



The Queensland Government

Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$358.62 (GST inclusive)

ISSN 0155-9362

Vol. 171

FRIDAY, 4 OCTOBER, 2002

No. 5

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
CA193/02	Bundaberg Regional Farms (Bundaberg Sugar Group Ltd) Enterprise Bargaining Certified Agreement No 4 2001	10/9/02	CA624/00
CA379/02	Elcom Australia Business Unit Certified Agreement 2002	17/9/02	
CA381/02	Kirks Electrical Pty Ltd Certified Agreement - 2001/2002	17/9/02	
CA384/02	RACQ Road Service Mechanical Tow Operators - Certified Agreement 2002	17/9/02	CA90/00
CA385/02	Cairns City Council State Award Employees Enterprise Agreement- 3 - Certified Agreement	17/9/02	CA379/96 & CA588/99
CA386/02	Cardwell Shire Council - Certified Agreement	17/9/02	CA694/00
CA391/02	Waggamba Shire Council State Award - Certified Agreement 2002	17/9/02	CA23/01
CA353/02	Sunland Constructions Pty Ltd - Certified Agreement 2001/2002	18/9/02	
CA357/02	Tjapukai Aboriginal Cultural Park - Gudji Guri - Certified Agreement	18/9/02	CA316/99
CA389/02	Dragon Group Pty Ltd - Certified Agreement 2002	18/9/02	
CA392/02	UQ Sport - Certified Agreement	20/9/02	
CA397/02	Rikshaw Concrete Pumping T/A Specialised Concrete Pumping Certified Agreement	20/9/02	
CA398/02	The Wesley Radiation Oncology Pty Ltd Enterprise Bargaining Certified Agreement 2002	20/9/02	CA553/98

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 342(1) – appeal from decision of industrial commission**Brisbane City Council AND Automotive, Metals, Engineering, Printing and Kindred Industries
Industrial Union of Employees, Queensland (No. C81 of 2002)**

PRESIDENT HALL

20 September 2002

DECISION

The appellant and the respondent are parties to a certified agreement under the *Industrial Relations Act 1999* which is known as the Brisbane City Council Enterprise Bargaining Agreement 2001. The Certified Agreement came into effect on 1 July 2001. It has a nominal expiry date of 30 June 2003.

At 1 July 2001 the appellant and the respondent were parties to a number of Local Area Agreements. Amongst those Local Area Agreements was a Local Area Agreement known as the Eight Day Fortnight Local Area Agreement. The Local Area Agreements were not supplanted by the Certified Agreement. The Certified Agreement recognised the continued existence of the Local Area Agreements and indeed enhanced their efficacy by providing for the continued operation of each agreement after its expiry date until the completion of a review process. For the purposes of these proceedings, it is common ground that the review of the Eight Day Fortnight Local Area Agreement was complete no later than 21 August 2002 when the appellant withdrew from the agreement which had long since expired.

Prior to the appellant's withdrawal from the Eight Day Fortnight Certified Agreement, the respondent had given notice of its intention to negotiate a certified agreement with the appellant which would contain the provisions relating to an eight day fortnight which were contained within the Eight Day Fortnight Local Area Agreement. On 3 September 2002 the respondent took the matter further by giving notice pursuant to s. 174 of its intention to take protected industrial action of various types. On 4 September 2002, the appellant, who contends that with the demise of the Eight Day Fortnight Local Area Agreement the implementation of the 38 hour week is governed by clauses 4.9 and 4.10 of schedule 3 clause 4 of the Engineering Award – State, instituted proceedings under s. 230. The appellant sought orders to (in short form) restrain the members of the respondent employed by the appellant from engaging in the industrial action referred to in the letter of 3 September 2002 and requiring the members of the respondent employed by the appellant to work in accordance with the Engineering Award – State. The application for the restraining orders failed. The application for mandatory orders requiring members of the respondent employed by the appellant to work in accordance with the Engineering Award – State succeeded. This is an appeal against the decision of the Commission refusing to grant the restraining orders. It has been brought on at short notice because of apprehension that the industrial action referred to in the letter of 3 September 2002 will or will continue to occur. There is presently no appeal against the orders for performance and observance of the Engineering Award – State which were granted. The respondent has reserved the right to revisit the validity and appropriateness of those orders and, indeed, to make further application to the Commission.

Critical to an understanding of the issues in the Commission and on the appeal are subsections (1), (2), and (3) of s. 181. The subsections are in the following terms:

“181 When industrial action must not be taken

- (1) This section applies to –
 - (a) a certified agreement from when it starts operating until its nominal expiry date has passed; and
 - (b) a determination under section 149 while it operates.
- (2) The following persons must not engage in industrial action for the purpose of supporting or advancing claims against the employer in relation to the employment of employees whose employment is subject to the agreement or determination –
 - (a) an employee whose employment is subject to the agreement or determination;
 - (b) an employee organisation that is bound by the agreement or determination;
 - (c) an officer or employee of the employee organisation acting in that capacity.
- (3) If the employee, organisation or officer does so, the action is not protected industrial action.”

The Commission, whose decision is yet to be reported, rejected the application for restraining orders in reliance upon the decision in *Kilpatrick Green Pty Ltd v. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Another* (1998) 559 FCA and the decision in *Emwest Products Pty Ltd v. AMEPKIU* [2002] FCA 61. The Commission attributed to the appellant that the appellant was advancing the case that, because there was a certified agreement which prior to the demise of the Eight Day Fortnight Local Area Agreement had dealt with the matter of an eight day fortnight (because the efficacy of the Local Area Agreement was recognised by the Certified Agreement), the respondent and its members were denied the opportunity to take protected industrial action in pursuit of a certified agreement upon the matter of the eight day fortnight until the nominal expiry date of the Brisbane City Council Enterprise Bargaining Agreement 2001. In fairness to the Commission, I should say that, if indeed that was the argument developed by the appellant, the Commission might have accepted the argument only if it was prepared to decline to follow or alternatively to distinguish the two Federal Court decisions previously referred to. On the appeal, Mr Herbert of counsel who now appears for the appellant seeks neither to challenge nor to distinguish the two Federal Court decisions (though reserving the right to do so in other proceedings). The contention agitated on the appeal is that the Commission quite misunderstood the case which the appellant had developed. In truth, the case developed by the appellant is that by the Brisbane City Council Enterprise Bargaining Agreement 2001 agreement had been reached upon the matter of the 38 hour week and that agreement continued to have effect under the Certified Agreement.

In summary form, the contention is that the Brisbane City Council Enterprise Bargaining Agreement 2001 initially dealt with the matter of the 38 hour week by recognising the continued efficacy of the Eight Day Fortnight Local Area Agreement, and by providing for a process of review to update and enhance that local area agreement. The Certified Agreement also dealt with the matter of the 38 hour fortnight by providing that if the review process failed and the Eight Day Fortnight Local Area Agreement lapsed, the provisions of the Engineering Award – State previously referred to, which make particular reference to employment by the appellant, were to govern the matter of the 38 hour week. The Certified Agreement was said to make clear that its treatment of the topic was exhaustive by barring the “tabling” of extra claims and confining negotiations about the matter of the 38 hour week to a review process in the course of which industrial action was prohibited.

I am unable to accept the appellant's construction of the Brisbane City Council Enterprise Bargaining Agreement 2001.

The framers of the Brisbane City Council Enterprise Bargaining Agreement 2001 were confronted with the difficulty that the Certified Agreement was in truth the fourth enterprise bargaining arrangement governing the relationship between the appellant and its workforce. A further difficulty was the existence of local area agreements. Clause 25.5 was directed to meeting those difficulties. It provides:

“25.5 Previous Agreements Incorporated Within This Agreement

The following Agreements will now form part of this Agreement and apply from 1 July 2001 until 30 June 2003 despite any provision to the contrary:

1. The Brisbane City Council Enterprise Bargaining Agreements C40009/94 and CA8/94, C40386/96 and CA373/96, C40689/98 and CA470/98 and C40886/99 and CA477/99.

