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No. 2

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
CA336/02	Tully Sugar Limited Tully Mill Enterprise Bargaining – Certified Agreement No. 6	16/8/02	CA325/01
CA338/02	A B Sea Cruises - Actors Equity - Certified Agreement 2002	20/8/02	
CA348/02	Claypave Pty Ltd - Ipswich Collective Bargaining - Certified Agreement	23/8/02	CA447/00
CA349/02	National Power Services Pty Ltd - Certified Agreement 2002	26/8/02	
CA339/02	Brisbane Convention & Exhibition Centre - Certified Agreement 2002	27/8/02	CA452/00
CA329/02	RM and JM Shea Scallywags - Certified Agreement 2002	29/8/02	CA352/98
CA362/02	Chubb Protective Services - Certified Agreement (Qld) 2002	30/8/02	CA91/00
CA374/02	In-Front Security - Certified Agreement 2002	30/8/02	

The following Agreement has been withdrawn:-

No/s	Title
CA357/01	Northpower (Queensland Projects) Enterprise Agreement 2001-2004 – Certified Agreement

E. EWALD
Industrial Registrar

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 137 – application to amend order

**The Australian Workers’ Union of Employees, Queensland AND
Local Government Association of Queensland (Incorporated) and Another (No. B16 of 2002)**

**ORDER - APPRENTICES’ AND TRAINEES’ WAGES AND CONDITIONS
(EXCLUDING CERTAIN QUEENSLAND GOVERNMENT ENTITIES)**

COMMISSIONER BLOOMFIELD
COMMISSIONER BROWN
COMMISSIONER THOMPSON

30 August 2002

Application to amend – Adult trainees – Application granted.

REPORT ON DECISION (As Edited and Expanded)

At the conclusion of proceedings on 30 May 2002 the Commission said:

“We are persuaded, after hearing the parties this morning and considering the various material that’s been tendered, to grant the application in principle.

We say “in principle” because we have several reservations about the application and the way it is drafted. Section 136(2) of the Industrial Relations Act, read in conjunction with s. 137, permits the Commission to fix a rate for an apprentice or trainee, “being a proportion of the wages payable for the relevant calling to employees in the workplace where the apprentice or trainee is employed or placed.”. It seems to us that the way to accommodate that requirement is to include a provision in the existing general clause covering wage rates for apprentices and trainees referring to the fact that rates for adult employees are subject to clause 5.1.1. We will set that out in our order when it is issued.

The second reservation we have about the application is at 5.1.1(b). It seems to us that that particular provision could be discriminatory in effect, either directly or indirectly. Having regard to the obligations on the Commission not to introduce provisions which may be discriminatory in effect, we have decided that we will not approve that particular aspect of the application. The effect of that will be that any trainees, whether they enter the apprenticeship before or after age 21, will be entitled to receive an amount which is not less than the Queensland minimum wage from the time that they are 21.

We thank the parties for their attendance and their submissions. We will provide expanded reasons in due course.”.

In deciding to vary the Award essentially in terms of the application we took particular notice of the fact that 58 of the existing traineeships/apprenticeships in local government provide adult minimum rates (out of 118). In addition, material contained within the various exhibits disclosed there was an increasing take-up of traineeships by adult workers – many of whom were, and are, existing employees of local government entities. Currently, the maximum rate payable to a trainee is \$396.00 at Skill Level A and \$378.00 at Skill Level B. By comparison, an employee employed at Level 1 under the Local Government Employees (Excluding Brisbane City Council) Award – State is entitled to \$453.10. If employed at Level 2 the employee is entitled to \$473.90.

The rate of pay proposed by the AWU’s application is \$413.40. This is significantly less than the adult rate which would apply if an existing employee of a local government entity did not enter into a traineeship. In our view, the existing rates act as a possible disincentive to employees to take up formal traineeship arrangements. If granted, the application will reduce that possible disincentive.

In addition, we note that there are many other traineeship arrangements which already provide adult rates for adult workers. In our view, employees under the Local Government (Operational Works) Traineeship should not be excluded from access to a level of entitlement now being enjoyed by an increasing number of trainees employed by local government entities, and by trainees in other industries.

We believe that the provision should apply equally to those who commence a traineeship as an adult or as a junior. If different rates applied depending upon the age of the person when they entered the traineeship, there could, in our considered view, be a potential for some discriminatory effect. Quite apart from the obligation on us not to introduce such a discriminatory provision, we do not believe it is appropriate that the wage rates depend upon the age of entry of the person. An adult trainee should be entitled to the adult minimum rate of wage irrespective of their age at entry.

Dated this thirtieth day of August 2002.

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

Operative Date: 30 August 2002
Report on Decision – Order – Apprentices’ and Trainees’ Wages and
Conditions (Excluding Certain Queensland Government Entities)
Released: 3 September 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 319 – representation of parties

William Bamford AND MIM Holdings Limited (No. B1153 of 2002)

COMMISSIONER ASBURY

2 September 2002

Industrial Relations Act 1999 s. 74 Application for reinstatement – s. 319 Representation of parties – Industrial Relations Act 1990 s. 45 Organisation coverage – Alteration to rules of Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland under subsections (4), (5) and (6) of s. 45 of the Industrial Relations Act 1990 in relation to employees of Mount Isa Mines Limited – Orders under s. 45 of Industrial Relations Act 1990 in relation to coverage of employees of Mount Isa Mines Limited – Whether alteration to rules and representation order under s. 45 of Industrial Relations Act 1990 is binding with respect to dismissed or former employee – Alteration to rules found not to operate with

respect to dismissed or former employee – Order under s. 45 of the *Industrial Relations Act 1990* in relation to coverage of employee organisations found not to preclude representation of dismissed or former employees by organisation of employees which would not have been entitled to represent employee while employed by Mount Isa Mines Limited – The term “industrial interests” in s. 45 of *Industrial Relations Act 1990*, s. 279 of *Industrial Relations Act 1999* and orders made under those sections, is not synonymous with the term “industrial matter” as defined in those Acts – The term “employees” in an order made under s. 45 of the *Industrial Relations Act 1990* and s. 279 of the *Industrial Relations Act 1999* is not synonymous with the term “employee” as defined in those Acts – Application made by employee in his own right – Officer of Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland appointed in writing under s. 319 of *Industrial Relations Act 1999* – Applicant entitled to be represented by an officer of the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland acting as agent in relation to his application for reinstatement.

