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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

NOTICE

The following Agreements have been certified by the Commission:

No/s	Title	Date certified	Cancelling
CA359/02	Anderson Industries (Qld) Pty Ltd - Certified Agreement No 3	19/9/02	CA455/00
CA388/02	Moggill Constructions Pty Ltd Earthmovers on Building Sites – Certified Agreement	20/9/02	
CA393/02	CS North West Enterprise - Certified Agreement 2002	20/9/02	CA527/00
CA395/02	St. Luke's Nursing Service, QNU and QPSU Certified Agreement 2002	27/9/02	CA518/00

The following Agreement has been amended by the Commission:

No/s	Title	Date amended
CA597/01	Queensland Transport Customer Service Centre - Certified Agreement	20/9/02

E. EWALD
Industrial Registrar

INDUSTRIAL COURT OF QUEENSLAND

Training and Employment Act 2000 – s. 244 – appeal against decision of industrial commission

Murrays Australia Limited AND Training Recognition Council and Kerry Anthony (No. C52 of 2002)

Kerry Anthony AND Training Recognition Council and Murrays Australia Limited (No. C53 of 2002)

Robert Chandra AND Training Recognition Council and Murrays Australia Limited (No. C54 of 2002)

James Chandra AND Training Recognition Council and Murrays Australia Limited (No. C55 of 2002)

John Mizzi AND Training Recognition Council and Murrays Australia Limited (No. C56 of 2002)

Peter Proctor AND Training Recognition Council and Murrays Australia Limited (No. C57 of 2002)

Derek Scott AND Training Recognition Council and Murrays Australia Limited (No. C58 of 2002)

- Randall Scovell AND Training Recognition Council and Murrays Australia Limited (No. C59 of 2002)**
- Diane Thompson AND Training Recognition Council and Murrays Australia Limited (No. C60 of 2002)**
- Robert McGowan AND Training Recognition Council and Murrays Australia Limited (No. C61 of 2002)**
- Timothy Kershaw AND Training Recognition Council and Murrays Australia Limited (No. C62 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and Timothy Kershaw (No. C63 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and Robert McGowan (No. C64 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and Diane Thompson (No. C65 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and Randall Scovell (No. C66 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and Derek Scott (No. C67 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and Peter Proctor (No. C68 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and John Mizzi (No. C69 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and James Chandra (No. C70 of 2002)**
- Murrays Australia Limited AND Training Recognition Council and Robert Chandra (No. C71 of 2002)**

PRESIDENT HALL

30 September 2002

DECISION

Murrays Australia Limited (hereafter Murrays) is a company under the Corporations Law. It conducts the business of a coach operator specialising in the charter of coaches and in conducting tours. It has traditionally been dependent upon the tourist trade, particularly the inbound overseas tourist trade. Each of Kerry Anthony, Timothy Kershaw, Robert McGowan, Diane Thompson, Randall Scovell, Derek Scott, Peter Proctor, John Mizzi, James Chandra and Robert Chandra was a long term employee of Murrays.

Over the period December 2000 to January 2001 Murrays and each of the drivers entered into training contracts under the *Training and Employment Act 2000*. It is perhaps a little unusual for such experienced drivers to enter into training contracts. Murrays gives the explanation that the objective was to give each of the drivers a recognisable skill or qualification. Neither Murrays nor the drivers nor the Training Recognition Council brought into existence by the *Training and Employment Act 2000* query the validity of the agreements at their inception. Subsequently, and within the first half of 2001, Murrays and three of the drivers entered into Australian Workplace Agreements pursuant to the provisions of the *Workplace Relations Act 1997* (Cwth). The employment of the other seven drivers was governed (at least in part) by certified agreements under the same Act.

In November 2001 Murrays sought to reduce its labour costs, *inter alia*, by implementing a redundancy program. Implementation of the program led to termination of the employment of each of the ten drivers previously named. Murrays sought to terminate the employment of each of the drivers other than Mr McGowan on 7 November 2001. On 15 November 2001 Murrays sought to terminate the employment of Mr McGowan. The need for the redundancy program, I should interpolate, was attributed by Murrays to the downturn in international tourism after the events of 11 September 2001 and to the collapse of Ansett on 14 September 2001.

So far as State law is concerned the termination of the drivers' employment was a breach of s. 139 of the *Industrial Relations Act 1999*.

The *Training and Employment Act 2000* contemplates that training will be employment based training. The Act is structured on the basis that any training contract will always be underpinned by an employment relationship. I do not seek to suggest that the *Training and Employment Act 2000* treats the training contract and the contract of employment as if they are one agreement. The proposition is that there cannot be a training contract in the absence of an employment relationship. The consequence is that restrictions upon the termination of the training contract are also restrictions upon termination of the relationship of employer and employee.

The provisions upon which I rely for the proposition that the structure of the *Training and Employment Act 2000* is based upon the assumption that where there is a training agreement there will be an employment relationship are –

- (i) section 8 which provides that a "traineeship" is employment based training declared by the Training Recognition Council to be a traineeship;
- (ii) section 10 which provides that a "trainee" is an employee who is being trained in a traineeship in circumstances particularised thereat;
- (iii) section 12 which provides that a "traineeship contract" is a contract for "the training and employment" of a person in a traineeship;
- (iv) schedule 3 which defines "employee" and "employer" to have the meaning attributed to those nouns by the *Industrial Relations Act 1999* and which defines "training contract" to mean, for a trainee, a traineeship contract as defined at s. 12 noted above.

The provisions upon which I rely for the proposition that restrictions on termination of a traineeship contract also restrict termination of the employment relationship are –

- (i) section 78 which provides that where a registered training contract is cancelled or completed the employment is taken to be lawfully terminated (subject to qualifications and provisos there set out), and;
- (ii) section 139 of the *Industrial Relations Act 1999* which declares it to be unlawful, and an offence, for an employer to terminate the employment of a trainee unless the traineeship is completed or is cancelled under the *Training and Employment Act 2000*; and
- (iii) section 391(2) of the *Industrial Relations Act 1999* which requires that an employer pay a trainee until the training contract is cancelled.