The effect of incorporation of those agreements is that any terms and conditions of employment which are set out in those Enterprise Bargaining Agreements and which are not inconsistent with the terms of this Agreement, shall continue in force and effect as if they are incorporated as express terms of this Agreement.

The Partners are committed to incorporating all relevant conditions into a consolidated document for the next Agreement.

2. Subject to the review/update process outlined in Clause 15, Local Area Agreements registered as a consequence of the implementation of the Brisbane City Council Enterprise Bargaining Agreements C40009/94 and CA8/94, C40386/96 and CA373/96, C40689/98 and CA470/98 and C40886/99 and CA477/99 during the period 1 January 1994 to 30 June 2001, will continue to apply until the conclusion of the review/update process.”.

The purpose of clause 25.5(2) was to regulate the impact of the Certified Agreement on the existing Local Area Agreements. It sought to guarantee their efficacy until reviewed. Clause 25.5(a) is not about the 38 hour week or the eight day fortnight save that it explains why those matters are not dealt with in the Certified Agreement. They are not dealt with in the Certified Agreement because they are otherwise dealt with.

Clause 15 of the Certified Agreement provides a review process which is, in truth, a process by which the parties will attempt to agree but does not seek to guarantee the success of the process. It is in the nature of the process at clause 15 that new initiatives will be raised for discussion. Indeed, the parties' commitment at clause 15 “to review and update existing Local Area Agreements (LAAs), and to develop and implement new LAAs which will deliver greater flexibility in working arrangements and lower operating costs...”, could not be met unless new initiatives were the subject of discussion. Whatever might be the meaning of the agreement at clause 25.8 that “no extra claims will be tabled during the life of this Agreement” it cannot be read to inhibit the raising of issues during the clause 15 process. The agreement is entirely silent as to that which is to occur if the process at clause 15 fails. Failure of the process inevitably will occur after issues have been “tabled”. There is nothing in clause 25.8 to disclose an intention that should the review process fail and a Local Area Agreement reach its expiry date, the Certified Agreement (or more fully the Certified Agreement and the Engineering Award – State) are to become an exhaustive statement of the rights and obligations of the parties upon the subject matter of the previous Local Area Agreement until the nominal expiry date of the Certified Agreement.

I accept that once the Eight Day Fortnight Local Area Agreement lapsed, the matter of the 38 hour week was regulated by Schedule 3 to the Engineering Award – State. That is a consequence of s. 165 of the Act read with clause 25.3 of the Certified Agreement. Section 165 provides:

“165 Certified agreement’s effect on awards, agreements or orders

(1) While a certified agreement operates, it prevails, to the extent of any inconsistency, over an award or industrial agreement or an order made under section 137.

(2) While a project agreement operates, it operates to the exclusion of any other certified agreement or QWA.”.

A principal difficulty with s. 165 is the noun “inconsistency”. On occasion, arguments will be developed that a certified agreement displays an intention to provide the whole of the terms and conditions of the employment relationships to which it relates, so that an award provision dealing with a topic not dealt with in the Certified Agreement will inevitably be said to be inconsistent with the Certified Agreement because, if given effect, it would add additional terms. The purpose of clause 25.3 of the Certified Agreement is to negative such arguments. It expressly denies any intention that the Certified Agreement should cover the field. It provides:

“25.3 Relationship to Existing Awards

This Agreement shall be read and interpreted in conjunction with the relevant Federal and State Awards listed in Schedule 3, provided that where there is an intended inconsistency the terms of the Agreement shall take precedence.”.

That is the purpose of clause 25.3. Clause 25.3 is about the relationship between the relevant award and the certified agreement where the parties have failed to agree upon a matter. It is no part of the function of clause 25.3 to substitute for the lack of actual agreement a notional agreement in terms of the relevant award.

The appeal must fail.

I have dealt with the substance of the appeal because the matter has been argued and because of its importance to the parties in their (presently) troubled relationship. I am not at all sure that the appeal should have been heard. The general principle is that an appellant is bound by the conduct of its case at first instance, compare *Coulton v. Holcombe* (1986) 162 CLR 1 at 728 per Gibbs CJ, Wilson, Brennan and Dawson JJ and *University of Wollongong v. Metwally* [No. 2] (1985) 60 ALR 68 at 71. Here, with respect to the in-house solicitor who appeared for the appellant at first instance, I doubt that anyone might have divined from the documents and the transcript that it was being contended that, on a proper construction of the Brisbane City Council Enterprise Bargaining Agreement 2001, the appellant, the respondent and the appellant’s employees had reached agreement upon the matter of the 38 hour week. Further, in the circumstances of the case, it is not merely a matter of ensuring the proceedings in the Commission do not become mere skirmishes which are a prelude to an appeal. On the relatively wide view of the circumstances in which extrinsic evidence may be admitted to aid in the interpretation of an instrument such as a certified agreement developed in *Short v. F W Hercus Pty Ltd* (1993) 40 FCR 511, there was every “possibility” to adopt the word used in *Coulton v. Holcombe, op cit*, that the respondent, one of whose representatives has informed the Commission that in negotiating the Certified Agreement the parties had put the matter of the eight day fortnight to one side, would have wished to call evidence if it had appreciated the nature of the case which was being mounted. In such a case the only appropriate course is to dismiss the appeal, compare *Water Board v. Moustakas* (1988) 180 CLR 491 at 497 to 498 per Mason CJ, Wilson, Brennan and Dawson JJ.

In any event I dismiss the appeal.

For the sake of completeness I record that two (quite significant) issues were briefly canvassed on the appeal. First, there was reference to the question whether in a case to which s. 230(1)(c) has no application jurisdiction under s. 230 is dependent upon the giving of a "notice of dispute" as described at s. 230(1)(a) and (b), and to the further question whether a notice given by the appellant on 31 May 2002 during the course of the review of the Eight Day Fortnight Local Area Agreement answered that description. Second, reference was made to the issue whether an order under s. 230 might be made about conduct constituting "protected industrial action" within s. 174 and, if such an order might be made, the circumstances in which the making of such an order might be appropriate. This decision does not decide, and indeed makes no comment upon, the proper resolution of those issues.

I reserve the question of costs.

Dated 20 September 2002.

D.R. HALL, President.

Appearances:

Mr A.K. Herbert, instructed by Brisbane City Legal Practice, for the appellant.

Mr S. Reidy of Reidy & Tonkin Solicitors, for the respondent.

Released: 20 September 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 474 – approval of eligibility rule amendment
Industrial Relations Regulation 2000 – s. 20 – application for amendment of eligibility rules

T.A.B Agents' Association of Queensland Union of Employers (No. U13 of 2002)

VICE PRESIDENT LINNANE

23 September 2002

Application for approval to amend Eligibility Rule – No objection – Application granted – Industrial Relations Act 1999 – s. 474(3).

REPORT ON DECISION (as edited)

In giving her decision from the Bench on 20 September 2002, Vice President Linnane stated:

"This is an application to amend *inter alia* the eligibility rules of the T.A.B. Agents' Association of Queensland Union of Employers. The application has been made in accordance with the provisions of the *Industrial Relations Act 1999* and the *Industrial Relations Regulation 2000* made thereunder.

The proposed amendment to the rules has been made in accordance with the rules of the applicant organisation. There is no objection to the amendment. There is no material before me on the basis of which I could conclude that the persons who will become eligible as a result of the proposed change might conveniently belong to any other organisation.

None of the matters outlined in s. 474(3) have been identified.

In those circumstances I am required by the provisions of the *Industrial Relations Act 1999* to grant consent to the amendment of the rules and I so do."

Order Accordingly.

Appearances:

Mr J.R. Jones of Jones Ross Pty Ltd, on behalf of the TAB Agents' Association of Queensland Union of Employers.