DECISION

Overview

On 19 July 2002, Mr William Bamford made an application for reinstatement under s. 74 of the *Industrial Relations Act 1999* (the Act). Appended to Mr Bamford’s application, is a notice of appointment of agent pursuant to s. 319(a) of the Act in the form required by Rule 102 of the *Industrial Relations (Tribunals) Rules 2000*. That notice states that Mr Bamford has appointed Evan Moorhead of the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (AMEPKU) as his agent in the “above proceeding”. The case number of the proceeding does not appear on the notice, although the notice is headed “William Bamford AND MIM Holdings Pty Ltd”. This is not surprising given that when an application is filed it does not have a case number.

The respondent in the application was said to be MIM Holdings Pty Ltd. Subsequently correspondence was received by MIM Holdings Limited advising that Mr Bamford’s employer was in fact Mount Isa Mines Limited. A conference in relation to the application was held on 30 July 2002 pursuant to s. 75 of the Act. Both prior to and at the conference on 30 July, Mount Isa Mines Limited contended that the AMEPKU was not lawfully permitted to represent Mr Bamford. Further, Mount Isa Mines Limited would not participate in a conciliation conference under s. 75 of the Act if the applicant was represented by any officer of the AMEPKU. With the agreement of the parties, a hearing was held on 2 August 2002, to determine if Mr Bamford was entitled to be represented by an officer of the AMEPKU, acting as his agent.

At that hearing, Mount Isa Mines Limited was represented by Mr J.E. Murdoch SC and Mr Bamford was represented by Mr E. Moorhead of the AMEPKU.

Submissions for Mr Bamford

It was submitted that Mr Bamford was entitled to appoint Mr Moorhead, in his capacity as an officer of the AMEPKU, as his agent, in relation to the reinstatement application. The appointment had been duly made under s. 319 of the Act, and nothing in that section precluded it. In the alternative, it was submitted that if the Commission found that Mr Moorhead could not represent Mr Bamford in his capacity as an officer of the AMEPKU, then he could do so as an individual.

Mr Moorhead also argued that the AMEPKU had no direct interest in the matter as a party principal, and was not seeking to use its appearance as agent for the applicant to make submissions on its own behalf. Termination of employment is a matter which cannot be included as part of an industrial dispute, and the AMEPKU was not seeking the arbitration of a dispute or the enforcement of any matter under an Award or Certified agreement to which it is not a party. Further, the AMEPKU was not seeking to act other than as an agent in relation to the application. Mr Bamford had standing to make the application under s. 74 in his own right and was the only person affected in the matter, other than the respondent.

Mr Moorhead argued that for these reasons, the decision of then President, His Honour Justice Moynihan, in *Gartrel and Smee v Federated Engine Drivers’ and Firemen’s Union of Employees, Queensland* (1989) 132 QGIG 1421 which held that the Commission was not bound to accept an agent appointed in writing, could be distinguished from this case. In *Gartrel*, the persons seeking to be represented by an agent, were not parties to the alleged industrial dispute. At an earlier stage in the proceedings, the Commission had allowed an individual crane driver to be represented by an official of a federally registered union acting as his agent, on the basis that those earlier proceedings involved the dismissal of the particular crane driver, and not general issues such as award conditions. When the basis of the dispute had changed, and general issues such as award conditions and industry agreements had become the subject of the dispute, the Commission refused to allow the federally registered union to continue to appear in proceedings. In upholding the appeal, Justice Moynihan said:

“The consequences of the Commission’s approach, which in my view was correct, was that those whom Mr Gartrell claimed to represent were not party to the proceedings in respect of which the ruling was made.”

In this case, Mr Bamford is a direct party to the application.

It was further contended that Mr Bamford is eligible to be a member of the AMEPKU. The rules of the AMEPKU had been altered so that the AMEPKU was not eligible to enrol as members employees of Mount Isa Mines Limited in certain areas as a result of a decision of a Full Bench of this Commission in *AWU v ETU and Ors* (1995) 150 QGIG 405. Mr Moorhead conceded that as a result of that alteration, Mr Bamford was not eligible to be a member of the AMEPKU while employed by Mount Isa Mines Limited. However, as Mr Bamford was no longer an employee of Mount Isa Mines Limited, the exclusion had no application to him, and he was eligible to be a member of the AMEPKU pursuant to s. 531 of the Act, and to appoint Mr Moorhead in his capacity as an officer of the AMEPKU as his agent, in the unfair dismissal application.

Mr Moorhead argued that Mr Bamford could not be considered forever to be an employee of Mount Isa Mines Limited and thereby ineligible to be a member of the AMEPKU. The very nature of the reinstatement application meant that the employment of Mr Bamford by Mount Isa Mines Limited had come to an end. Further, the nature of the demarcation order was to reduce “jockeying” between unions, and resultant industrial disputation, over employees of Mount Isa Mines Limited. Such disputation could not arise in relation to an unfair dismissal application. It was also contended by Mr Moorhead that the term “employees” was used in the representation order in the context of “employees of Mt Isa Mines Limited”, and there was no basis for finding that this phrase should also include persons who may previously have been employees of Mount Isa Mines Limited.