In fact, no proceedings for breach of s. 139 of the *Industrial Relations Act 1999* were instituted. However, certain of the drivers, viz Ms Thompson and Messrs James Chandra, Proctor, Scovell, Kershaw, Anthony and McGowan did raise the matter with the Training Recognition Council. There were dealings between the Council and Murrays. Ultimately (on 12 December 2001), and without resiling from the claim that the employment of each of the drivers was at an end, Murrays applied to the Training Recognition Council for cancellation of the training contracts. The matter came into the hands of a delegate of the Council. There is no challenge to the authority of the delegate in the current proceedings. On 21 December 2001 the delegate declined to cancel any of the training agreements, gave reasons for his decision and published an information notice to each driver and to Murrays.

Murrays were entitled to appeal to the Queensland Industrial Relations Commission and did so. (The appeal was later withdrawn). Murrays also sought to persuade the Training Recognition Council to review the decision of its delegate. The Training Recognition Council did so. There has been some debate between senior counsel for Murrays and counsel for the Training Recognition Council as to the basis on which the Training Recognition Council conducted the review. Counsel for the Training Recognition Council submits that the review was authorised by s. 24AA of the *Acts Interpretation Act 1954*. Senior counsel for Murrays contends that the Training Recognition Council proceeded on the view that as principal it might go behind any decision of its agent and determine the matter for itself. For the purpose of these proceedings it is not necessary to resolve the debate. Neither is it necessary to determine whether s. 24AA, which may be displaced by a contrary intention appearing in any Act, (s. 4 of the *Acts Interpretation Act 1954*), can have application in the presence of a statutory right of appeal to the Queensland Industrial Relations Commission against the decision of the delegate (on very short notice). It is not necessary to deal with those issues because both in the Commission and in the Court the proceedings involving Murrays, the drivers and the Training Recognition Council have proceeded throughout on the basis that the decision of the Training Recognition Council of 8 February 2002 reversing the decision of the delegate and approving the cancellation of the drivers' training agreements (effective 11 February 2002) was other than a nullity. (Before the Commission both Murrays and the drivers contended that the decision though valid needed to be corrected).

Each of the drivers lodged an appeal to the Queensland Industrial Relations Commission on 4 March 2002 (within time). Murrays lodged a separate appeal against each driver seeking an earlier cancellation date on 21 March 2002 (out of time). Murrays sought an extension of time from the Commission. The Commission exercised its discretion to grant the extension of time. There is no appeal against that exercise of discretion. However, the Commission declined to exercise its discretion to enable each of the drivers to amend his/her appeal to allege that Murrays had "purported to cancel the contract other than the way allowed" under the *Training and Employment Act 2000* and to seek relief under Division 2, Part 2 of Chapter 8 by way of the payment of compensation pursuant to s. 237(b) and relief by way of a pecuniary penalty pursuant to s. 240 of that Act. Authority to allow the amendment is now challenged on appeal by each of the drivers.

The general principles applicable to an appeal against an exercise of discretion by a tribunal of first instance are well settled (see *House v. The King* (1936) 55 CLR 499 at 504-505 per Dixon, Evatt and McTiernan JJ, *Lawrence v. Oil Drilling* [1967] QWN 4 and *Harnell Pty Ltd v. Powell* (2001) 168 QGIG 344). It is unnecessary to republish the well known extracts. It is sufficient to say that in reliance on the decision of the High Court in *State of Queensland v. J L Holdings Pty Ltd* (1997) 189 CLR 146 the drivers complain that the Commission acted upon a wrong principle and/or allowed an irrelevant matter to guide or affect it. The gravamen of the complaint relates to the use made by the Commission about dilatoriness by the drivers and/or their legal representatives (who are their agents) in complying with directions orders. The critical passage in the decision of the Commission, 170 QGIG 361 at 362 is:

"After considering the submissions I ruled to reject the application for a number of reasons. Firstly, the nature of the relief claimed would have made the case substantially different to that which the respondents had come to argue. Secondly, it was too late in the day for the appellant trainees to be given further latitude to amend given their demonstrated tardiness in complying with directions orders. Thirdly, the appeal was starting to become a moving feast as the appellant trainees identified new issues they wished to air or new remedies which they sought to obtain."

State of Queensland v. J L Holdings Pty Ltd (1997) 189 CLR 146 was not a case in which leave to amend was refused because of earlier non-compliance with directions orders. It was a case in which, after a number of interlocutory hearings and several amendments to the defence, the defendants sought to amend their defence yet again (to add an arguable defence) in circumstances in which it was likely that allowing the amendment would result in the vacation of the previously fixed trial date which was six months hence. The primary judge, who had had the management of the case since 1994, refused the application to amend. The Full Court of the Federal Court of Australia upheld that decision. The majority, Whitlam and Sundberg JJ, concluded:

"Unless we are to mouth the repeated cautions about discretionary judgments, case management, efficiency, practice and procedure, and the advantages of the managing judge, only to ignore them when it comes to the crunch, this appeal must be dismissed."

On appeal, the High Court reversed the decision of the Full Court of the Federal Court. At 154 the majority (Dawson, Gaudron and McHugh JJ) said:

"It may be said at once that in the passage which we have cited from *Sali v. SPC Ltd* Toohey and Gaudron JJ are not to be taken as sanctioning any departure from the principles established in *Cropper v. Smith* and accepted in *Clough and Rogers v. Frog. Sali v SPC Ltd* was a case concerning the refusal of an adjournment in relation to which the proper principles of case management may have a particular relevance. However, nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances, to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

However, although *State of Queensland v. J L Holdings Pty Ltd* (1997) 189 CLR 146 is directed to the influence of case management principles upon applications to amend, any notion that parties may be disciplined for dilatoriness by refusal of subsequent applications to amend seems to me to be wholly incompatible with the principles underlying the decision of the High Court. If I had been satisfied that the Commission did act on such a principle I should have allowed the appeal by each of the drivers against the decision refusing leave to amend. However, the extract from the reported decision of the Commission cited above is not the decision of the Commission upon the application for leave to amend. That decision was given on transcript on the second day of hearing in the Commission. The extract from the reported decision is merely a summary, and I think an inaccurate one, of the decision upon the application to amend. It was given in the course of reciting the history of the matter. On transcript, the Commission said:

"COMMISSIONER: Mr Murdoch, I don't need to hear from you on the issues. Mr Reed, I'm not minded to allow the amendment which has been sought. The original appeal is quite clearly addressed as being an appeal to the Court which is wrong, it's actually to the Commission, from the whole of the decision of the Training Recognition Council given on the 8th of February in respect to an application and so on.