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

Released: 23 September 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 329 – Adjournment Application

Queensland Council of Unions and The Australian Workers' Union of Employees, Queensland
AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers
and Others (Nos. B209 and B308 of 2002)

VICE PRESIDENT LINNANE
COMMISSIONER BLOOMFIELD
COMMISSIONER BLADES

20 September 2002

Application for an adjournment – Adjournment sought pending determination of similar applications by the Australian Industrial Relations Commission – Application opposed by Applicants and the State of Queensland – Application made after the presentation of all evidence in the matter – Matters before AIRC not intended to commence hearings before May, 2003 – Application dismissed – Industrial Relations Act 1999 – s. 329.

DECISION

- [1] B209 of 2002 is an application by the Queensland Council of Unions (QCU) pursuant to s. 288 of the *Industrial Relations Act 1999* (Act) for a Statement of Policy regarding Termination, Change and Redundancy (TCR). B308 of 2002 is a similar application by The Australian Workers' Union of Employees, Queensland (AWU).
- [2] This decision relates to an application pursuant to s. 329 of the Act by the Australian Industry Group, Industrial Organisation of Employers (Queensland) (AIG) to adjourn the substantive proceedings *sine die* pending the finalisation of certain matters currently before a Full Bench of the Australian Industrial Relations Commission (AIRC).

[3] A brief history of the matters before this Full Bench of the Queensland Industrial Relations Commission (QIRC) is as follows:

- B209 of 2002 was filed by the QCU on 8 February, 2002;
- a Directions Notice was forwarded to the parties on 15 February, 2002 notifying of a preliminary hearing on 28 February, 2002;
- B308 of 2002 was filed by the AWU on 22 February, 2002;
- on 28 February, 2002 B209 of 2002 and B308 of 2002 were joined and directions were issued for the further conduct of the matters;
- on 28 February, 2002 the hearing dates were scheduled to commence on 12 August, 2002 and to conclude on 26 September, 2002 with written submissions to follow the conclusion of evidence and oral submissions scheduled for 24 October, 2002;
- on 25 March, 2002 we granted the Minister for Employment and Workplace Relations a limited right to be heard in the matter;
- Responses were filed by 28 March, 2002;
- Conciliation conferences were held before Commissioner Asbury on 4, 11 and 22 April, 2002;
- an Amended Application was filed by QCU on 22 April, 2002;
- a Further Amended Application was filed by QCU on 27 May, 2002;
- a Further Amended Application to reflect that of the QCU was filed by the AWU on 31 July, 2002;
- the evidence before the Full Bench commenced on 19 August, 2002;
- the evidence before the Full Bench was heard over eight days; and
- the evidence before the Full Bench concluded on 16 September, 2002.

[4] A brief history of the proceedings before the AIRC as conveyed to us by the AIG and the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (QCCI) is as follows:

- the ACTU corresponded with the President of the AIRC on 7 August, 2002 indicating that over the course of the next few weeks affiliate unions would be lodging applications in relation to a redundancy test case and requesting that a Full Bench be convened in relation to the foreshadowed applications. That correspondence indicated that a copy of the letter to the President was to be provided to the "ACCI, the AIG and the Commonwealth";
- various applications were lodged by federally registered unions in the AIRC after 7 August, 2002;
- the AIG has also filed applications in the AIRC seeking to amend the TCR standard;
- on 9 September, 2002 the various applications were listed before a Full Bench of the AIRC (Guidice P, Ross VP, Politics SDP, Smith C and Deegan C) for mention;
- the parties agreed on the directions which were issued by the AIRC on 9 September, 2002;
- the directions that issued have:
 - the applicants in each matter filing and serving their outline of contentions and all evidentiary material including witness statements by 20 December, 2002;
 - the respondents in each matter filing and serving their outline of contentions and all evidentiary material including witness statements by 11 April, 2003;
 - any material in reply being filed and served by 14 May, 2003;
 - the matters listed for hearing not before 21 May, 2003;
 - conciliation before Senior Deputy President Marsh on dates to be advised shortly.

[5] At the conclusion of the evidence before this Full Bench the AIG made its application for an adjournment. The AIG contends that its current application is made in a timely fashion given that the applications in the AIRC were only filed in the past two to three weeks and it was only on 9 September, 2002 that the Full Bench of the AIRC indicated its preparedness to hear a test case.

[6] Essentially the AIG argument for an adjournment can be summarised as follows:

- there is a serious risk of conflict being created between AIRC and QIRC award provisions via the conduct of simultaneous inquiries and any such conflict would undermine public confidence in the various award systems. It was contended that it is "well settled that industrial tribunals such as this Commission should strive to maintain uniformity of minimum conditions of employment for workers engaged in Australian industry". In this regard we were referred to the decision of Sheldon J. in *Re Production Planners, Technical Officers, (State) Award 1967 A.R. (NSW) 52* and in particular to the following passage at p. 54:

"The principles are that where the larger part of an industrial field is covered by a federal award, it is proper that the smaller part, where a State award operates in relation to those not bound by the federal award, should be covered by the same industrial provisions. This is achieved by adopting those in the federal award."

His Honour however went further to state:

"But these principles are the same as any others. They are neither rigid nor immutable. They are not rigid because there may be special circumstances which apply ...".

Further, the AIG drew the Bench's attention to the decision of a Full Bench of this Commission (Ledlie SC, Marshall C and Howatson C) in *Application by The Australian Workers' Union of Employees, Queensland for the making of a new Award to be titled "Transport Workers (Oil Agents/Contractors) Award – Mackay and Northern Divisions"* (1981) 107 QGIG 305. In that case the AIRC had, prior to the initiation of the proceedings in the QIRC, found the existence of an industrial dispute between the Transport Workers' Union of Australia, Union of Employees and a number of employers. That dispute finding was extended at a latter time so that by the time the QIRC made the decision relied upon a "substantial number of employers" in the industry sought to be covered by the application in the QIRC were clearly named as parties in federal dispute findings. The award sought in the QIRC proceedings was a common rule award which, if granted, would have effectively bound the employers the subject of the federal dispute findings. We note the following comments made by that Full Bench that:

"... the subject matter inherent in the submissions made before us goes directly to the competing interests of the two named Unions in the area of North Queensland. It is not a new issue, but one of long standing with one Union having long exercised its rights and coverage in that area under a State Award and the other wishing to extend into that area, the coverage which it has long held in Australia generally."

And further:

"We express concern at any possibility that an Applicant before us in any matter endeavouring to pursue its normal role of acting in the interests of its membership could be frustrated in those activities if a competitor Union having created a Federal dispute to challenge the position of a State registered Union did not act to exercise its rights to have the question of Award coverage finalised."

Whilst the QIRC in that matter adjourned the hearing of the AWU application it did so only when a substantial number of the employers sought to be covered by the award application were made the subject of a dispute finding in the AIRC. Prior to the further dispute finding, the Full Bench had indicated its preparedness to hear and determine the AWU matter as it was “charged to do” under the then *Industrial Conciliation and Arbitration Act 1961 – 1980* and to exempt from the effect of any determination those employers who were then parties to an “unfinalised dispute” in the AIRC.

Those facts are clearly distinguishable from the facts currently before this Full Bench. The application before this Full Bench is for a Statement of Policy in respect of TCR. The outcome only has relevance to employers and employees in Queensland who are not parties to, or bound by, awards of the AIRC. The AIRC does not have before it any matter that has the ability to impact upon employers and employees covered by industrial instruments of the QIRC. The result of the two proceedings may be that differing TCR provisions apply in the Queensland jurisdiction as opposed to the federal jurisdiction;

- that employers will now be required to defend two sets of proceedings simultaneously and that represents a “huge drain on our resources”. However the position is that the proceedings before this Full Bench have all but concluded. It only remains for written submissions and one hearing day for brief oral submissions. All parties to the matter before this Full Bench have already resourced their prosecution or defence of the application;
- the continuation of the proceedings before this Full Bench would effectively hamper the conduct of the matters before the AIRC and cause embarrassment to either or both the AIRC and the QIRC; and
- there are before the Full Bench of the AIRC applications from employer organisations including applications under s. 170FB of the *Workplace Relations Act 1996* for the restoration of consultation provisions in the TCR standard.