Submissions for Mount Isa Mines Limited

For Mt Isa Mines Limited, Mr Murdoch submitted that the rules of the AMEPKU had been altered by order of the Commission made on 18 October 1995 (the rules order), preventing the AMEPKU from enrolling as members, employees of Mount Isa Mines Limited, except as provided in the rules order. The alteration to the rules of the AMEPKU had reflected an order of a Full Bench of the Commission dated 12 September 1995 (the representation order) which provided that the AMEPKU could not represent under the Act, the industrial interests of employees of Mount Isa Mines Limited, engaged in certain areas.

Mr Bamford had been employed in the position of boilermaker, pursuant to the *Metallurgical Plants Area Mount Isa Mines Limited Certified Agreement 2000* (CA505/00). The AMEPKU has no right to represent employees within the scope of that Certified Agreement, and there has been a specific finding to this effect by the President in *MIM Holdings Limited v AMEPKU* (2000) 164 QGIG 316. As a consequence of the representation order and the rules order, the AMEPKU does not have the right to represent the industrial interests of Mr Bamford including in an unfair dismissal application, which is necessarily an application made under the Act. Further, unless Mr Bamford was a member of the AMEPKU as at October 1995, and has not at any time ceased to be a member, he does not have an entitlement to be or remain a member of the AMEPKU.

It is also submitted for Mount Isa Mines Limited that the notice of appointment of agent filed with the reinstatement application, appoints "Evan Moorhead of Automotive, Metals, Engineering, Printing and Kindred Industries Union" as agent and indicates that the AMEPKU is the agent with the relevant officer being Mr Moorhead. All contact details are those of the AMEPKU.

It was contended that the AMEPKU in defiance of the representation order, has previously attempted to represent employees whom they have no right to represent. It was further contended that what is meant by "represent" was exhaustively considered by the President in *MIM Holdings Limited v AMEPKU* (2000) 164 QGIG 316, where it was made clear that the exclusion prevents the AMEPKU from being legitimately concerned with the industrial interests of workers who are subject of the exclusion. In that decision, it was held that the AMEPKU lacked capacity to be a party to certified agreements which exclusively cover employees outside the AMEPKU's eligibility rule. Applying the President's reasoning, the representation order denies the AMEPKU the right to represent employees covered by the Certified Agreement, in unfair dismissal applications.

Mr Murdoch also argued that it was inconsistent with the status of the AMEPKU as a registered organisation of employees, to provide resources for a purpose inconsistent with its rules, the Act and orders of the Commission. Further, the Commission should not allow its orders or legislation to be subverted by artificial means: *Jaques v Queensland Police Service* (1997) 155 QGIG 237; *Shop Distributive and Allied Employees Association (Queensland Branch) Union of Employees v Retailers' Association of Queensland Limited Union of Employers and Ors* (1997) 155 QGIG 544.

Clearly, Mr Bamford has either authorised the AMEPKU or Mr Moorhead to act on his behalf, or alternatively, Mr Moorhead in his capacity as an officer of the AMEPKU. Even if this was not the case, any appointment of Mr Moorhead is a sham, obviously designed to subvert the representation order and the rules order as well as the relevant provisions of the Act. To allow Mr Moorhead to represent Mr Bamford, even for the limited purpose of conciliation, would be to further that attempt.

Mr Murdoch contended that the submission of the AMEPKU to the effect that once the employment relationship ended, the representation order and the rules order were defeated, was erroneous. This was because the definition of "employee" in Schedule 5 of the Act extends beyond the common law concept of employee, and includes a person who is usually an employee. Mr Murdoch argued that the term "employees" as it was used in the representation order, should be given the same meaning as the definition in Schedule 5 of the Act, so that the order barred representation of both employees of Mount Isa Mines Limited and persons usually employed by Mount Isa Mines Limited.

In support of this proposition, it was also pointed out that the provisions of the Act dealing with unfair dismissal refer to dismissed employees as "employees". In this regard, s. 74(3) of the Act provides that an application may be made by an employee or an organisation whose rules entitle it to represent the employee's industrial interests. Further, the definition of "employee" in the Act is mirrored in the rules of the AMEPKU which provide at 1A that: "The Union shall consist of an unlimited number of persons who are employed or usually employed in or in connection with...trades, callings or branches...".

Mr Murdoch also drew the attention of the Commission to an apparent limitation in the AMEPKU rules with respect to persons employed in the industries or occupations within callings covered by the constitution of the AWU, as an indication that the limitation on the AMEPKU with respect to employees of Mount Isa Mines Limited, was not the only difficulty facing the AMEPKU, with respect to its eligibility to enrol Mr Bamford as a member.

In relation to the AMEPKU or Mr Moorhead acting as an agent for Mr Bamford, Mr Murdoch said:

"The other matter relied on is the attempt to say that the union as a corporation for the purposes of the Act is entitled to go out on the highways and byways as an agent. Commissioner, irrespective of what it might style its role to be, in my submission, whether it's as an agent or whether it's as a union operating as such, the function of representing Mr Bamford is still the function of representation and the Full Bench order contains an exclusive assignment of rights to, as a union, represent persons in certain areas.

They're exclusively given in the relevant area to The Australian Workers' Union, but the flip side of the coin is that there is a prohibition on the Metal Workers Union representing employees in that category.

Now the prohibition, I submit, Commissioner, is an absolute prohibition and it's not open to the Metal Workers to say that, 'We're going to change t-shirts and we're going to put on a new t-shirt that says we're an agent and because we've changed our shirt we can step around the order of the Full Bench'.

The prohibition does not confine itself in that way, nor does it provide any loophole which permits the registered body to style itself as agent and by so doing commence to do the very representational tasks which are denied it by a Full Bench order."

The representation order in Mr Murdoch's submission, removed the right of the AMEPKU to represent the industrial interests in any capacity, be it party principal or agent. The term "industrial interests" should be read so that it encompasses all industrial matters defined in Schedule 1 of the Act, and any matter under the Act, including unfair dismissal applications.