It seems to me that the amendment which has been applied for today would make the hearing a substantially different animal to that which is set out in the original application to appeal and in the amended application to appeal. It seems to me that it being an appeal right from the outset against a decision of the Training Recognition Council, that it should be restricted to that ground or those grounds of appeal. It seems to me that it is far too late in the day for the appellant trainees to be given further latitude to further amend their appeal grounds to incorporate what, to my way of thinking, are significantly new grounds at this late stage.

I commented yesterday on several occasions about the tardiness of the appellant trainees in terms of having their material in. The original decision that was appealed against was made on 8 February. Appeals were lodged on 4 March. There's an argument there as to whether they were within the time frame in any event if my maths is correct.

Amended applications to appeal were filed on 27 March. The parties might not be aware of when they were filed because the application, or the amended application to appeal, is dated 4 March which gives an artificial indication as to the date that it was lodged. There was lodged on 27 March, well after the appellant trainees had access to all of the material and should have been able to marshal the arguments that they were going to raise on appeal.

The decision that's been tabled in Ferros and Cairns City Council is distinguishable and I adopt the arguments of Mr Murdoch, senior counsel, in that regard. The amended application to appeal shows me that the appellant trainees gave some thought to expanding on the arguments that were contained in the original application to appeal, and I don't think that the case should become a moving feast where when errors or omissions are discovered or disclosed, latitude is given to an appellant to improve its case or to increase the matters it can argue by being given leave to amend. In those circumstances leave to amend is formally refused.

It's not necessary for me in the circumstances to rule on interpretation to be given to the work contract where it appears in S235(b). Although forced to express an opinion I would favour the opinion expressed by the Training Council."

The essence of the decision on transcript appears to be that the drivers, who have had access to competent legal advice throughout, had so dithered about what case it was which was to be mounted on the appeal that two days into the hearing an amendment was being sought which would change the nature of the case and, when taken with earlier amendments (filed late) would give Murrays a legitimate basis for complaining that they were being confronted with a "moving feast". At worst, the criticism of the drivers is that they were seeking an indulgence whilst they came with unclean hands.

It must be acknowledged that Queensland industrial legislation does not always use the nouns "appeal" and "application" with precision; see, e.g., s. 510A of the *WorkCover Queensland Act 1996* which provides (emphasis added):

"510 Costs of appeal to Industrial Court

- (1) On an appeal, the Industrial Court may order a party to pay costs incurred by another party only if satisfied the party made the application vexatiously or without reasonable cause.
- (2) Costs of the order are to be in accordance with the *Industrial Relations (Tribunal) Rules 2000*, rule 66."

See also *Golden Video Pty Ltd v. Chief Executive, Department of Employment, Training and Industrial Relations* (2000) 164 QGIG 298 where "application" at s. 235 of the *Industrial Relations Act 1999* was held to include an "appeal". However, when Divisions 1 and 2 of Part 2 of Chapter 8 of the *Training and Employment Act 2000* are read as a whole, it is apparent that the purpose of Division 2 is to allow the Queensland Industrial Relations Commission in appeals where it has jurisdiction to exercise powers not otherwise available to the Commission in order (expeditiously) to resolve all matters arising out of a training contract. To read s. 235 as granting trainees aggrieved by a purported termination the right to apply for relief under Division 2, whether or not an appeal described at s. 230 (Division 1) is on foot is to read into existence a right to relief without any apparent* limitation period. (*The *Limitation of Actions Act 1974* may make appropriate provision). The limitation period of 21 days at s. 230(3) can have no application. There will not be an information notice in the case of a purported termination. A remedy without a limitation period (or now subject to a lengthy period under the *Limitation of Actions Act 1974*) sits ill with the Minister's Second Reading Speech which said of the new appeals system:

"Appeals. A new appeals process is being introduced. Industry stakeholders see the existing system as lacking substance and independence, being overly bureaucratic and cumbersome. The new appeals mechanism addresses these concerns and reflects the needs of a modern, streamlined training system. Under the new system, appeals from decisions that have substantial impact on a person or an organisation's commercial activities can proceed to the Magistrates Court. This includes decisions relating to the registration of training organisations, the accreditation of courses and the recognition of industry training advisory bodies and group training organisations.

An appeal on matters of law may be taken to the District Court. Appeals relating to the training and employment employment of apprentices or trainees may proceed to the Queensland Industrial Relations Commission. This recognises that a growing proportion of apprentices and trainees are adults, where previously the majority were under the age of 18. The commission will hear appeals related to the scope and quality of training provided to apprentices and trainees and to disciplinary matters. A further appeal on points of law may be taken to the Industrial Court in matters relating to disciplinary issues."

On any view of the authorities reference may be made to the Second Reading Speech to assess the purpose of the *Training and Employment Act 2000*. The interpretation which will best achieve the purpose of the Act is to be preferred to any other interpretation, *Acts Interpretation Act 1954*, s. 14A(1). Division 2 of Part 2 of Chapter 8 should be read as supplementing the powers of the Commission when an appeal under Division 1 is properly before it.