[7] The AIG application was supported by the Minister for Employment and Workplace Relations who was granted leave to be heard on the application. Essentially it was contended by the Minister for Employment and Workplace Relations that the granting of the QCU and AWU claims would be likely to “irretrievably disrupt the current national TCR standard” and would “severely limit the ability” of the AIRC to re-establish a national standard that is based on the principles established by the AIRC in 1984. The only secure way of maintaining a national standard is to ensure that any review of the standard is first undertaken by the AIRC. Further, any disruption of the national standard would be highly undesirable within Queensland and nationally as it would result in different minimum standards.

[8] The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers and those organisations represented by Employer Services Pty. Ltd. also supported the AIG application.

[9] The QCCI position is one of neither supporting nor opposing the AIG application. The QCCI however questioned the timing of the AIG application given the amount of time and resources that had been invested by the parties in the preparation and hearing of the matter before this Full Bench. The QCCI also submitted that if the Full Bench were minded to grant the AIG application then it should consider requiring the AIG to pay the witness expenses of the other parties to the proceeding, including the expenses associated with the provision of reports from expert witnesses.

[10] The AIG application was opposed by the State of Queensland, the QCU and the AWU.

[11] The State of Queensland referred to the dual systems of conciliation and arbitration that existed in Australia – a system that resulted in overlapping federal and state jurisdiction in industrial relations. The reality, according to the State of Queensland, is that various matters will come before the various tribunals at different times and whilst on some occasions uniformity of outcomes will arise on other occasions different standards will apply in the various jurisdictions. One example of the latter is the New South Wales TCR standard which forms the basis of the application before this Full Bench. The potential for a more favourable TCR entitlement in Queensland to the federal standard as a result of the proceedings currently before this Full Bench is not, according to the submissions of the State of Queensland, a reason for adjourning the matter before the QIRC. Rather it is a matter that should be addressed by parties expressing such concerns in their submissions. The State of Queensland also made reference to the different legislative frameworks under which the AIRC and QIRC operate.

[12] The QCU submitted that the AIG argument that there is the potential for different TCR standards to apply ought to be considered in light of the fact that currently different standards apply in the federal, New South Wales and Queensland jurisdictions and that within those jurisdictions there are differing arrangements e.g. public sector TCR provisions and enterprise bargaining outcomes. The QCU also raised the fact that there are different standards applying in the federal and Queensland jurisdictions in a range of conditions of employment with the uniformity or consistency issue generally arising only in respect of minimum wage outcomes.

[13] The AWU supported the arguments advanced by the State of Queensland and the QCU.

Conclusion

[14] We have not been persuaded to adjourn this application. Essentially our decision is based on the following matters:

- the advanced stage of the proceedings i.e. the evidence is concluded and only written and oral submissions remain;
- the legislative framework under which this Full Bench operates is different to that under which the AIRC will conduct its proceedings;
- currently there is not one general TCR standard. The current application before this Commission generally seeks the NSW standard. Further, the so-called federal standard does not contain provisions which currently are included in the QIRC Statement of Policy because of the different legislative framework operating in the federal jurisdiction;
- it is not unusual for there to be different minimum standards of conditions in the different jurisdictions e.g. the standard for shift work penalties is greater in the federal jurisdiction than it is in this jurisdiction; and
- whilst there is a similarity in the applications before this Full Bench and those filed by industrial organisations of employees in the federal jurisdiction there are a number of differences e.g. the matters before the AIRC include a claim for the provision of a professional services allowance as well as a claim in respect of the criteria for determining acceptable alternative employment. Further, unlike the AIRC, this Full Bench does not have before it claims by employer organisations such as the AIG which go to adequate alternative employment, the transmission of business, differing provisions dealing with redundancies in large organisations as contrasted with provisions dealing with redundancies in small organisations and differing claims where the redundancies result from insolvencies rather than other causes.

[15] Whilst we can understand the concerns expressed by the AIG and others supporting the adjournment application we have a clear legislative responsibility to hear and determine matters brought before the QIRC. The current applications have progressed during the course of 2002 to the point where all the evidence is now before us and we await the submissions of the parties. To adjourn these matters at this time pending the outcome of AIRC proceedings would, in our view, be an abrogation of our responsibilities under the Act. We therefore dismiss the application for an adjournment.

[16] In the course of submissions the AIG referred to the potential for an application to the AIRC pursuant to s. 128 of the *Workplace Relations Act 1996* for an order restraining this Full Bench from further dealing with the matters before it. Should such an application be made it will be a matter for the AIRC to determine.

D.M. LINNANE, Vice President.
A.L. BLOOMFIELD, Commissioner.
B.J. BLADES, Commissioner.

Appearances:

Ms. D Ralston for the Queensland Council of Unions.
Mr. B Swan for The Australian Workers' Union of Employees, Queensland.
Mr L. Gillespie for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.
Mr T. Shiptone, Mr E. Porter and Mr C. McInerney for the State of Queensland.
Mr J. Stewart and Mr B. Cosgrove of the Australian Government Solicitor on behalf of the Minister for Employment and Workplace Relations.
Ms S. Lindsay, Mr J. Dwyer and Mr M. Smith for the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers.
Mr. M. Moir, Mr H. Lephah, Ms S. Davis, Mr M. Belfield and Mr R. McPherson for the Australian Industry Group, Industrial Organisation of Employers (Queensland).
Mr M. Guymner and Ms S. McAuliffe for the Retailers' Association of Queensland Limited, Union of Employers.
Mr D. Matley for the Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers).
Mr R. Wotherspoon for the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers.
Mr D. Pratt for The Queensland Road Transport Association Industrial Organisation of Employers.
Mr K. Law for The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers.

Hearing Details: 2002 16 and 17 September.
Released: 23 September 2002

Mr G. Trost for the Queensland Cane Growers' Association Union of Employers.
Mr G. Roberts and Mr S. Wiseman for The Baking Industry Association of Queensland – Union of Employers.
Mr C. Lentini for the Queensland Hotels Association, Union of Employers.
Ms V. Lincoln for the Queensland Country Press Association, Union of Employers and Printing Industry Association of Australia.
Ms T. Scrine for the Furnishing Industry Association of Australia (Queensland) Limited Union of Employers.
Mr M. Proctor for the Australian Sugar Milling Association, Queensland, Union of Employers.
Mr R. Beer for the Local Government Association of Queensland (Incorporated).
Mr M. Cuthbertson for the Australian Mines and Metals Association (Incorporated) Queensland Branch.
Mr G. Seibenhausen on behalf of the Queensland Real Estate Industrial Organisation of Employers and the Queensland Motel Employers Association, Industrial Organisation of Employers.
Ms. K. de Lange for The Registered and Licensed Clubs Association of Queensland, Union of Employers.
Mr G. Muir, Mr M. Patti and Mr J. Patti of Employer Services Pty Ltd on behalf of the Private Hospitals' Association of Queensland Inc., Consulting Surveyors Queensland Industrial Organisation of Employers, Royal Queensland Bowls Association, Australian Dental Association (Queensland Branch) Union of Employers, Fast Food Chains Association (Qld State Committee), Child Care Industry Association of Queensland Inc, Queensland Community Services Employers Association, Queensland Master Hairdressers' Industrial union of Employers, Darling Downs Foods Limited, Warwick Bacon Company.
Mr C. Pollard of Jones Ross Pty Ltd on behalf of the Australian Building Services Association – Queensland Division, Industrial Organisation of Employers, The Association of Professional Engineers, Scientists and Managers, Australia, Queensland Branch, Union of Employees, and the Motor Trades Association of Queensland Industrial Union of Employers.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 87 – severance pay

Winfield Holdings Pty Ltd t/a Chandlers Earville AND Julie Joinbee (No. B1104 of 2002)

COMMISSIONER EDWARDS

19 September 2002

Severance Pay – Orders – Redundancy – Business transmitted – Employment continued – Downturn of business – Not acceptable alternative employment – Application refused.