Mr Murdoch also argued that the Commission was not bound to accept the appointment of an agent, particularly where the representation was not *bona fide*: *Gartrel and Smee v Federated Engine Drivers' and Firemen's Union of Employees, Queensland* (1989) 132 QGIG 1421 at 1423, and said that the appointment of Mr Moorhead in this case was also not *bona fide*.

Conclusions

The central issue for determination is whether the terms of the rules order and/or the representation order prevent Mr Moorhead in his capacity as an officer of the AMEPKU, or as an individual, from representing Mr Bamford. It is convenient to start with the provisions of the Act dealing with reinstatement applications and representation of parties in proceedings.

The provisions of the Act under which applications may be made for reinstatement, are found in s. 74. Relevantly, s. 74(3) provides that an application may be made by an employee, or with the employee's consent, an organisation whose rules entitle it to represent the employee's industrial interests.

The application under s. 74(3) subject of this proceeding, has been made by Mr Bamford and not by the AMEPKU. Mr Bamford is a party to the application in his own right. Given that the AMEPKU has not made the application, the requirements in s. 74(3) (b) are not triggered, and I am not required to determine whether, for the purpose of s. 74(3)(b), the AMEPKU is entitled to represent the industrial interests of Mr Bamford.

The provisions of the Act dealing with representation of parties, are found in s. 319. Section 319(1) is in the following terms:

“319 Representation of Parties

- (1) In proceedings, a party to the proceedings, or a person ordered or permitted to appear or to be represented in the proceedings, may be represented by –
- (a) an agent appointed in writing;
 - (b) if the party or person is an organisation – an officer or member of the organisation.”.

Section 319 goes on to provide a number of restrictions on the representation of parties to proceedings by lawyers. As a party to the application under s. 74(3), Mr Bamford has appointed Mr Evan Moorhead of the AMEPKU as his agent pursuant to s. 319(a) for the purpose of that application. Mr Moorhead stated that he is not a lawyer, and the respondent did not contest this statement. *Prima facie* the applicant has validly appointed Mr Moorhead in his capacity as an officer of the AMEPKU, as agent for the reinstatement application.

However, it is also necessary to examine the rules order and the representation order, to determine whether they bar Mr Moorhead as an officer of the AMEPKU or as an individual, from representing the applicant. The history of these orders can be summarised as follows:

- In 1993-94 applications were made under s. 45 of the then *Industrial Relations Act 1990* by The Australian Workers’ Union, Queensland (B149 of 1993); Mount Isa Mines Limited (B234 of 1993) and the Australian Council of Trade Unions Queensland (B81 of 1994) on behalf of a number of affiliated unions including the Automotive, Metals and Engineering Industrial Union of Employees seeking various competing orders in relation to representation rights with respect to employees of Mount Isa Mines Limited;
- On 13 October 1994 a Full Bench of the Commission released a decision in relation to these applications which appears at 147 (2) QGIG 932;
- As part of that decision, the Full Bench also made an order, known as the *MIM Lease Representation Order* (the representation order) which can be found at 959 – 960.
- As a result of an appeal from that decision, the Industrial Court in a decision of 8 May 1995, reported at 148 QGIG 270, held that the Full Bench had directed a nominated Commissioner to make an alteration to the rules of certain unions in a manner which was beyond power, and remitted the matter to the Full Bench for further consideration;
- On 12 September 1995, the Full Bench by a decision reported at 150 QGIG 405, adopted the findings of fact in the decision of 13 October 1994, and made a further *MIM Lease Representation Order* (at 406-407);
- Section 10 of that further order stated that the rules of a number of unions required alteration, and referred the matter to a nominated Commissioner;
- In November 1995, His Honour Justice McKenzie, then President of the Industrial Court dismissed a further appeal instituted by the Federated Engine Drivers’ and Firemens’ Association of Australasia Queensland Branch, Union of Employees and the Electrical Trades Union of Employees of Australia, Queensland Branch, where it had been contended that the Full Bench had misconceived its role on the remitter. This judgment is reported at 150 QGIG 1403.

As a result of the decision of the Full Bench of 12 September 1995 to refer rules alterations to a nominated Commissioner, a decision and order altering the rules of a number of unions, including the AMEPKU was made by then Chief Commissioner now President Hall on 18 October 1995. The decision and the order are reported at 150 QGIG 1123. The order then made with respect to the rules of the AMEPKU, which appears at 1128-9, was in the following terms:

“5. The rules of the Automotive, Metals and Engineering Industrial Union of Employees, Queensland be altered by inserting the following new subrule at the end of subrule 1F:

‘1G Notwithstanding the foregoing provisions of this rule, all employees of Mount Isa Mines Limited who are engaged in the following Divisions or Departments...shall be eligible for membership in the Union. But all employees of Mount Isa Mines Limited other than those described in this subrule, shall not be enrolled as members of the union’.”.

I am unable to accept the respondent’s submission that the rules order should be construed so as to bar a former employee of Mt Isa Mines Limited, from joining the AMEPKU. Mr Bamford is a boilermaker. The respondent agreed that it was in this capacity that Mr Bamford was employed. Although the respondent raised a question about Mr Bamford’s eligibility to be a member of the AMEPKU on a ground other than the rules order, it was not seriously contested that but for that order, Mr Bamford would be eligible to be a member of the AMEPKU. If the respondent’s argument is taken to its logical conclusion, the effect of the rules order would be to prevent the AMEPKU from enrolling as a member, any person who had been at any time ineligible to join the AMEPKU because of the rules order, regardless of the fact that the person was no longer employed by Mt Isa Mines Limited.