It follows that the discretion exercised by the Commission was a discretion on a point of practice and procedure. Substantive rights were not disposed of, save that the opportunity to seek a pecuniary penalty (s. 240) will not arise. The Commission's jurisdiction under Division 1 Part 2 of Chapter 8 is exclusive, s. 234(1). There is no comparable provision at Division 2. The purpose of Division 2 is to permit parties to an appeal pursuant to s. 230 to ask the Commission to exercise powers not otherwise available to the Commission in order that all issues may be conveniently and expeditiously resolved in one proceeding. It is not the purpose of Division 2 to codify and limit remedies available to trainees when a recalcitrant employer breaches a traineeship contract or the provisions of the *Training and Employment Act 2000* or any other Act. Appeals against an exercise of discretion on matters of practice and procedure attract a subset of principles. All Courts have, and certainly this Court has, been reluctant to interfere with discretionary decisions about practice and procedure, see in *Re The Will of F B Gilbert (deceased)* (1946) 46 SRNSW 318 at 323, *Brambles Holdings Ltd v. Trade Practices Commission* (1979) 28 ALR 191 at 193, *Adam P Brown Male Fashions Pty Ltd v. Phillip Morris Incorporated* (1981) 148 CLR 171 at 177 per Gibbs CJ, Aickin, Wilson and Brennan JJ, *Hartnell Pty Ltd v. Powell* (2001) 168 QGIG 344. Here, the nature of the case to be mounted, so far as Murrays was concerned, was to be fundamentally changed. Importantly, a claim for a pecuniary penalty was to be advanced. Unlike the situation in *State of Queensland v. J L Holdings Pty Ltd* (1997) 189 CLR 146 the application was made, not six months prior to the date of trial, but on the second day of the hearing. I adhere to the view which I expressed in *Alamzeb v. Education Queensland* (2001) 168 QGIG 347 at 347 that where a respondent acts upon an applicant's pleadings refusal of an application to amend during the course of the hearing will not ordinarily be reviewed by this Court. Though other Commissioners might have dealt with the matter in other ways, e.g. by granting the amendment on an undertaking by the drivers to pay any costs thrown away in consequence of any necessary adjournment, it seems to me that consistently with principle I can conclude only that it was the Commission's discretion, not the Court's, and that I should not interfere.

The unusual difficulty in this case is that having rejected the application for leave to amend the Commission changed its mind. Perusal of the report 170 QGIG 361 at 362 reveals the passage:

"After considering the submissions I ruled to reject the application for a number of reasons. Firstly, the nature of the relief claimed would have made the case substantially different to that which the respondents had come to argue. Secondly, it was too late in the day for the appellant trainees to be given further latitude to amend given their demonstrated tardiness in complying with directions orders. Thirdly, the appeal was starting to become a moving feast since the appellant trainees identified new issues they wished to air or new remedies which they sought to obtain.

However, having reflected on the matter since the ruling, I have now come to the view that the matters dealt with in Chapter 8, Part 2, Division 2 of the T&E Act are, in fact, relevant potential remedies in this case. I canvass the import of this at the conclusion of my decision."

Then at 368 to 369 the Commission said:

"Compensation

As mooted earlier, the question of the trainees' entitlement to compensation was raised by Mr Reed at the beginning of the second day of substantive hearing.

Mr Reed sought to amend the trainees' appeals by adding the following provision:

'A determination that Murrays, on 7 November 2001, purported to cancel the contracts of the appellant other than in a way allowed under the Training and Employment Act 2000 and to further add, alternatively, an order for compensation under section 237 of the Act equivalent to six months' wages at the rate payable to the appellant immediately prior to 7 November 2001 and a further subparagraph, that the Commission make an order under section 240 of the Act.'

At that time there followed some debate on the appropriateness of the amendment at such a stage in the proceedings, which included submissions from the parties on whether the remedy/penalty provisions of s. 237 and s. 240 could in fact be invoked in the circumstances of the case, based on whether the threshold conditions of s. 235 were satisfied (see pp141-154 transcript).

At the time, and for the reasons set out earlier, I determined not to allow the amendment of the trainees' appeals as requested by Mr Reed.

Now, however, upon reflection, it appears to me that the factual matrix of this case clearly sustains the preconditions in s. 235 and enlivens in me the ability to consider whether payment of any compensation to the trainees under s. 237 would be reasonable in all the circumstances.

Subject to my concluding remarks regarding further submissions, I view my ability to consider the matters in Chapter 8, Part 2, Division 2 of the T&E Act as predicated solely upon the satisfaction of the requirements of s. 235, and as matters I may consider, if appropriate, on my own motion. I do not see myself as limited in this by my previous refusal of Mr Reed's application to amend, or by the absence before me of any other specific application by a party to consider the remedies provided by that Division.

Section 235 states:

'This division applies if –

- (a) *an appeal to the industrial commission is about the cancellation of a registered training contract; and*
- (b) *the commission decides the employer or the apprentice or trainee has purposed to cancel the contract other than in a way allowed under this Act.'*

I agree with the parties' submissions that in s. 235 'contract' must be read as 'registered training contract'.

Despite Mr Murdoch's SC various arguments to the contrary (see pp145-147 transcript), including his assertion of a conceptual separation of the act of terminating the trainees' employment from that of terminating their training contracts, it seems plain to me that the requirements of s. 235 are satisfied.

There is:

- (a) an appeal about the cancellation of a registered training contract; and
- (b) the employer has purported to cancel the contract other than in a way allowed under the T&E Act.

In my view Murrays' putative termination of the trainees' employment contracts on 7 and 15 November 2001 was simultaneously a repudiation of Murrays' obligations under the training contracts sufficient to effect at least 'purported' cancellation of the training contracts, and thus sufficient to satisfy s. 235(b).

An integral feature of a traineeship is that it is 'employment based' training. In the absence of ongoing employment (and exposure to the everyday workplace environment) an employer cannot realistically fulfil their obligations under a training contract. Intentionally terminating a trainee's employment amounts to a purported termination of the 'employment based' training contract (see *Bryden and Training Recognition Council* (2001) 166 QGIG 305).

For completeness I note that this manner of purported cancellation of a training contract (i.e. without the auspices of the Training Recognition Council) is not a method of cancellation allowed under the T&E Act (see Chapter 3, Division 4 of the T&E Act).

Having found that my jurisdiction under Chapter 8, Part 2, Division 2 is enlivened, I come to consider the question of remedy for the purported cancellation of the training contracts other than allowed under the T&E Act.

I have stated above that there is no basis for the resumption of the trainees' training contracts. The training contracts are cancelled and the issue is whether, under s. 237(b) of the T&E Act, the trainees should receive some compensation. I have determined that in the circumstances a further penalty payable under s. 240 would not be appropriate.