DECISION

This is an application by Winfield Holdings Pty Ltd t/a Chandlers Earville for an order from the Commission under subclause 9 “Alternative Employment” of Clause C – Redundancy of the Termination of Employment, Introduction of Changes, Redundancy Policy (TCR Policy) (Extract of Decision 16 June 1987 125QGIG 1119–1121 as amended) of the Commission.

The applicant relied on clause 2.2 of the Retail Industry Interim Award – State and in particular subclause 9 of clause C of the TCR Policy which states:

“An Employer, in a particular case, may make application to the Commission to have the general severance pay prescription varied if the Employer obtains acceptable alternative employment for an employee.”.

Ms Julie Joinbee was employed by The Vox Retail Group (Chandlers) from 14 December 1979 until 14 October 2000. The business transmitted to Winfield Holdings Pty Ltd with the employment continuing with the new entity until 8 July 2002.

As a result of a severe downturn in business it was necessary for Winfield Holdings Pty Ltd to reduce the number in its workforce. The Manager decided that Ms Joinbee's employment would cease. Mr P. Winfield of Winfield Holdings Pty Ltd actively began looking for alternative acceptable employment for Ms Joinbee. As a result of his effort, employment was found with another company, “Your Appliance Service Pty Ltd” and Ms Joinbee commenced duty on 9 July 2002.

At the hearings on 18 July and 1 August 2002 the respondent conducted her own case. On 19 August 2002 she was represented by Mr C. Birrell of The Australian Workers' Union of Employees, Queensland (AWU). Mr Birrell submitted that the employment was not acceptable employment in accordance with subclause 9 of Clause C of the TCR Policy.

The areas of difference were as follows:

- Lower hourly rate;
- Slightly additional travel;
- Probation period as prescribed by the legislation; and
- No recognition for years of service.

In response, Mr Winfield indicated that the rate being paid by Winfield Holdings Pty Ltd was higher than she was entitled to as her duties had changed but it was decided to maintain her salary at the existing rate. So be it, the rate she was paid was by agreement.

In examining all aspects of the application, especially the employment conditions as agreed between Your Appliance Service Pty Ltd and Ms Joinbee, the Commission refers to the decision by Giudice J President, Politics SDP and Bacon C (Q6010) 22/9/98 (1998) 44 AILR 3-892 wherein the Full Bench relied on the decision in the *Termination Change and Redundancy Case* 1984 AILR p 256 which held that, "severance pay is given to employees as compensation for non-transferable credits, and the inconvenience and hardship imposed on employees".

On consideration of all the submissions but especially the fact no recognition was given for years of service, the Commission does not accept that the new employment is within the definition of "acceptable alternative employment".

The application is refused.

The Commission orders accordingly.

K.L. EDWARDS, Commissioner.

Appearances:

Mr P. Winfield on behalf of Winfield Holdings Pty Ltd.

Ms J. Joinbee at the first two hearings and with her Messrs C. Birrell and D. Noack of The Australian Workers' Union of Employees, Queensland at the final hearing on behalf of the respondent.

Released: 19 September 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**Jayne Kelly AND Stewart Silver King and Burns (Gold Coast) Pty Ltd
(ACN 069 399 864) (No. B1674 of 2001)**

COMMISSIONER BECHLY

19 September 2002

DECISION

The applicant in this matter is Ms Jayne Kelly who was dismissed from employment as a financial controller with Stewart Silver King and Burns (Gold Coast) Pty Ltd ACN069399864 on 4 September 2001. She was first employed by the Respondent on 10 January 1996.

Ms Kelly became financial controller in December 2000. Prior to that appointment she held the position of Accounts Manager of the Accounts Department. She holds no formal qualifications but managed to acquire all her skills in the accounting field through eight and three-quarter years of service with her previous employer and her subsequent employment by the Respondent.

Some time after commencing employment with the Respondent Ms Kelly became a minor shareholder (3%) with an investment of \$15,000. She states that she was entitled to 3% of the profits. The Respondent states that the entitlement was to 3% of dividends. She has received dividends, initially by way of direct payment of dividends and later by way of reimbursement of overseas travel expenses.

During her employment with the Respondent Ms Kelly's workload increased considerably. She states that she "invested approximately nine to ten hours per day, further supplemented by work from home and on weekends, for no additional reward".

Towards the end of 1999, she states that due to the increasing workload and hours worked she sought authorisation to take every second Friday off work. Even so, on those days she was completing work for the Respondent.

She raised these issues with the Respondent's directors who commissioned KPMG to make an assessment of the accounting client services provided by the Respondent and to provide advice on restructuring of staffing arrangements in the accounts department. A report in relation to the internal control procedures of the company, particularly in relation to approval of invoices for payment and cheque processes was specifically requested.

Ms Kelly, among others, was interviewed by a representative of KPMG and the requested report was prepared.

In early to mid November 2000 Ms Kelly attended a meeting with the Respondent's representatives Mr Howard Stewart and Mr Michael Silver together with KPMG representatives where the appointment of a financial controller was discussed as a part of the restructure of the accounting department.

On 15 November 2000 a staff meeting was held, at which Ms Kelly was in attendance, when the proposals in the report were presented by KPMG staff.

On 29 December 2000, the Respondent verbally advised Ms Kelly that she would be appointed as financial controller and that another employee in the accounts department, Ms Denise Williamson, would be appointed as accounts manager.

Ms Kelly objected to the appointment of Ms Williamson as accounts manager and asked the Respondents not to make any changes to the positions until she had had an opportunity to discuss the new role of financial controller. She says that she was completely devastated because in her view, the Respondents had taken away what had been promised at the beginning of her employment. She states that prior to her employment as accounts manager, she was informed by the Respondent that it would be "her area" and that she would hold jurisdiction as to the hiring and firing of staff.

On 2 January 2001, the Respondent confirmed the advice of 29 December in writing. The Respondent's evidence is that the earlier advice was a courtesy to Ms Kelly to ensure that she was aware of what was intended prior to other staff being informed.

The written advice of 2 January outlines the intent of the new position and was accompanied by copies of the KPMG report and recommendations. It states that it was the intent of the Respondent to enlarge upon the duties of the Financial Controller but that they will be effectively those set out by KPMG.

It was the Respondent's belief that Ms Kelly understood what was proposed of that role and that she accepted the role, albeit with some hesitation. Ms Kelly acknowledged during the hearing that she accepted the new role, although with some reluctance.

On 9 January, Ms Kelly wrote to the Respondents and expressed her opinions about their actions. In this she objected to the decision of the Respondents to place Ms Williamson in the position of accounts manager in light of her view as to her rights to appoint staff. She further objected to the appointment of a person who had had six months' employment in the business as against her daughter Aimee's experience of two years in the accounts department. She referred to an offer to her daughter of the position of accounts manager "when and if it arose".

She referred to the enormous workload and the extra effort and pressure and stress that she had been under and expressed the belief that she had been "kicked in the guts" by the Respondents and that she felt that her services in the office must not be needed any longer and that the change was the way the Respondents were using to remove her from the office. She emphasises that the main reason for her displeasure was that the Respondent had not shown any regard to her request to defer the change to the structure of the accounts section.

She requested two weeks leave to reassess her position.

On 11 January the Respondent replied offering to discuss her concerns and the reason that the decision was made not to choose her daughter for the accounts manager position when Ms Kelly was ready to do so. The leave of absence sought was approved and Ms Kelly was invited to call when she was ready to discuss the matters raised.

The Respondents later arranged a meeting with Ms Kelly to discuss changes made to ensure that she was comfortable with them, to discuss issues of concern to her and to discuss system changes that they wished her to implement.

