Under Treasurer on 23 April 2002, Mr Scott, General Secretary of the QPSU rejected the proposed certified agreement.

Pursuant to s. 149(1)(b) the Commission considered it unlikely that further conciliation would result in the matter being settled in a reasonable period having regard to the outlined history of events.

The Commission determined that the QOGR would be regarded as the applicant.

Two preliminary matters were raised and resolved. Firstly the QPSU contended that the matter should not proceed until the ramifications of s. 160 – no disadvantage, were determined and secondly Mr Farren for QOGR contended that a statement contained in the witness statement of Barry Graham Watson constituted a preliminary matter.

The Commission determined that neither were matters of a preliminary nature requiring prior determination.

During the hearing the QOGR challenged as inadmissible paragraphs 5 and 6 of the proposed witness statement of Barry Watson on the basis that it failed the parole evidence test. The Commission agreed (see decision in transcript).

**Background**

The QOGR is a portfolio office within Queensland Treasury and is responsible for the regulation of gaming in Queensland including the administration of the State’s various gaming laws which include–

- *Casino Control Act 19812*
- *Gaming Machine Act 1991*
- *Charitable and Non-Profit Gaming Act 1999* (previously *Art Unions Act 1992*)
- *Keno Act 1996*
- *Lotteries Act 1997*
- *Wagering Act 1998*
- *Interactive Gambling (Player Protection) Act 1998*.

Part of the task of QOGR is to regulate and monitor the operation of Casinos on behalf of the Queensland Government. To this end there is full-time staff employed in the inspectorate offices in Queensland’s four Casinos *viz* –

Cairns Reef,  
Townsville Jupiters,  
Treasury, Brisbane,  
Gold Coast, Jupiters.

This matter arises through a failure of the parties to reach final agreement on the QOGR’s proposal to restructure its Casino operations. Broadly, the proposed change was to reduce staff from 2 employees to one employee at certain times, with a resultant roster change which would mean less opportunities to work night shift and hence a lower take home pay because of reduced access to night shift penalties.

The parties, by agreement in the Public Service Award – State – Casino Inspectors – Queensland Office of Gaming Regulation – Industrial Agreement (the Agreement) worked a system that averaged shift penalties, weekend penalties and public holidays over a 12 month period and paid a consistent weekly loading throughout the year. This was known as the “block pay” system.

The following is a comparison between the “block pay” under current arrangements and those proposed:

<b>Regional Office</b>	<b>Current Block Pay percentage</b>	<b>Proposed Block Pay Percentage</b>
Brisbane and Gold Coast	32.90	27.52
Townsville	33.42	28.10
Cairns	32.91	28.71

Negotiations regarding the changes proposed had been ongoing since May 2001.

During that time two separate votes of affected employees were held – the first vote showed more against than for and the second, after further explanation saw a majority of employees affected vote in the ballot, with a majority of those in favour of adopting the changes.

Subsequent correspondence in April 2002 by Mr A. Scott (QPSU) to the Under Treasurer indicated that the QPSU was unhappy with the proposals and refused agreement.

The parties agreed that the industrial instruments governing the employees in question are –

- The Agreement
- State Government Departments – Certified Agreement 2000

To familiarise the Commission with the nature of the work in question, the Commission conducted inspections at the Cairns Reef Casino on Monday, 22 July at 10 p.m., Townsville Jupiters Casino at 5 p.m. on Tuesday, 23 July, Brisbane Treasury Casino at 10 p.m. on Wednesday, 24 July and Gold Coast Jupiters at 10 p.m. on Thursday, 25 July. The Cairns and Townsville inspections were requested by the QOGR. The Brisbane and Gold Coast inspections were requested by the QPSU.

The Commission was able to observe the working environment and receive explanations regarding aspects of the work in question.

The QOGR called evidence from Michael Bernard Sarquis, David Kenneth Ford and Barry Andrew Sargeant.