In my view, it is apparent from the terms of the rules order itself that it was not the intention that it operate to remove the eligibility of persons who are no longer employed by Mount Isa Mines Limited, to join the AMEPKU. The rules order clearly refers to “employees of Mount Isa Mines Limited” engaged in certain Divisions or Departments. The intent of the rules order can also be seen from the decision of President (then Chief Industrial Commissioner) Hall when upon reference from the Full Bench which had made the representation order, he determined to alter the rules of the AMEPKU. In that decision, reported at 150 QGIG 1123 at 1124-1125, the President distilled a number of points from decisions of the Australian Industrial Relations Commission, in relation to s. 118A of the then *Industrial Relations Act 1988* (Cth), which were relevant to consideration of the power under s. 45 of the then *Industrial Relations Act 1999* (Qld).

One of these points (the second point) identified that the primary concern of s. 45, was representation rights, and that the power to alter rules is to supplement and support the exercise of the powers in that section: *Re FMWU* (1992) 40 IR 407 at 412, per Williams DP. Another point (the fourth point) was that in discharging the function of determining whether a Union’s rules should be altered, the nominated Commissioner is not to be concerned with the broad question of whether alteration of rules is desirable. The role of the nominated Commissioner was to discern the precise matter being referred and the intention of the Full Bench in referring it, and then within those limitations, exercise the power conferred by s. 45(5), and determine the form of the rule alterations required. The intention and purpose of the Full Bench which made the representation order, was said by the President to be clearly expressed in the decision which accompanied that order. In that decision, reported at 147 (2) QGIG 932 at 959 the Full Bench noted that Mount Isa Mines Limited had been restricted in its ability to move forward through the implementation of change, by being required to negotiate with five unions on virtually every issue, and had been confronted with a different agenda from each of the unions with which it has had to deal. Passages with respect to this intention on the part of the Full Bench are set out in the President’s decision, reported at 150 QGIG 1123 at 1125.

With respect to the rules alterations, the Full Bench said that "major surgery" was necessary, and that any change must impact on existing as well as potential employees. There is nothing in the decision to suggest that the alteration to the rules of the AMEPKU, as a result of the representation order, was intended to operate with respect to former employees of Mount Isa Mines Limited. To construe the rules order in the manner contended for by the respondent, would take the operation of the rules order beyond its terms and the manner in which those terms were intended to operate. On balance, and on the basis of the material before me, I am not satisfied that Mr Bamford is currently ineligible to be a member of the AMEPKU, by virtue of the rules order.

The further question then arises, of whether the representation order prevents Evan Moorhead of the AMEPKU from acting as an agent for Mr Bamford in relation to the reinstatement application. The representation order, insofar as it applies to the AMEPKU, is in the following terms:

"(6) The Automotive, Metals and Engineering Industrial Union of Employees, Queensland does not have the right to represent under the Act the industrial interests of employees of Mount Isa Mines Limited who are engaged in:-

- (a) all activities in the Copper and Zinc/Lead Streams (except those carried out by employees from the Surface Workshop Department of the Copper Stream and the Fans and Refrigeration Department of the Copper Stream;
- (b) all activities in the KSCO; and
- (c) the Control System Maintenance Department of the Engineering Division.

(7) The Automotive, Metals and Engineering Industrial Union of Employees, Queensland does not have the right to represent under the Act the industrial interests of employees of Mount Isa Mines Limited who are engaged in the following Divisions or Departments:-

- (a) Administration Division;
- (b) Research and Development Division;
- (c) Personnel Division;
- (d) Supply Department; and
- (e) Safety and Security Department."

The representation order was made pursuant to s. 45 of the then *Industrial Relations Act 1990*, which provided at subsection (1) that:

"45. (1) A Full Bench may, on the application of an industrial organisation, an employer or the Minister, make the following orders –

- (a) an order that an industrial organisation of employees is to have the right, to the exclusion of another industrial organisation or other industrial organisations, to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation;
- (b) an order that an industrial organisation of employees that does not have the right to represent under this Act the industrial interests of a particular class or group of employees is to have that right;
- (c) an order that an industrial organisation of employees is not to have the right to represent under this Act the industrial interests of a particular class or group of employees who are eligible for membership of the organisation."

In my view, the intent of the representation order, made as it was under s. 45(1) of the *Industrial Relations Act 1990*, was to remove the right of the AMEPKU to represent the industrial interests of individual employees as members of a group or a class. That group or class is defined in the representation order as "employees of Mount Isa Mines Limited" engaged in nominated areas. Mr Bamford, as a former employee is no longer within this group or class, and the representation order cannot operate with respect to the right to represent him.

I am also unable to accept the argument that the term "employees of Mount Isa Mines Limited" should be read so that "employees" means persons formerly employed by Mount Isa Mines Limited. The definition of "employee" in s. 6 of the Act refers to a person whose usual occupation is that of an employee in a calling. The definition of employee also provides that for the purpose of proceedings for recovery of amounts, an employee is a former employee. The term "calling" is defined in Schedule 5 to the Act to mean a craft, manufacture, occupation, trade, undertaking or vocation or a section of any of these. With the greatest of respect to the significance of Mount Isa Mines Limited as an employer, Mr Bamford cannot be said to have been employed in a calling, simply by virtue of being employed for some time by Mount Isa Mines Limited.

The definition of "employee" in s. 6 of the Act, relates to Mr Bamford's reinstatement application, insofar as at the time he was dismissed he was employed in a calling, that of boilermaking, and his usual occupation was that of an employee in that calling. His capacity to make a reinstatement application is derived from the fact that he is usually employed in a calling and was so employed at the time of his dismissal, and not from the specific identity of his employer. The identity of Mr Bamford's employer is relevant to the issue of responsibility to the application, not to Mr Bamford's capacity to make it, and to appoint as his agent in that application, an officer of an organisation of which he is a member.