Section 237 states:

'If the industrial commission considers it would be inappropriate in the circumstances for training to continue, the commission may order –

- (a) *the contract be cancelled; and*
- (b) *the employer pay to the apprentice or trainee the compensation decided by the commission if the commission is satisfied the payment of compensation is reasonable in all the circumstances.'*

Under the section, payment of compensation must be reasonable in all the circumstances.

Again, in a tangential way, some of the matters going to the reasonableness of payment of compensation, and perhaps a reasonable quantum, were touched upon at hearing and in final submissions.

However, due to my refusal to allow Mr Reed's requested amendment, none of the parties had the opportunity to address me specifically and directly on these questions.

I invite the parties to make further submissions directed specifically to reasonableness of payment of compensation in the circumstances, and of quantum.

Arrangements for further submissions

If a party has no wish to make further submissions on either of the above matters I will rely on the submissions I have from them to date.

I will re-list this matter for further submissions restricted to the above two matters on Friday, 26 July 2002 at 10.00 a.m.

Parties intending to make submissions should file outlines of arguments, and serve them on the other parties by 12.00 noon on Tuesday, 23 July 2002.

The Commission determines and orders accordingly."

Each of the drivers complains by way of appeal about what occurred in the Commission. So also do Murrays.

Each driver complains that the putative claim for relief under s. 240, viz payment of a pecuniary penalty, was rejected without reasons. The complaint must succeed. The extent to which the Commission must give reasons is probably incapable of precise formulation. However, on any view, the Commission must disclose what matters were taken into account and in what manner they were taken into account sufficiently to enable an assessment to be made of whether an error has occurred: see generally *Soulezis v. Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, *Sun Alliance Insurance Ltd v. Massoud* [1989] VR 8, *Cypressvale Pty Ltd v. Retail Shop Lease Tribunal* [1996] 2 QdR 462, *Edwards v. Giudice* (1999) 94 FCR 561, *Hopper v. Mt Isa Mines Ltd* [1999] 2 QdR 496. Particularly where, as here (*Industrial Relations Act 1999*, s. 333), there is a requirement to give written reasons for the exercise of decision making power, see *Dornan v. Riordan* (1990) 24 FCR 564 at 573, failure to give proper reasons constitutes an error of law. There is no room for argument about sufficiency here. There were no reasons at all.

Murrays' complaint is that the Commission denied it natural justice in determining to vacate the earlier order dismissing the application to amend and in determining also an issue which would arise if the amendment were allowed, viz whether Murrays had purported to cancel the training contracts in a way other than that allowed by the *Training and Employment Act 2000*, without notifying Murrays that the issues were to be dealt with and without granting Murrays the right to be heard. It is not necessary to go further than the observations of Mason J in *Kioa v. West* (1985) 159 CLR 550 at 582 viz:

"It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it: *Twist v. Randwick Municipal Council* (82); *Salemi* [No. 2] (83); *Ratu* (84); *Heatley v. Tasmanian Racing and Gaming Commission* (85); *F.A.I. Insurances Ltd v. Winneke* (86); *Annamunthodo v. Oilfields Workers' Trade Union* (87). The reference to 'right or interest' in this formulation must be understood as relating to personal liberty, status, preservation of livelihood and reputation, as well as to proprietary rights and interests."

In reliance on *Stead v. State Government Insurance Commission* (1986) 161 CLR 141 at 145, *Giretti v. Deputy Commissioner of Taxation* (1996) 70 FCR 151 at 164 to 166 per Merkel J and *Wasfi v. Commonwealth* (1998) 155 ALR 310 at 323 to 324, senior counsel for the drivers contends that Murrays' complaint should not be upheld because the only issue about s. 235 was an issue of law which might only be decided one way. I am unable to accept that argument. It is not clear to me that senior counsel for Murrays would not have cross-examined at greater depth on the s. 235 issues if he had been aware that those issues were before the Commission. Further, as appears below, there were other issues of law. In any event, the prior question was whether the amendment should be allowed.

I have dealt with the Commission's original decision to refuse leave to amend on the simple basis that it was a quintessential exercise of discretion vested in the Commission upon a matter of practice and procedure, and that no proper basis was shown for supplanting the exercise of power by the Commission with the exercise of power by the Court. The truth is that as debate about the proposed amendment and about Division 2 Part 2 of Chapter 8 progressed in the Court, it became apparent that the Commission had not been provided with an adequate argument about the complexities and the delays which would flow from grant of the amendment.

For reasons given above, it is tolerably clear that State law proceeds on the view that a training contract will always be underpinned by the relationship of employer and employee. Further, by s. 139 of the *Industrial Relations Act 1999* an employment relationship may not (lawfully) be brought to an end unless and until the training contract has been (lawfully) brought to an end. The difficulty is that some of the drivers had entered into Australian Workplace Agreements. The agreements dealt with the matter of termination of the relationship of employer and employee as follows:

"28. TERMS OF EMPLOYMENT

Probationary Employment

- (a) If the Employee is a new employee the Employee will be employed on a probationary basis for a period of three (3) months from the day the Employee commences employment with the Company.
- (b) During the probationary period, the Company will assess the Employee's performance and where such performance is unsatisfactory the Employee will, subject to clauses (c) and (d), be counselled and given an opportunity to improve.
- (c) Notwithstanding clause (b), either party may terminate the employment of the Employee at any time for any reason during the probationary period upon giving the other party one (1) week's notice.
- (d) Notwithstanding clauses (b) and (c), the Company may terminate the employment of the Employee without notice for serious misconduct.