In evidence, Michael Bernard Sarquis, Director, Compliance, QOGR made the following points:

- He is a career Public Servant who worked on the establishment of QOGR which commenced on 1 January 1995;
- He has attended various national gambling conferences and presented papers to such conferences;
- He is a member of the Australasian Best Practice Casino Control Model Working Party;
- The matters that QOGR seek will provide for:
  - a reduction in minimum staffing levels from two to one during quieter times in Casinos (night shifts);
  - vary length of shifts in southern casinos to a combination of 10 and 12 hour shifts as in the model rosters;
  - reduce nominal shift levels by two positions in each of the regional offices;
  - provide for greater flexibility in varying the agreed rosters; and
  - recalculate the block pay allowance to reflect the reduction in shifts;
- Create two or three Assistant Regional Managers (AO5 positions) in each regional office as a consequence of the determination;
- The QOGR adopted a risk based approach in 1996 where most of the duties and responsibilities of Gaming Inspectors in casinos are not mandated and are discretionary;
- QOGR management has the capacity to determine what is appropriate and to vary the duties accordingly;
- The mandatory requirements under the Casino Gaming Rule 1999 re infrequent occurrences will continue to be accommodated under the proposed arrangements;
- Extensive negotiations with the QPSU were undertaken with the QPSU to achieve the changes sought;
- The introduction of the 12 hour shifts and block pay allowance were never intended to entrench a particular quantum of block pay allowance regardless of the rostering practices in place;
- The implementation of the proposed changes is essential to QOGR's business operations with respect to budget imperatives, allowing resources to be reallocated to meet other business priorities including additional resources in the investigations area and the appointment of a training officer, to improve accountability and quality control, to better match the rostering of staff to the workload, to improve the working conditions of staff by reducing the amount of late night shift work, to deliver more flexible working arrangements to meet departmental needs, to reduce operating costs, to fulfil management obligations and keep pace with "best practice" standards and to consolidate Inspector's conditions of employment into one instrument.
- Benefits for regional staff include the reduction of the number of night shifts required to be worked, the maintenance of a block pay arrangement, a better career structure and the undertaking of more rewarding and valued work;
- Patron complaints are only taken between 9.00 a.m. and 9.00 p.m. and attendance by Inspectors at soft counts are no longer compulsory although, at least twice a week, an inspector will attend;
- Changes on inspectorates will be minimal;
- No additional risk on an Inspector working alone;
- All safety issues have been addressed;
- Proposed changes will not affect the quality of regulation of casinos and other gaming activity and are consistent with Government policy for the regulation of gambling; and
- The high standard of gambling regulation in Queensland will be maintained.

In support of QOGR's position David Kenneth Ford, Executive Director, QOGR, Queensland Treasury since 1995 led the following evidence:

- He attended various international and national gambling conferences conducted by regulators and others and presented papers on issues including regulatory trends, interactive gambling and gaming machine legislative changes and participated in panel discussions and chairing sessions;
- He stated that the Compliance Division, of which the casino based regional offices form a part, have responsibility for compliance activities across all seven of the principal pieces of legislation;
- He said in 1995 the QOGR commenced a process of change and for a number of reasons moved away from the traditional risk adverse approach to casino regulation to a risk based approach to the supervision of casinos;
- A consequence of that package of changes was a decision to reduce the resources applied specifically to casino regulation, especially resources applied to the night shift;
- He stressed that the savings to QOGR through the implementation of the package will be used to meet urgent requirements for additional investigation and training staff; and
- He indicated that Inspectors no longer have a permanent presence in the Northern Territory, the Australian Capital Territory and Western Australia.

Evidence was called from Barry Andrew Sargeant, Director General of the Department of Racing, Gaming and Liquor in Western Australia, where he made the following points:

- He had been a member of the Territory of Christmas Island Casino Surveillance Authority since 1993 and attended international and national gambling conferences;
- The services of his staff are utilised in undertaking licensing, inspectorial and audit functions in relation to the regulation of community gaming and casino operations, on-course and off-course wagering and involved in the regulation of the liquor industry;
- He said that in continuing with the risk analysis approach of monitoring casino operations, inspectors were gradually removed from the soft count, issuing of gaming equipment, collection of drop boxes and drop buckets, junket settlements and verification of most jackpot payments. Subsequently, the need to have 3 or 4 inspectors on shift at the same time diminished and over the years the number of inspectors on shift reduced to one;
- He approved a new shift roster from April 2002 based on a 10 hour shift with one inspector rostered on each shift with a full-time presence not being maintained; and
- His opinion was that the adoption of a risk based approach was in keeping with international best practice and that the proposed reduction by QOGR of inspectors on night shift would not effect the quality of casino gaming regulation in Queensland.