There was no definition in s. 45, or elsewhere in the *Industrial Relations Act 1990*, of the term "industrial interests". This is also the case with respect to s. 279 of the current Act. I can see no basis for holding that the terms "industrial interests" and "industrial matters" are synonymous. The *Industrial Relations Act 1990*, provided a detailed and comprehensive definition of the term "industrial matter" at s. 6. Such a definition is now to be found in the current Act at Schedule 1. If the legislature had intended that an order with respect to the rights of an organisation to represent a particular class or group of employees operated with respect to industrial matters, it would have been simple to include in s. 45 of the *Industrial Relations Act 1990*, a reference to what was then a well established and defined term.

It is more likely, given that the legislative provisions about coverage, were designed to regulate the activities of industrial organisations, that the term "industrial interests" was used to describe the activities of those organisations as parties principal. It is apparent from the reasons given by the Full Bench in determining to make the representation order in the first place, that the order was directed at the role of unions in their capacity as parties principal, and the impact that the multiplicity of unions was having on the operations of Mount Isa Mines Limited. The decision of His Honour Justice Moynihan in *Gartrel and Smee v Federated Engine Drivers' and Firemen's Union of Employees, Queensland* (1989) 132 QGIG 1421 highlights this distinction. This distinction can also be found in the decision of the President in *MIM Holdings Ltd v Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland* (2000) 164 QGIG 316. In that decision at 318, the President observed that because the employees referred to at s. 142(b)(1) may be future employees in a new business, there is some difficulty in reading "represent" as "represent as an agent". At 320, the President said:

"And deprived as the AMWU is, of the capacity to represent the industrial interests of the employees in the Mining and Metallurgical Plants Areas of MIM, AMWU may not be party principal to the proposed agreements."

During the hearing in relation to this matter, I also referred the parties to a decision made on transcript by Bloomfield C on 12 December 1995 in B1714 of 1995. In that matter, two union officials sought to appear on behalf of individual employees of Mount Isa Mines Limited, who had purported to

appoint those officials as their agents. The argument on that occasion on behalf of Mount Isa Mines Limited in opposition to that appearance, was that the employees who had purported to appoint the officials as their agents, were not parties to the matter which was before the Commission. Further it was argued that documents of agency do not make an individual a party to proceedings (Transcript p 7). In rejecting the attempt by the officials to appear in the proceedings, Bloomfield C held that to allow the representation, would be to run counter to the representation order, and that the officials concerned could not be separated from the organisations in which they held office.

In the matter of Mr Bamford’s reinstatement application, the AMEPKU is not acting in its capacity as party principal. Mr Bamford as a party to the application has appointed Mr Moorhead, an officer of the AMEPKU to act as his agent in the application. I am of the view that the AMEPKU representation of a former employee of Mount Isa Mines Limited, as agent in a reinstatement application, is not precluded by, and does not subvert the representation order. Both the rules order and the representation order remain binding on the AMEPKU and all relevant persons who are currently employed by Mount Isa Mines Limited, and operate in accordance with their terms.

Accordingly, Mr Bamford may be represented in his reinstatement application, B1153 of 2002, by Mr Evan Moorhead of the AMEPKU, in accordance with the Notice of Appointment of Agent form 22, completed by Mr Bamford and appended to that application. It should be noted that this decision deals only with the issue of an application made by a former employee of Mount Isa Mines Limited, which that former employee was entitled to make in his own right.

Dated this second day of September 2002.

I.C. ASBURY, Commissioner.

Appearances:

Mr E. Moorhead of the Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland for the Applicant.

Released: 2 September 2002

Mr J.E. Murdoch, SC for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 276 – application to void or amend contract

Talbot Lindsay Harrison AND Evans Deakin Industries Ltd (No. B1990 of 2001)

COMMISSIONER BROWN

4 September 2002

DECISION

Talbot Lindsay Harrison (the applicant) lodged an application pursuant to s. 276 to amend or void his former contract of service with Evans Deakin Industries Ltd (the Respondent).

The application (as amended) sought an order declaring that the contract was unfair for the following reasons:

- it failed to provide payment to the applicant of appropriate hourly rates of pay, overtime and penalty rates during the period when the applicant worked for the respondent on the Boyne Smelter Expansion Project;
- it failed to provide for payment to the applicant of the value of the applicant’s accumulated untaken sick leave on termination of his employment with the respondent;
- it failed to provide for payment to the applicant of a special lump sum closure payment on termination of his employment with the respondent;
- it failed to provide for a reasonable period of notice of termination of the applicant’s employment with the respondent;
- it failed to provide that payments made to the applicant on termination of his employment with the respondent would be made on the basis of the applicant’s total remuneration package; and
- it was otherwise harsh, unconscionable or unfair, or against the public interest, upon such grounds and for such reasons as the Commission may find.

The amended application also sought orders to either void or amend the contract to rectify the alleged unfairness and a further order that certain amounts be paid by the respondent to the applicant to remedy the alleged unfairness together with interest and costs of proceedings.

During the hearing the respondent accepted that certain payments would be made to the applicant. Subsequent to the conclusion of the hearing advice was received by the Commission that the following had been paid to the applicant:

“Payment	Net Payment
Once off closure payment	\$2,319.00
Overtime (1 January 1997 to 4 July 1997)	\$3,073.51
Overtime (Up to 20 December 1996)	\$5,558.55
Pro-rata completion bonus	\$1,189.28
Total	\$12,140.34”

The relevant sub-sections (1) and (7) of s. 276 read:

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

- (a) the contract is–

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

“(7) In this section—

‘contract’ includes—

- (a) an arrangement or understanding; and
- (b) a collateral contract relating to a contract.

‘industrial instrument’ includes an award or agreement made under the Commonwealth Act.

‘unfair contract’ means a contract that—

- (a) is harsh, unconscionable or unfair; or
- (b) is against the public interest; or
- (c) provides, or has provided, a total remuneration less than that which a person performing the work as an employee would receive under an industrial instrument or this Act; or
- (d) is designed to, or does, avoid the provisions of an industrial instrument.”.

Background

The applicant joined the respondent as an apprentice boilermaker in 1962 and became a tradesperson in 1967.