Ms Kelly eventually returned to the office on 6 February after securing a medical certificate indicating that she had been suffering from depression. At that time there existed serious illness within her family.

Prior to her return to work she was provided with a description of the position of financial controller.

On 6 March the Respondents called Ms Kelly to a meeting to discuss a number of matters relating to the operation of the office. The Respondents regarded this as a counselling session relating to Ms Kelly's conduct. Ms Kelly did not regard the discussion at that level. She states that she informed Mr Stewart that she did not think much of him for what he had done to her. She also complained of the work of Ms Williamson.

On 14 March the Respondents provided Ms Kelly with a warning letter concerning her behaviour and confirming the counselling session of 6 March.

The letter was extensive. Amongst the issues raised were those that related to alleged unsatisfactory conduct relating to:

- lack of cooperation with both principals and staff members;
- lack of courtesy in dealing with principals and staff members; and
- failure to follow reasonable and relevant instructions in the context of her employment.

The letter went on to detail examples of behaviour complained of and set out a course of action required of the Respondent to resolve the issues raised.

Ms Kelly in her evidence acknowledged receipt of the letter but denied that the performance or conduct issues raised in it were dealt with at the meeting of 6 March. She stated that she was denied an opportunity to respond.

Considering that employment continued until September 2001 ample opportunity was available to respond.

Ms Kelly states that she experienced difficulty in complying with the requirements of the position solely because inefficiency and inexperience of the new accounts manager Ms Williamson and that she attempted to raise these problems with the Respondents from time to time. She says that her concerns were never addressed.

The Respondents acknowledge that issues were raised about Ms Williamson by Ms Kelly. One issue was the allegation by Ms Kelly that Ms Williamson had lied in her application for employment. This was not able to be demonstrated by Ms Kelly during the hearing. She was cautioned by the Respondents over this allegation and warned against making such allegations as they were defamatory.

It was a requirement of Ms Kelly that she train staff in the internal procedures of the business to enable them to competently perform various duties in the accounts department. The allegation is that Ms Kelly favoured her daughter in such training.

Her daughter had no formal qualifications, although at some stage she had commenced (but later withdrawn from) a diploma in Financial Planning by correspondence through Deacon University. On the other hand Ms Williamson possesses an Associate Diploma of Business Accounting and an Advanced Certificate in Accounting from Moorabbin College of TAFE and has been employed as a bookkeeper and Office Administrator with various employers for a number of years.

One aspect of Ms Williamson's evidence went to a belief held by her that Ms Kelly did not provide appropriate assistance/advice as to procedures adopted within the accounting department as to the recording of transactions. Ms Kelly denies this accusation.

The Respondent's evidence is that Ms Kelly was verbally cautioned on a number of occasions subsequent to 14 March about matters referred to in the letter of 14 March and that these cautions were put to her in a verbal but formal manner. Ms Kelly denies she was cautioned.

On 2 August an incident took place between Ms Kelly and Ms Williamson. Ms Kelly confronted Ms Williamson about a matter concerning who was responsible for an error in an accounting procedure. Ms Kelly's belief was that Ms Williamson had blamed her for the incorrect entry. The incident occurred at Ms Kelly's desk which is situated near the reception area in an open plan office. Her voice was raised and could be heard by others. This incident was observed by the Respondents.

Mr Stewart interviewed Ms Kelly about the incident and determined what had occurred. He later informed her that her behaviour was unacceptable. Other staff were interviewed about the incident.

Ms Williamson was later found by Mr Stewart in a distressed state crying in the lunch room after the confrontation by Ms Kelly. He discussed the issue with her and, as result of the discussion, believed that the matter would go no further. However, Ms Williamson made a formal complaint to the Respondents the following day. She alleges that Ms Kelly accused her of deceit in her employment resume and that she set out to steal people's jobs. She alleges that Ms Kelly during the confrontation and repeatedly in the past had accused her of stealing the job which her daughter was being trained for.

The Respondents further investigated the matter and on 15 August issued a warning letter to Ms Kelly about the incident and requested her to read it and act upon its contents. Ms Kelly made it clear that she did not intend to read it at that time.

Later that afternoon Ms Kelly contacted Mr Stewart on his mobile phone and insisted on a meeting at 8:30 a.m. the following day. At some inconvenience to Messrs Silver and Stewart they returned the following morning. Mr Stewart left Byron Bay at 5:30 a.m. specifically to attend the meeting and Mr Silver returned from annual leave.

At 8:30 a.m. Ms Kelly entered the office and casually walked past Messrs Stewart and Silver and advised them that there was a message for them on the computers. The message cancelled the meeting. She was told that this was unacceptable and was asked why she had not contacted them by phone and thus avoid the inconvenience of returning to the office. She advised them that she would not attend the meeting as she had consulted a solicitor at 8:00 p.m. the previous evening. She then walked out of the office and left on prearranged annual leave for about two weeks.

On her return from annual leave several attempts were made by the Respondent to meet with her to discuss the content of the letter. She refused to cooperate or respond to verbal and written requests to attend a meeting. She was eventually issued a written advice that the matter would be dealt with at 11:00 a.m. on 4 September. She was offered the previous afternoon off to prepare for the meeting. She eventually agreed to attend with a witness.

At the meeting on 4 September Ms Kelly presented a letter of response through her witness.

Mr Stewart's evidence is that Ms Kelly adopted a confrontationalist attitude during the meeting. He and Mr Silver had discussed possible outcomes prior to this meeting. Termination was a possible outcome if the meeting did not resolve the ongoing problem. He decided, upon hearing the content of Ms Kelly's letter and observing her demeanour that the only alternative was termination.

The letter of 15 August made certain allegations about Ms Kelly's behaviour in the office to her duties and staff and advised her that it was a letter of warning and, in respect to her future employment, required that she take certain steps.

While it was proposed that there was nothing in the letter of 15 August which would have suggested to Ms Kelly that an outcome might be termination of employment, I conclude otherwise.

Ms Kelly held a senior position within the Respondent's organisation. I accept that she was cautioned verbally on several occasions about her behaviour both before and after the first letter of warning. She disregarded clear instructions from the Respondent to not continue with unfounded allegations about Ms Williamson's past employment and also continued the unsatisfactory behaviour which was the subject of earlier warnings.

Her behaviour in dressing down Ms Williamson in the manner in which she did in public view of an open office would have been inappropriate in the absence of earlier verbal and written counselling about making defamatory statements about her. It became more so in the circumstances where such counselling had been given.

To not realise that her continued employment was in serious jeopardy upon receipt of the letter of 15 August is incomprehensible.

It is apparent from the evidence that Mr Stewart determined that there had been a complete breakdown in the relationship with Ms Kelly.

On a consideration of the evidence as to the content and tone of the written reply, what occurred at that meeting and previous occurrences subsequent to the appointment of Ms Kelly as financial controller I have come to the same conclusion. Ms Kelly strongly expressed belief as to betrayal by the Respondent, the views expressed by her about the Principles and her evidence that she was no longer prepared to work for the Respondent given her view as to the permanent damage that the working relationship had suffered further lead me to that belief. Her behaviour with respect to attempts to get her to attend meetings to discuss the various issues adds to that belief.

Although the written response did indicate finally that she was prepared to work positively in the future, it was conditional. Ms Kelly denies that she was at fault and accuses Mr Stewart of trying to upset her work environment and cause undue stress. In the circumstances it is abundantly clear that at the meeting of 4 September there was no other course reasonably open than to terminate Ms Kelly's employment.

Mr Stewart proposed three alternatives to Ms Kelly, these being dismissal, resignation or redundancy. Ms Kelly left the meeting without responding. Mr Stewart called after her requesting an answer. She did not reply. Her employment was terminated that day and treated as a redundancy by the Respondent to maximise the benefits available to her. She was requested to leave the premises that day. In the circumstances that does not appear to have been unreasonable.