Termination of Employment Generally

(e) Full-time Employee's Period of Continuous Service as a Full-time Employee	Period of Service Notice
Not more than 1 year	1 week
More than 1 year but not more than 3 years	2 weeks
More than 3 years but not more than 5 years	3 weeks
More than 5 years	4 weeks

The period of notice is increased by 1 week if the full-time employee is over 45 years old and has completed at least 2 years continuous service as a full-time employee. For the purpose of this clause the date of employment will be the employees original start date not the operative date of this agreement. All termination payments will be calculated on the Company's base rate specified in clause 11.1

- (f) Except as otherwise provided in this Agreement, full-time employees will be employed by the week.
- (g) In respect of full-time employees, subject to sub-clause (h), either party may terminate the employment by the giving of one week's notice (or such longer period as is provided for in applicable legislation) on either side given at any time, or (at the Company's discretion) by the payment or forfeiture of pay, as the case may be, either wholly or partly in lieu thereof.
- (h) Nothing contained in this clause will prevent the Company from dismissing an employee at any time without notice for misconduct, in which case wages will be paid up to the time of dismissal only.
- (i) An employee will comply with all reasonable and lawful directions of the Company associated with his/her employment."

I am unable to accept the submissions of senior counsel for the drivers that clause 28 is no more than a machinery provision regulating the exercise of a right to terminate on notice which arises under the general law of contract. It seems to me that, on any fair construction, clause 28 supplants any right to terminate on notice which might otherwise have existed under the general law of contract and formulates periods of notice on quite a different basis. In consequence, three significant issues arise:

- (1) Does s. 170VQ(4) of the *Workplace Relations Act 1996* (Cwth) operate to exclude the operation of the training agreements to the drivers during the period of operation of the Australian Workplace Agreement, a question the resolution of which probably depends on whether a "training agreement" is a "State agreement" as defined at s. 170VA.
- (2) Does s. 170VR(1) operate on clause 28 to override ss. 139 and 391(2) of the *Industrial Relations Act 1999*, a question the resolution of which will require consideration of whether "inconsistency" at s. 170VR takes its meaning from s. 109 of the Constitution? Subsidiary questions will be whether a "training agreement", which is given effect by the *Training and Employment Act 2000*, may properly be characterised as "a State law" so as to attract the operation of s. 170VR and whether, if s. 170VR does not operate upon s. 139 or the traineeship agreements, s. 109 of the Constitution operates in any event.
- (3) In the event that any of the arguments at (1) and (2) succeed, and Murrays is held to have brought the employment relationship to an end by the giving of appropriate notice under clause 28 so as to destroy the assumption underlining the *Training and Employment Act 2000* that a traineeship will be underpinned by an employment relationship, may any part of the State legislative scheme be severed or does the entire scheme fail?

It is not necessary to attempt to answer any of those questions. It is sufficient to say that at least the issues relating to s. 139 and s. 391(2) of the *Industrial Relations Act 1999* will raise issues arising under the Constitution or involving its interpretation. The Court should not hear argument upon the issues until such time as notices pursuant to s. 78B of the *Judiciary Act 1903* (Cwth) have been given.

The certified agreement which regulated the employment of seven of the drivers is not in evidence. If the amendment were allowed and the certified agreement providing for termination on notice were tendered, comparable questions would arise save that one would be concerned with s. 170LZ(1) rather than s. 170VQ(4).

In my view the proceedings before the Commission were exactly the sort of proceedings in which an amendment should not be allowed. The amendment was sought two days into the hearing. It was eventually granted after the evidence relevant to the question whether the decision of the Training Recognition Council should be set aside had closed. It sought to fundamentally alter the nature of the case which had been mounted against Murrays. In particular, it sought to advance claim for a pecuniary penalty. If granted it would give rise to complex questions which would require adjournment and consideration. If granted it would require the giving of notices to the various Attorneys-General; a process which would take some weeks and might well give rise to further applications for adjournment and/or for the preparation of a case stated. Without referring again to the authorities bearing upon interference in the exercise of a discretion by a tribunal at first instance, it seems to me that any decision to allow an amendment in such circumstances must be damned as manifestly unjust.

The conclusion that it was not open to the drivers to amend makes it unnecessary to determine whether Murrays had purported to terminate the training agreements within the meaning of s. 235 of the *Training and Employment Act 2000*. Notwithstanding that I have heard considerable argument on the point, it would be inappropriate to express an opinion on the matter in circumstances in which Murrays were not given the opportunity to cross-examine on evidence relating to the issue and where, if the amendment was granted the issues about conflict of State and Federal law would arise. It is also unnecessary to comment upon the drivers' claim for lost wages. As a matter of first principle, I should have thought that evidence about wages lost would be relevant to the assessment of compensation under s. 237. Recovery of wages where service has not been rendered is another matter, though it is arguable that such recovery is available where there is a statutory prohibition on termination of the employment and the dismissed employee remains ready and willing to perform the work, compare *Automatic Fire Sprinklers Pty Ltd v. Watson* (1946) 72 CLR 435 at 459 per Rich J, at 469 to 473 per Dixon J, at 473 per McTiernan J and at 476 to 478 per Williams J (noticing that Latham CJ and Starke J dissented) and *Byrne v. Australian Airlines Ltd* (1995) 185 CLR 410 at 426 per Brennan CJ, Dawson and Toohey JJ (who doubted the proposition) and at 453 to 457 per McHugh and Gummow JJ. For present purposes, it is sufficient to say that those issues will arise in the case governed solely by State law in which an argument is accepted that an application under s. 278(1)(c) of the *Industrial Relations Act 1999* may be heard contemporaneously with the proceedings under s. 230 of the *Training and Employment Act 2000*. This is not such a case. If it had been proper to allow the amendment an issue would have arisen as to whether the wages

were in truth due pursuant to the Australian Workplace Agreements and the certified agreement. If the answer to that question was in the affirmative, as a matter of first impression, the short answer to the submissions put on behalf of the drivers would be that the Queensland Industrial Relations Commission could not hear a claim to enforce the obligation because the Commission is not vested with any part of the judicial power of the Commonwealth.

There are matters relating to the appeal pursuant to s. 230(1)(e) of the *Training and Employment Act 2000* which may not be so readily disposed of.