The QPSU called Glen Origlasso and Graham Raymond William Dow to present evidence to have the *status quo* remain. Barry Graham Watson also was to be examined, however following the decision that some of his evidence was inadmissible, the QPSU chose not to call him.

Glen Origlasso, Gaming Inspector, Treasury Casino, said he had held that position since 1985 and had been working shift work since 1973. He said shifts at the casino were originally based on an 8 hour roster but changed 7 years ago to a 12 hour roster. He maintained that the current roster including the 12 hour shifts minimised the impact of shift work on his wellbeing and family life. He believed that the staffing levels contained in the Agreement were the minimum required to maintain quality casino regulation in Queensland and are necessary to ensure that workloads are reasonable and employment conditions do not erode.

Graham Raymond Dow, Supervising Inspector, Treasury Casino, for the past 7 years stated that he had been working shift work for the past 17 years. He believed that 12 hour rosters improved the quality of life of both himself and his family. He said that he had been involved in negotiations for Certified Agreements at agency and sub-agency levels. He believed that there should be maintenance of conditions of the Agreement. He understood that the QOGR's proposal would lead to reduced staffing in casino throughout Queensland. He maintained that the Treasury Casino is currently under staffed and that any further reduction in staff levels would have a detrimental effect on the stress, anxiety and depression levels of Inspectors. He also believed that a reduction in staff numbers would lead to reduced levels of casino regulation in Queensland.

### Conclusion

Section 149(5) states:

“(5) In considering the matters at issue, the commission must consider at least the following:

- (a) the merits of the case;
- (b) the likely effects the commission's proposed determination, and any matters agreed before arbitration, on employees and employers who will be bound by the proposed determination;
- (c) the public interest, and to that end the commission must consider—
  - (i) the objects of this Act; and
  - (ii) the likely effects of the commission's determination on the community, economy, industry generally and on the particular enterprise or industry concerned;
- (d) the extent to which the negotiating parties have negotiated in good faith.”.

In the view of the Commission, the QOGR satisfactorily addressed the issues of inspectors' safety, career structure and the viability of the proposed working arrangements in terms of the QOGR fulfilling its responsibilities to the Government, the casinos and patrons.

The evidence indicated that there will be occasions whereby unforeseen circumstances requiring the attention of inspectors will, sometimes, place heavier demands on them. However, the Commission is of the view that the issue of workload has been satisfactorily addressed by QOGR and the Commission is further of the view that inspectors with appropriate experience and training can safely perform their work over a roster cycle that, from time to time, includes night shifts worked alone.

In accepting that the proposed workloads can be safely managed, I note that I have accepted that the figures (statistics) prepared by QPSU and presented by QOGR do not include all incidents requiring the attention of inspectors.

After considering the proposed staffing structure and re-allocation of resources, including the proposed 10 new Assistant Regional Managers, the Commission is also satisfied that in addition to career structures the application satisfactorily addresses the issue of community benefit and service delivery, efficiency and effectiveness as required by clause 4(2) of the Core Agreement 2000.

In considering submissions and the evidence of Barry Andrew Sargeant, in particular, and having regard for his experience, I am satisfied that the issue of Best Practice has been addressed.

David Kenneth Ford's evidence addressed the issue of audits and inspection in a manner that satisfied the Commission that the proposed arrangements, funded from budgetary savings, will not adversely affect the thoroughness of the operations of inspectorates.

The QPSU made submissions regarding the likely adverse impact on inspectors resulting from the proposed changes.

The Commission has already indicated its position on some of the issues raised by the QPSU in respect to staffing levels, workloads, workloads on night shift and the ability to perform regulatory duties under the proposed structure in the assessment of QOGR's case.

The evidence adduced from the QPSU witnesses has not convinced the Commission that there would be significant impact or indeed any adverse impact on the work, social and family life of inspectors as a result of working in the fashion proposed.

This, however, is not the case with respect to the accompanying reduction in take home pay which would eventuate should the "block pay" currently paid be adjusted to account for the reduction in the number of night shifts worked.