In coming to the above conclusions I have taken into account the positive and conciliatory approaches taken towards Ms Kelly both in (necessarily) including her in the enquiry into the accounting operations of the business, the early advice of processes proposed to be implemented in the restructure and the responses to her communications and actions taken by her to show her displeasure.

I have also taken into account Ms Kelly's evidence as to her personal health and family illness.

I have also taken into account the evidence of Mr Chester with respect to his role as financial controller. He was appointed as Group Financial Controller on 17 September 2001 following his response to an advertisement in August 2001.

I am satisfied that the role for which he applied was not the role carried out by Ms Kelly, although he has temporarily filled that role since her termination. The Respondent conducts various businesses at various locations within the state and in New South Wales and thus the Respondent was able to make a genuine offer to Ms Kelly of reemployment to the role from which she was dismissed. The offer was rejected by her.

Any suggestion that Mr Chester was employed to replace Ms Kelly is unsustainable.

I do not accept the allegation of Ms Kelly that the appointment of her to the role of financial controller was a ploy to get rid of her. The Respondents placed a high level of trust and confidence in her. There is nothing to suggest that she was not competent to perform the role as proposed by the Respondent.

The application is rejected.

R.E. BECHLY, Commissioner

Released: 19 September 2002

Appearances:

Mr G. I. Thomson (instructed by McCullough Robertson) for the Applicant.
Mr A. G. O'Connor (of Short Punch Greatorex) for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations (Tribunals) Rules 2000 – r. 63 – application for rehearing

**Keith & Rhonda Joy Hegarty and John William & Julia Nancy Spillane t/a
Lamberts AND Michael Hennessy (No. B1316 of 2002)**

COMMISSIONER THOMPSON

19 September 2002

Application for rehearing of case number W68 of 2002 – No opposition to application – Application granted.

DECISION

Background

An application was lodged with the Industrial Registrar on 19 August 2002 by Mr Keith Hegarty (the respondent in case number W68 of 2002) seeking that, in accordance with the *Industrial Relations (Tribunals) Rules 2000*, r. 63, that the matter of W68 of 2002 be reheard:

“Rehearing of proceeding heard in respondent’s absence

63.(1) This rule applies if the commission makes an order under section 278 of the Act in the respondent’s absence.

(2) The respondent may apply to the commission to rehear the application.

(3) The application may only be made within 30 days of the decision or order in the proceeding being made or released, whichever is the later.

(4) If the commission is satisfied it is necessary in the interests of justice for the application to be reheard, the commission may rehear the application.”.

Applicant

In providing submissions to the Commission, Mr Hegarty stated that due to travel commitments on 12 August 2002 (the date when the W68 of 2002 matter was heard), when he arrived at the Townsville Court House, the matter had been concluded and, therefore, was unable to enter an appearance.

Whilst he had not provided affidavit material in line with the directions order he, nevertheless, intended to argue the merits of the application, and the Commission’s decision to proceed in his absence on 12 August 2002 denied him that opportunity.

A positive outcome of this application would enable such argument to be advanced and he indicated to the Commission the intention to call witnesses (two in number) if there was to be a rehearing.

Respondent

Mr Glen Townsend, of the Department of Industrial Relations (DIR), in the absence of Mr Michael Hennessy, appeared for the respondent in the proceedings, despite, in his submission, not being served with the application as directed in the directions order of 23 August 2002.

It was not the position of DIR, in respect of this application, to object to the matter being reheard and, as such, no opposition to the application was offered.

Conclusion

In the determination of this matter, the Commission must be satisfied, in the interests of justice, that a rehearing is warranted, and in reaching my finding, I have taken into account all of the circumstances relating to the hearing of W68 of 2002 in the first instance and, in particular, the inexperience of Mr Hegarty in this jurisdiction.

Based on the submissions of Mr Hegarty, the Commission has been convinced that to dismiss the application would not serve the interests of justice, and it is appropriate for Mr Hegarty to have an opportunity to put forward argument in the substantive matter.

The non-objection to the application by Mr Townsend of DIR, in my view, removes what may well have been the only significant obstacle or hurdle faced in these proceedings by the applicant.

Accordingly, the matter of W68 of 2002 is to be reheard in Townsville on Tuesday 29 October 2002 and a new set of directions orders will subsequently be issued.

The previous decision in W68 of 2002, released on 20 August 2002, in the circumstances, is now rescinded.

I order accordingly.

J.M. THOMPSON, Commissioner.

Released: 19 September 2002

Appearances:

Mr K. Hegarty, Applicant.
Mr G. Townsend, of the Department of Industrial Relations, Respondent.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – application for unpaid wages***Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch AND
Queensland Rail (No. W53 of 2000)**

COMMISSIONER BECHLY

18 September 2002

Application for unpaid wages – Overtime – Allowance for standby/on call – Allowance sought never paid to Depot Managers – Requests for allowance rejected – Salary at a level to reimburse employee – Discretionary power to senior officers to authorise overtime payments in unusual circumstances – Applicant applied for received such payments on certain occasions – Applicant aware of non-payment of on-call allowance – Policy applied to exempt management from allowance – Application rejected.

DECISION

An application has been made by the Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch (ARTBU) on behalf of its member Mr Stephen Shepherd for recovery of alleged unpaid wages relating to a requirement to stand by on-call while occupying the temporary position of Depot Manager, Rolling Stock Maintenance Division, Freight Group at Willowburn, Toowoomba from 23 September 1996 until 24 December 1998.

Queensland Rail (QR) opposes the claim and alleges that the salary rate provided in the Award takes into account the nature of the duties required, including being on-call.

The crux of the matter is whether clause 1.3(b) of the Railway Award – State excludes Mr Shepherd from a Standby/On Call allowance contained in the Award and associated agreements.

Clause 1.3 is in the following terms:

“1.3 Area of Coverage

- (a) This Award shall apply to employees of Queensland Rail and Queensland Rail as the employer in relation to such employees.
- (b) Notwithstanding (a) above, an employee defined herein who is remunerated at a level in excess of AO5(4) shall be exempt from the overtime provisions of this Award, except where otherwise expressly authorised by the employer.”.

The Standby/On Call provision in question is in the following terms:

“Clause 4.9(1)

Standby/On Call – Any employee, other than a Station Supervisor, who, after finishing duty for the day, is required to remain contactable and available at short notice shall be paid a minimum of one hour’s pay at ordinary rates:

Provided that an employee who is required to remain contactable and available at short notice on a Saturday and/or Sunday and/or Public Holidays shall be paid a minimum of two hours’ pay at the rate applicable to that day.”.

The “rate applicable” to Saturday and Sunday is provided in clause 4.7 and 4.8 in the following terms:

“All ordinary hours worked on a Saturday shall attract an additional 50% penalty payment”, and

“All ordinary hours worked on a Saturday shall attract an additional 100% penalty payment.”.

Mr Shepherd was seconded temporarily but indefinitely to the position of Depot Manager, Rolling Stock Maintenance Division, Freight Group at Willowburn from 23 September 1996.

This position attracted a salary at level ET6.1 with progressive increases through both the annual incremental scale combined with negotiated enterprise agreement increases.

Prior to appointment to this position Mr Shepherd held the position of Supervisor (Examiners), Rolling Stock Maintenance at a salary level of ET3.3.

As from 23 September, 1996 Mr Shepherd’s salary increased by approximately \$14,000 per annum.

The position description for the role of Depot Manager at Willowburn is in the following terms:

“Purpose

To effectively manage the rolling stock maintenance facilities and employees at Roma and Willowburn and contribute to the provision of a quality service.

Responsibilities

- Effectively and Efficiently manage the resources under their control in a largely autonomous manner to achieve customer and corporate goals.
- Ensure the maintenance of rolling stock to agreed standards of reliability and availability.
- Develop and manage the annual budget.
- Ensure a safe working environment.
- Communicate effectively and promote staff development to ensure productive and harmonious staff and industrial relations.
- Implement and develop a quality improvement philosophy and procedures.
- Plan strategically to maintain a competitive edge in a dynamic business environment.
- Create an environment which continually promotes fairness and equity in the workplace, through the development and promotion of a code of practice and the implementation of the strategies outlined in the freight group “equity” business plan.