In reliance upon the well known judgment of Thomas JA (with whom Pincus JA and Muir J agreed) in *Aldrich v. Ross* [2001] 2 QdR 235 at 248 to 249 and 252 to 258 the Commission rightly held that the function of the Commission under s. 232 of the *Training and Employment Act 2000* was to decide for itself whether the training agreements should be cancelled. Regrettably the Commission did not adhere to that approach. The Commission upheld an appeal against the Training Recognition Council’s decision to cancel the training agreements on the basis of denial of natural justice. The approach taken by the Commission was, with respect, entirely misconceived. The better view is that a properly conducted appeal by way of a hearing *de novo* cures any denial of natural justice in earlier proceedings, see *Australian Workers’ Union v. Bowen (No. 2)* (1948) 77 CLR 601 and *Calvin v. Carr* (1979) 22 ALR 417. There are of course qualifications, compare Forbes JRS, *Disciplinary Tribunals*, (1990) Law Book Co at 136 to 137, but the qualifications were of no concern to the Commission. The Commission’s responsibility was to give Murrays a full and fair hearing of the case and a decision quite independent of any view formed by any other adjudicators. That function the Commission quite failed to discharge. It is not to the point that the Commission overcame the difficulties caused by allowing the appeal against the Training Recognition Council’s decision to cancel the training agreements by exercising the power at s. 237 to, itself, cancel the agreements. The power at s. 237 was available only if the remedies at Division 2, Part 2 of Chapter 8, were available to the Commission.

Fortunately, on the critical issue whether Murrays had established that it could not perform its obligations under the contract because there had been a substantial change in Murrays’ circumstances which had affected Murrays’ capacity to perform its obligations as an employer under the training contract, the Commission did decide the matter for itself.

It is submitted by Murrays that the Commission erred in adopting as the (effective) date of cancellation of the drivers’ traineeship agreements the effective date determined by the Training Recognition Council by its decision of 8 February 2002, viz 11 February 2002. The submission is that the correct date was the date of the decision of the delegate of the Training Recognition Council, viz 21 December 2001.

As noted earlier these proceedings have been conducted both in the Commission and in the Court on the assumption that the decision of the Training Recognition Council of 8 February 2002 was a valid order, though on the view contended for by Murrays a valid order requiring correction. I do not accept that a valid order of the council cancelling a training contract may have an effective date prior to the date of the decision. Section 63(3) of the *Training and Employment Act 2000* provides:

“If the council decides to cancel the contract, the cancellation has no effect until at least four weeks from the day the notice is given, unless a shorter time is stated in the notice.”.

There is nothing to suggest that the power of the Commission at s. 233(2)(b) to allow an appeal, set aside the decision being appealed and substitute another decision or the power at s. 233(2)(c) to allow the appeal and amend the decision, confers power upon the Commission to make an order which might not have been made by the Training Recognition Council itself. If there had been such a power, this case was not the appropriate one for its exercise. The conclusion of the Training Recognition Council of 8 February 2002 and the decision of the Commission that Murrays had made out its case at s. 63(1)(a) were both based upon evidence which did not come into existence until after 21 December 2001.

In each of appeal C52 of 2002, C63 of 2002, C64 of 2002, C65 of 2002, C66 of 2002, C67 of 2002, C68 of 2002, C69 of 2002, C70 of 2002 and C71 of 2002 I order that –

- (1) the decision of the Commission setting aside the decision of the Training Recognition Council be itself set aside and in lieu thereof I order that the appeal to the Commission against the order of the Training Recognition Council be dismissed; and
- (2) the decision of the Commission to permit each driver named in the aforementioned appeals to pursue remedies under Division 2, Part 2 of Chapter 8 of the *Training and Employment Act 2000* be set aside .

I dismiss each of the following appeals: C53 of 2002, C54 of 2002, C55 of 2002, C56 of 2002, C57 of 2002, C58 of 2002, C59 of 2002, C60 of 2002, C61 of 2002 and C62 of 2002.

I reserve the question of costs.

Dated 30 September 2002.

D.R. HALL, President.

Appearances:
 Mr J. Murdoch SC, and with him Ms C. Arnold, instructed by Blake Dawson Waldron, for Murrays Australia Ltd.
 Mr J.S. Douglas QC, and with him Mr R.E. Reed, instructed by Gadens Lawyers, for each of the drivers.
 Mr C. J. Murdoch, instructed by Crown Law, for the Training Recognition Council.

Released: 30 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

Queensland Master Hairdressers’ Industrial Union of Employers (No. U19 of 2002)

VICE PRESIDENT LINNANE

27 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 24 September 2002, Vice President Linnane stated:

“This is an application by the Queensland Master Hairdressers’ Industrial Union of Employers to amend, *inter alia*, the eligibility rules of the organisation.

The application has been made in accordance with the provisions of the *Industrial Relations Act 1999* and the *Industrial Relations Regulation 2000*.

The proposed amendment to the rules has been made in accordance with the rules of the application 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 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.

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

Appearances:

Mr J. Patti of Employer Services with him Mr S. Dwane for Queensland Master Hairdressers’ Industrial Union of Employers.

Hearing Details

2002 24 September

Released: 30 September 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 275 – power to declare persons to be employees

Transport Workers’ Union of Australia, Union of Employees (Queensland Branch) AND The Queensland Road Transport Association Industrial Organisation of Employers and Others (No. B67 of 2002)

VICE PRESIDENT LINNANE
COMMISSIONER BLOOMFIELD
COMMISSIONER EDWARDS

1 October 2002

Application pursuant to s. 275 of the *Industrial Relations Act 1999* – Application does not sufficiently particularise the contracts, arrangements, understanding or collateral contracts said to form the basis of the application – Applicant to file and serve sufficiently particularised amended application – *Industrial Relations Act 1999 – s. 275 – Industrial Relations (Tribunals) Rules 2000 – rr. 42 & 70*.

DECISION

[1] This is an application by the Transport Workers’ Union of Australia, Union of Employees, (Queensland Branch) (TWU) pursuant to s. 275 of the *Industrial Relations Act 1999* (Act) seeking an order declaring a certain class of persons who are owner-drivers engaged in courier and taxi truck work to be employees. The application is directed to thirteen particular Respondents. Those Respondents are as follows:

- Zip Express Couriers Pty Ltd, Deplin Pty Ltd t/a Team Taxi Trucks and Couriers, Edgcote Pty Ltd t/a Metropolitan and Southern Queensland Couriers, Allied Express Transport Pty Ltd, GTM Holdings Pty Ltd t/a Black Thunder Express and Kentlands Pty Ltd t/a Bluebird Taxi Trucks.