Disposable income does have a direct impact on inspectors and their dependants and would certainly impact, at least to some degree, on the inspector's social life if the reduction in pay was in the order of 5% before tax or 3% after tax.

In the view of the Commission certainty is one of the most positive aspects of the Enterprise Bargaining system. For employees, certainty of work patterns and certainty of the levels of income are extremely important not only for the personal impact that these issues have on employees at the time of any change but on the confidence that employees have in the system of Enterprise Bargaining. To allow an immediate and negative impact on inspector's wages of 5% as a result of this exercise would inevitably create, at best, cynicism and, at worst, open hostility towards the next round of Enterprise Bargaining and the Enterprise Bargaining system as a whole. Public Servants and the State Government have recently expressed reservations about the Enterprise Bargaining system of regulating workplace relationships. A reduction such as that proposed would certainly further undermine the confidence of employees in the system.

The QPSU submissions regarding the Award, Industrial Agreement and the Certified Agreement have been considered as has the argument that the proposed changes represent a "further claim" in breach of the No Further Claims provision contained in clause 2.2 of the Certified Agreement 2000.

The Commission, however, is inclined to accept as correct the agreement reached between the parties that clause 1.8 of the Certified Agreement 2000 enables QOGR to seek the proposed changes during the life of that Certified Agreement. This agreed position was presented by the parties in the following terms:

**"Authority enabling Queensland Treasury to seek the proposed changes during the life of a certified agreement.**

Clause 1.8 – 'Agency Level Flexibility' of the State Government Departments Certified Agreement 2000 (No. CA234 of 2000) states that the certified agreement is a 'framework agreement' and provides for the implementation of agency and sub-agency flexibilities and changes (including changes to conditions of employment) through certified agreements made in accordance with all of the provisions of Chapter 6, Part 1 of the *Industrial Relations Act 1999*."

I do not accept that this application is in breach of the "No Extra Claims" provision.

Clause 1.8 of the Certified Agreement 2000 reads:

**"1.8 Agency-Level Flexibility**

- (1) This agreement represents a framework certified agreement.
- (2) Parties to this agreement are entitled to make agency/sub-agency certified agreements in accordance with all the provisions of Chapter 6, Part 1 of the *Industrial Relations Act 1999*.
- (3) Nothing in this agreement prevents the parties from identifying flexibilities or changes to be implemented at the agency or sub-agency level by mutual agreement between a department or agency and the relevant union(s).
- (4) There must be:
  - (a) consultation with affected parties;
  - (b) agreement by the union(s) covering affected employees; and
  - (c) agreement by all relevant parties at the Agency Consultative Committee.

Provided that where agreement cannot be reached, the parties may access the disputes procedure set out in Part 13 of this agreement.

- (5) Any such change must be documented and made available to all employees directly affected by the proposal.
- (6) If an appropriate flexibility provision is contained in the relevant award then the parties may implement changes in accordance with the relevant award provision.
- (7) Where an identified flexibility or change affects an award condition of employment or a condition of employment specified in a Ministerial Directive then the department or agency and the relevant union(s) must effect the change through a certified agreement made pursuant to the provisions of the *Industrial Relations Act 1999*."

Clearly as was acknowledged by both parties, agreement on the proposed change was not forthcoming.

I am satisfied that the parties negotiated in good faith. It could have been argued that the QOGR, and for that matter the QPSU, had the right to unilaterally withdraw from the Industrial Agreement by giving the appropriate notice contained in clause 5 therein (four weeks).

Schedule 4 of the Industrial Agreement that sets out rosters contains the following:

"Management may alter this roster on a permanent basis providing that 14 days notice is given to employees of the inspectorate. Before exercising this clause, Management will consult with staff but in the event that agreement cannot be reached and in a time frame acceptable to Management, the final decision on the application of this clause resides with Management."

In that the Industrial Agreement had been incorporated as a part of the current Certified Agreement, QOGR were right to take the path they took. That of negotiation and subsequently a request for a determination under s. 149. That was the responsible approach.

In my estimation, Mr Scott of the QPSU also acted in a responsible manner and in the interests of his members.