QualificationsAdditional Factors

Must be available to be on call and for call outs outside of working hours.

Must possess a manual "A" class motor licence.

Must comply with divisional and depot codes of practice.

Budgets:- \$3.8 million.

Key Selection Criteria

KSC 1 Extensive knowledge of the rolling stock maintenance environment and management requirements.

KSC 2 High level of skill in application of business management principles.

KSC 3 Substantial level of skill in budget formulation and expenditure control.

KSC 4 Extensive knowledge of quality improvement principles and implementation.

KSC 5 Substantial knowledge of policy, procedures and practices pertaining to E.M.S. and equity.

KSC 6 High level of interpersonal and communication skills."

The allowance sought has never been paid to a person occupying the position of Depot Manager at Willowburn or to the previous position of District Engineer which held responsibility for some of the tasks required of the Depot Manager prior to a restructure of the operation some years ago. District Engineers did have an entitlement to an additional week's annual leave in lieu of overtime and call-outs. This was not extended to Depot Managers as a part of the restructure of this area of Q.R's operations.

According to the evidence requests were made for payment of overtime and standby allowance from time to time over the years but were rejected on the ground that the salary determined for those positions was set at a level to reimburse employees for the requirement to be available and, on occasions, to work overtime.

At a later stage in 1995, by way of a policy decision, overtime payments were made to the then incumbent, Mr Brian Maguire who provided evidence in the proceedings and who was the incumbent prior to the applicant, because of the excessive nature of actual callouts during a grain season when trains were using unused sidings that had not been maintained. Mr Maguire shared the on-call requirements with Mr Shepherd.

The policy relied on gave a discretionary power to certain senior officers to authorise overtime payments in unusual circumstances.

When the applicant took up the position of Depot Manager he made application for and was paid overtime on such occasions. It is significant that he did not make application for all time worked on call-outs. He used his discretion and applied only for payments which he regarded as being for unusual time on call-outs.

It is apparent that Mr Shepherd was aware of the non-payment of the on-call allowance from the outset. He states that it was discussed at the first Depot Manager's meeting and acknowledged that he was aware of that fact when he accepted the position.

The argument for the applicant is quite straightforward. Compelling precedence is quoted in support of the contention that standby is not overtime and therefore does not fall within the exclusion from entitlement to payment proscribed by clause 4.9(i).

On the other hand, Queensland Rail present the argument that customarily standby arrangements for staff at levels higher than AO5(4) have been regarded as overtime for the purpose of exemption from the standby allowance as a matter of policy.

That policy is given standing through relevant provisions of the Award and Enterprise Agreement in the following terms:

"Employees of Queensland Rail shall be employed under the provisions of the *Transport Infrastructure (Railways) Act 1991*, and procedures and policy statements as approved by the Chief Executive as may be in force from time to time".

A policy has been in place for a number of years, known as the "Payment of Overtime to Senior Staff" which operated to exclude specific senior staff from some award overtime provisions.

The application of that policy effectively deemed the standby allowance to fall into an overtime category.

The resolution of this matter has been difficult. One of the difficulties is the widespread application of the policy to many staff positions over many years and, with a few exceptions, the apparent recognition by incumbents that recompense for on-call or standby aspects of their role was contained in the salary for the position. It is clearly the case with Mr Shepherd's salary that recompense for on-call is contained therein.

On the one hand there is significant precedence which has held that standby in some awards is not overtime. However, there are issues to be taken into account with this matter which are not apparent in the industrial instruments upon which the quoted precedence is based.

The industrial instrument in this matter covers classifications of employees ranging from labouring duties to senior management roles.

There is a clear intent to exempt management levels from overtime. There is given to Queensland Rail the capacity to develop and implement policy with respect to employment conditions.

I accept that a policy has been developed and applied which excludes certain management levels from payment of a standby allowance.

There is specific reference in the Award to the exemption of a Station Supervisor from the allowance. That classification, originally a Station Master, has been excluded from the allowance for many years. It appears that, over the years, as varying Management Positions were developed, exclusion was applied by way of policy where the roles attracted a salary greater than that now described as AO5(4).

In Mr Shepherd's case, when the new senior management position specific to the role he was to occupy was developed, a requirement of the role was the availability to be "on-call" and for "call-outs" outside normal working hours.

It is clear that the two components that is "on-call" and "call-outs" were built into the salary established for the position.

"Call-outs" were excluded from payment by clause 1.3(b). The requirement to be available such call-outs, that is "on-call" was built into the salary. To accede to the present claim would be to provide a double payment.

It is not an uncommon factor in industry, particularly a twenty-four hour day, seven day a week industry, for there to be a requirement at certain management levels to be available for call-outs when such an eventuality may arise and for remuneration for such requirement to be built into the salary for the role. This is of course quite the opposite to the conditions applicable to employees who may be supervised by management staff when such call-outs occur.

A contention by the Union is that the policy is an overtime policy and not one which can have any application to standby or call-out which has been determined in some cases as not being overtime.

I think the following comments by Moynihan P in the Radiographers Award – Public Hospitals – the Queensland Radium Institute and the Department of Health (QGIG Vol. 133 at p. 280) when dealing with a matter of standby and call-out have some application:

"The construction to be placed on the clause in the Award turns on the word used. The construction given to differently worded clauses in different awards construed from the point of view of concerns different than those in issue in these proceedings can be of little assistance in cases such as this and indeed may prove to be positively misleading."

There is no suggestion that the on-call requirement placed on Mr Shepherd, which he shared with Mr Maguire, was oppressive. It was a well known fact that payment for such requirement was considered within the salary set for the position. I find that the claim is not sustainable.

Comment should be made about the implementation of the "Policy" and the overtime exclusion provision in the Award.

As earlier indicated there was in place a discretion available to senior management to approve overtime payments in some cases where staff excluded from overtime payments worked overtime beyond what might be considered reasonable (or in excess of that contemplated in the salary set for the position). Mr Shepherd benefited from that policy and received payment for overtime claimed.

Through evidence extracted during the hearing from management salary records it is evident that the same discretion is available in cases of standby for some senior management positions.

Mr Shepherd was aware that some managers or staff at higher than AO5.4 level did receive a standby or on-call allowance and expressed considerable dissatisfaction at what he believed was discrimination in the application of the policy to him. There is no material before me to suggest that Mr Shepherd was treated in a discriminatory manner with respect to call-outs.

However, I would make the observation that different application of policy relaxation in the same or different operational groups will inevitably lead to discontent. While I accept that policy considerations may take into account different imperatives, equity must be seen in the eye of the beholder if discrimination beliefs such as those held by Mr Shepherd are to be avoided.

The application is rejected.

Dated 17 September 2002.

R.E. BECHLY, Commissioner.

Appearances:

Ms B. Houston of Australian, Rail, Tram and Bus Industry Union of Employees, Queensland Branch for the Applicant.

Mr J. Shepherd, with him Ms L. Collins, of Queensland Rail for the Respondent.

Released: 20 September 2002

Filename: no.5 04.10.02
Directory: S:\QIRCDEV-BASE\qgig\2002\vol 171
Template: H:\NORMAL.DOT
Title: QGIG - Vol. 171 No. 5 04.10.02
Subject:
Author: Queensland Industrial Relations Commission
Keywords:
Comments:
Creation Date: 01/10/2002 9:35:00 AM
Change Number: 4
Last Saved On: 17/01/2008 2:23:00 PM
Last Saved By: TorrenVM
Total Editing Time: 7 Minutes
Last Printed On: 17/01/2008 2:23:00 PM
As of Last Complete Printing
Number of Pages: 14
Number of Words: 12,823 (approx.)
Number of Characters: 65,912 (approx.)