He continued in employment with the respondent in Gladstone, was appointed as a supervisor in 1974 and was appointed as a supervisor on salary on 1 July 1989. At this stage he was no longer considered a wages employee.

The applicant and the respondent agreed that this relationship was one whereby the applicant performed work under a contract of service that was **not covered by an industrial instrument** (See amended application and amended response) (the emphasis is mine).

The applicant and the respondent agreed that this was the case at relevant times i.e. prior to the commencement of work by the applicant on the Boyne Smelter Expansion Project and endured until the applicant was made redundant on 5 May 2000.

During his employment the applicant worked on many projects in Queensland, interstate and overseas and also in the Brisbane workshops of the respondent.

The applicant commenced at the Boyne Smelter Expansion Project in January 1996 in connection with the Integrated Paste Plant (IPP). That portion of the project was conducted as a joint venture involving Bechtel Australia Pty Ltd and the respondent, although the applicant was at all material times an employee of the respondent.

The applicant completed his work on that project on 4 July 1997.

The applicant remained in the employ of the respondent and on 29 February 2000 became aware that the respondent intended to close its Colmslie and Sherwood workshops and that the applicant would be made redundant. (EX4)

The applicant’s claim arises primarily from two sources—

1. work on the IPP; and
2. the termination.

Boyne Smelter Expansion Project

This Project was undertaken by some 1,500 employees employed by about 40 different companies.

As mentioned the respondent in a joint venture partnership with Bechtel Australia Pty Ltd were responsible for the IPP portion of the expansion.

On this job, the applicant was initially paid a salary at the rate of \$62,506.00 per annum, comprising a base rate of \$39,394.00 and a site allowance loading of \$23,112.00 per annum.

On 1 July 1996, the base rate was increased to \$45,000.00 per annum. The site allowance loading did not change, resulting in a total of \$68,112.00 per annum.

The applicant believed that the loading covered, among other things, work up to 90 hours per week. He formed this view as a result of comments made to him by the Manager of the respondent’s Colmslie plant, Mr Russell.

The applicant claimed that prior to his commencing on the IPP, he was given an assurance by his Manager, Mr John Taylor, in the following terms:

“I guarantee that you will not be paid less than any other worker on the job.”.

Mr Taylor denied having given such a guarantee but recalled saying words to the effect that—

“if Mr Harrison fairly considered all aspects of his remuneration as a supervisor and compared all aspects of his remuneration to the wages received by wages employees, he would not feel aggrieved about his remuneration.”.

Peter Anthony Sylvester in evidence claimed to have witnessed the conversation in question between the applicant and Mr Taylor and at paragraph 7 of his affidavit (Ex 2) stated:

“I recall Taylor responded to this by saying words to the effect: ‘I can guarantee that you will not be getting paid any less than anyone else on the job’.”.

In cross-examination Sylvester stated that he believed that the conversation was in the context of comparing what the applicant would expect to be paid with other wages employees of the respondent on the IPP. (T’cript p. 20, lines 40-41)

Sylvester stated that he was familiar with the distinction between wages employees and supervisors within the respondent’s structure and that the comments of Taylor did not relate to anyone beyond the respondent’s wages employees.

Sylvester also stated that he could not be certain that the word “guarantee” was used by Taylor. Nor could he recall Taylor having made the comments he claimed to have made during that conversation mentioned earlier.

The applicant’s statement at paragraph 23 stated that the subject of pay was raised by Sylvester. Sylvester denied raising the subject during the conversation. (T’cript p. 20, lines 19-33)

Unlike Sylvester, the applicant, importantly, believed that the guarantee to be paid was no less by comparison with “any” employee not just employees of the respondent.

Jurisdiction

The Commission developed concerns during the course of the hearing and during the research process prior to writing this decision, those concerns became serious doubts.

The doubt was that whilst the Commission agrees with the parties that the arrangements in place between the applicant and the respondent were in the form of a contract of service, the Commission was not convinced that the service (or work performed) was not covered by an award or industrial instrument.

The Commission (at T’cript p. 16, line 15 and p. 17, line 7) sought the understanding of the parties as to the meaning of s. 276 (1)(a). Both parties agreed that the contract was a contract of service under which the work performed is (or was) not covered by an industrial instrument.

The hearing proceeded and concluded and as mentioned the concerns became serious doubts which caused the Commission, via a further directions order, to require the parties to address the issue of whether or not the applicant’s employment was covered by an award or industrial instrument in written submissions.

The applicant in those submissions asserted that:

- the Commission has jurisdiction to declare a contract of service void if such contract is not covered by an industrial instrument;
- the Metal, Engineering and Associated Industries Award, 1998 (the Award), an Award made under the Commonwealth Act would be an award applicable to the respondent, if they or their Association were a named party;
- the applicant was eligible to be a member of an organisation listed in clause 1.7. 1(a) of that Award; and
- the applicant is unable to determine whether he has equivalent competencies as required by the Award to fall within the classification of a principle/trainer/supervisor/coordinator in Schedule D of that award.

The respondent for its part in written submissions:

- stated that it considered itself bound by the terms of the Metal, Engineering and Associated Industries Award, 1988; and
- asserted that the applicant was not employed in any of the callings specified in Schedule A of the Award and did not fall within the classification definitions set out in Schedule D of the Award as the applicant had not completed the necessary training therein contemplated.

The applicant was on the Boyne Smelter IPP Project from January 1996 to 4 July 1997. The Project Development Partnership Agreement (PDPA), the Certified Agreement that governed the employment relationship between employees and employers on the site specifically excluded “Supervisors”.

The Commission was not given any detail as to what other Certified Agreements may have been in place at workplaces where the applicant worked from July 1997 until his termination effective 5 May 2000.

Possession of the knowledge of whether or not there were subsequent Certified Agreements in place and whether or not they excluded the applicant is not essential as the matter can be determined, in the opinion of the Commission, by reference to the Award which, if applicable to the applicant, would apply in the absence of a Certified Agreement.