The arrangements in place were part of the current Certified Agreement. The ability to change them arises under subclause (2) of clause 1.8

The QOGR cites as authority the decision of Nutter C in his decision regarding the introduction of continuous crushing into the sugar industry (152 QGIG 1861-63) and noted that his decision was cited with approval by Asbury C. Nutter C in that decision stated:

“As a basic right and principle the employer has a right to organise a business in the way in which it considers the most efficient manner. It has a right to ensure that work practices are such as to minimise health and safety risks to employees and meets the duty of care to employees.”

He also cited the South Australian Industrial Commission in the *BHP Employees (Payment of Wages)* case (39 SAIR 158 at 166) as follows:

“On the matter of the right of the employer to conduct his business without interference, the Commission and its predecessor, the Court has taken the view that management has an almost unfettered right to manage its business as it thinks fit unless in so doing the employee is unreasonably subjected to a condition or circumstances which will be prejudicial to him.”

The High Court in *Re: Cramm, Ex parte N.S.W. Colliery Proprietors' Association Ltd and Others* (163 CLR at 136-137) said:

“Rather it is an argument why an industrial tribunal should exercise caution before it makes an award in settlement of a dispute where that award amounts to a substantial interference with the autonomy of management to decide how the business enterprise shall be efficiently conducted.”

Like *Asbury C*, I agree with *Nutter C* as he then was, with respect to the right of an employer to organise his or her workforce so as to serve their operational requirements efficiently.

Having regard to all of the evidence, submissions and with the knowledge and understanding gained from inspections, I am satisfied that inspectors have the time and the skills to perform their duties in the manner required and more over it is safe for them to do so.

I therefore grant the application insofar as the proposed staffing levels and rosters are concerned.

I am not prepared to grant the application with respect to the immediate reduction in block pay.

The Commission is of the view that it is right and proper that a clause such as clause 1.8 of the Certified Agreement exists. This enables agencies and sub-agencies to continually monitor procedures and practices and if warranted implement appropriate changes and efficiency measures including measures that address economic efficiencies.

Such changes are in the interests of QOGR, the inspectors and indeed the tax paying public. However, I do not believe that this clause should be used in such a way as to substantially reduce take home pay of employees during the life of an agreement.

As mentioned the inspectors are entitled, in the view of the Commission, to a level of certainty regarding pay at least until the nominal expiry date of the Certified Agreement 2000.

It is not the view of the Commission that QOGR should be burdened with the payment of Block pay allowance at the level that exceeds the actual amount earned by inspectors. Such a decision could have very negative flow-on effects. It is, however, the view of the Commission that the adjusted levels of Block pay that reflect the actual work performed should be phased in.

During the course of negotiations the parties discussed this issue but failed to reach agreement.

For QOGR's part they contemplated Block pay maintenance for a period of time but not so much as to maintain the rate until the current Certified Agreement 2000 is replaced by a new one.

For the QPSU's part they considered full maintenance until the next Certified Agreement is in place to be appropriate.

The Commission is satisfied considering the evidence and submissions that the inspectors affected by the change should maintain their Block pay at current levels until the nominal expiry date of the current Certified Agreement 2000 being 30 April 2003.

Whilst the Commission has expressed confidence that the proposed working arrangements will be adequate to fulfil the responsibilities of QOGR, the Commission wishes to express in the strongest possible terms that this decision in no way condones a situation whereby there are no inspectors on duty in a casino at any time the particular casino is operational.

To this end, each casino is to develop a protocol that will ensure that, in the event of an emergency whereby a casino is left without an inspector for a time, replacement staff will be at the site in the shortest possible time frame. In the protocol should be a requirement that the film recorded by the QOGR dedicated surveillance cameras, during the time that no inspector was present, be reviewed by inspectors by the completion of the shift following the unforeseen absence.

The QOGR is to submit a draft determination in line with this decision within 7 day's of the release of this decision.

Depending on the wishes of the parties, the staffing protocols mentioned above may be in the form of a Schedule attached to the determination or recorded in a memorandum of understanding between the parties with a copy placed on the file of the Commission.

Order accordingly.

D. K. BROWN, Commissioner.

*Appearances:*

Mr D. Hooper, with him Mr P. Ramsay and Ms K. Flanders, for the Queensland Public Sector Union of Employees.

Mr. J. Farren, with him Messrs Sarquis and Searson, for Queensland Treasury Department on behalf of the Queensland Office of Gaming Regulation.

Released: 28 August 2002