It is the view of the Commission that if the applicant’s contract of service was covered by an industrial instrument, then the Commission lacks jurisdiction.

As the respondent has conceded respondency to the Award and the applicant admitted he was eligible to be a member of an organisation listed in clause 1.7 of the Award, the only matter left to determine is whether the classification structure in Schedule 1 and the classification definitions in Schedule D have application to the work the applicant performed during his employment with the respondent.

The best guide to the actual work of the applicant is to be found in his own evidence.

He stated at paragraph 8 of his affidavit dated 26 March 2002 that he was responsible for planning, coordination, direction and supervision of all activities associated with the construction projects he worked on and at times in recruiting personnel. In paragraph 9, he said that during his times as supervisor he worked on site, side by side, with employees who he supervised, performing the same tasks as those people, who were mostly covered by the relevant Award or other industrial instrument that applied to them. In his supplementary affidavit dated 24 May 2002, he stated that during his

employment with the respondent, he would often work with wage employees doing the same work, particularly on small jobs. He said on large jobs where his supervisory duties took up more time, he would spend less time working with wage employees.

In cross-examination by Ms Brown for the respondent, the applicant stated that there was a core of 3 or 4 other supervisors, who like himself, supervised the various crews on projects and at times worked alongside those crews. (See Transcript p.102 lines 37-51).

There was no dispute at the time that the applicant was a supervisor. That issue at no time required resolution by reference to the terms of the Award.

I accept that the applicant was engaged in the classification of "supervisor" in an industry covered by the Award. The Award and its predecessors contain provisions including wages for supervisors. The service or work under the contract is covered by an industrial instrument with the exception of the function of hiring staff, which was a very small part of the applicant's duties performed for a short period of time at the start of the IPP project in 1996.

In the absence of the contract of service, the Award would have applied. In fact, if one has regard to s. 135 (Inconsistency between awards and contracts), the Award has effect parallel with the existence of a contract of service.

The Full Bench of the Australian Industrial Relations Commission in *T. Sammartino and Mayne Nickless Express t/a Wards Skyroad* (U No. 30616 of 1998) quoted Denning LJ, when considering the nature of the relationship between the parties, as follows:

"If the true relationship of the parties is that of master and servant under a contract of service, the parties cannot alter the truth of that relationship by putting a different label on it . . .".

Similarly in this instance I believe that if the true nature of the relationship is one of an employee working in accordance with a contract of service that is covered by an Award, the parties cannot agree to put a different label on it.

The respondent maintained that the applicant did not possess the qualifications and equivalent competencies to fall within the classification definition of a principle/trainer/ supervisor/coordinator in Schedule D of the Award. However, the last paragraph of that definition covers those employees who do not possess the required qualification but have equivalent experience. Likewise in the classification definition of Trainer/Supervisor/Coordinator Levels 1 and 2 also in Schedule D, the relevant clause for Level 1 states:

"A Trainer/Supervisor/Coordinator – Level 1 is an employee who is responsible for the work of other employees and/or provision of structured on-the-job training. Such an employee has completed 9 modules of training in supervision and/or training. (emphasis mine)

Despite the above definition, an employee who has not completed the specified training or equivalent for this level may enter this classification consistent with 5.2 of the Implementation Guide until such times as competency standards for this level are finalised."

The definition of Level 11 is in similar terms and identical in the paragraph dealing with the absence of formal training.

Having considered the evidence, submissions, background and a detailed scrutiny of the Award, I find that the applicant was an employee with supervisory responsibility holding qualifications as a boilermaker working under a contract of service where the vast bulk of the work in question was capable of coverage by the Award.

The applicant's contract is not a contract of service not covered by an industrial instrument nor was the arrangement a contract for services.

In that light, the Commission lacks jurisdiction to hear the matter pursuant to s. 276 (1)(a)(i).

On that basis the application fails for want of jurisdiction.

Order accordingly.

D. K. BROWN, Commissioner

Appearances:
Mr G. Harley, with him Mr A. Anderson, of Clayton Utz, for the applicant.

Ms S. Brown (instructed by Flower and Hart) with Ms T. Jessie on behalf of Evans Deakin Industries Pty Ltd.

Released: 4 September 2002

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QUEENSLAND INDUSTRIAL REGISTRAR

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

Queensland Teachers Union of Employees (No. Q27 of 2002)

REGISTRAR EWALD

29 August 2002

Request for Conduct of Election – Prescribed Information – Casual Vacancy – Method of Election – Electoral Commission to Conduct Elections.

DECISION

On 16 August 2002, the Queensland Teachers Union of Employees lodged in the Registry under s. 481 of the *Industrial Relations Act 1999*, the information prescribed in section 36 of the *Industrial Relations Regulation 2000* and supporting material, in relation to the conduct of an election by the Electoral Commission of Queensland for the following position of office:-

Office	Number of Positions	Method of Election
State Council Representative of a Branch Nambour Branch.....	1	by members of Nambour Branch

Timing of Elections

The Rules prescribe that nominations shall be called by advertisement in the "Queensland Teachers' Journal" with the closing date of nominations no earlier than twenty-one days after the date upon which such notice first appears in the Journal. I am advised that the next Journal is to be printed on 5 September 2002.

Method of Election

I am satisfied that the method of election is by a direct vote of members of the Branch.

Conduct of Elections

I have considered the request, supporting material, the Act and Rules and I find that the election being sought is for a position of office within the meaning of the Act and required to be held under the Rules of the Industrial Organisation.

Therefore, under s. 482 of the *Industrial Relations Act 1999*, I am making arrangements for the election of the above named position to be conducted by the Electoral Commission of Queensland.

Dated this twenty-ninth day of August, 2002.

E. EWALD,
Industrial Registrar.

Released: 29 August 2002

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