This group of Respondents is being represented by The Queensland Road Transport Association Industrial Organisation of Employers (the QRTA represented Respondents);

- Snap Express Pty Ltd t/a SNAPX, Reliable Couriers Pty Ltd t/a Reliable Couriers, Consolidated Transport Industries Pty Ltd t/a CTI Couriers, Couriers ‘R’ Us (Qld) Pty Ltd t/a ASAP Couriers, Brisk Couriers Pty Ltd t/a Brisk Couriers and Lindcastle Pty Ltd t/a ABS Courier Services.

This group of Respondents is being represented by the Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers (the QCCI represented Respondents);

- All Purpose Enterprises Pty Ltd t/a All Purpose Transport Services is being represented by Livingstones (Australia) (All Purposes Services).

[2] When the matter first came on for mention on 6 March 2002, Mr Andrews SC for the QCCI represented Respondents raised a number of deficiencies with the application itself and opposed the progressing of the matter until such time as the application was particularised in a number of respects. At the conclusion of that mention a direction was issued to the Respondents to do certain things by 13 March 2002 and a further direction was issued requiring the TWU to file and serve an amended application by 25 March 2002. This amended application was to address the deficiencies raised during the course of the mention.

[3] Apparently not all Respondents complied with the first direction within the stipulated time frame. Further, the TWU did not comply with the second direction to file and serve an amended application by 25 March 2002.

[4] Contact was made with those representing the TWU to obtain some indication as to when the amended application would be filed and served. In the absence of any appropriate response, the Full Bench called the matter on for further mention on 22 May 2002 where a further direction was issued to the TWU to file and serve its amended application by 26 July 2002 and a further mention was arranged for 2 August 2002.

[5] At this mention the Respondents sought to have the application struck out pursuant to rule 42 for failure to comply with rule 70 of the *Industrial Relations (Tribunals) Rules 2000*. Rule 70 provides as follows:

“Application to declare persons to be employees

70.(1) For section 257 of the Act, an application must—

- (a) be in the non-chapter 12 approved form; and
- (b) state the class of persons to be declared employees; and
- (c) state the work performed by the persons; and
- (d) state the industry in which the work is performed; and
- (e) state the nature and effects of the contract for services.

(2) If the contract for services is written or partly written it must be attached as an exhibit to an affidavit filed in support of the application.”.

[6] Section 275 of the Act empowers a Full Bench of this Commission to make an order declaring a class of persons who perform work in an industry under a contract for services to be employees and declaring a person to be an employer of the employees. Section 275(2) of the Act provides that the Full Bench may make an order only if it considers “the class of persons would be more appropriately regarded as employees”. Thus in this matter the terms of any contract between the individual Respondents and those who are engaged by them will be a significant matter in the Full Bench’s consideration of whether to exercise its discretion under s. 275 of the Act.

[7] The Full Bench was referred to the decision of *The Australian Workers’ Union of Employees, Queensland AND Hammonds Pty. Ltd. and Others* (2000) 165 QGIG 268 and in particular to the following comments of President Hall at p. 271:

“It is convenient to set forth the ‘Statement of Facts and Issues’ because of the exceptional nature of s. 275. The novelty of the power is not, of course, a barrier to its exercise in an appropriate case... However, because exercise of the power involves altering the nature of relationships freely ... entered into by persons of full legal capacity, and, because in this case exercise of the power would involve alteration of the relationship to benefit persons outside the class of persons to be declared employees, it seems to me that notwithstanding the Queensland Industrial Relations Commission has traditionally declined to place great emphasis on pleading, the applicant should be restricted to the case advanced by the application (and opening submissions). It is that case which the respondent came to the Commission to meet.”.

[8] In his decision Commissioner Bloomfield adopted those observations of the President.

[9] It is in this context that the Respondents challenge the sufficiency of the detail provided in the amended application itself. The current state of the pleading would not enable any Respondent to know the “contract for services” which is sought to be challenged in this proceeding. The TWU has not sufficiently particularised the contracts, arrangements, understandings or collateral contracts said to form the basis for the application.

[10] One example of the deficiencies in the pleading is that found in paragraph 4(c) of the application which states:

“The contracts or arrangements under which the class of persons described in Schedule A to this Amended Application work are partly oral and partly written. To the extent that those contracts or arrangements are oral, they consist of individual and group conversations from time to time between management and owner drivers. To the extent that those contracts or arrangements are written, they consist of contracts, memoranda, rates, sheets and other documents issued on various dates, particulars which will be provided after discovery, except where particulars are given below.”.

[11] Having regard to Rule 70 and the above authority, the TWU will need, in respect of each Respondent, to particularise to a far greater extent the contracts or arrangements said to have been entered into between the various Respondents and the courier and/or taxi truck owner drivers (couriers).

[12] As for documents we understand that some documents may not currently be in the possession of the couriers and therefore cannot be pleaded in great detail until a discovery process is undertaken. The discovery process however is not a fishing expedition. Where documents are not in the possession of the couriers, the TWU will need to give sufficient particulars to enable the Respondents to identify the document being relied upon. Such particulars will include:

- the approximate date of the document or the approximate date of the issue of the document to couriers;
- what the document relates to so far as the couriers can recall e.g. rates of pay, uniforms, work to be performed etc;
- specify as much as can be recalled of the terms of the document;
- where the document was issued to the couriers; and
- any other relevant detail that can be recalled about the particular document.

[13] Where the contracts or arrangements are said to be oral in nature the TWU will be required to particularise the conversations to the extent able to be recalled by the couriers. Once again these particulars should include:

- the approximate date of the conversation;
- where the conversation occurred;
- who participated in the conversation; and
- the relevant terms of the conversation.

[14] Whilst it has not been raised in this proceeding, we are concerned that the failure on the part of the TWU to sufficiently particularise their claim may result from a perceived fear on the part of couriers that the Respondents may victimise them for participating in, or proposing to participate in, these proceedings. If that perception exists then we would seek to allay any such fears. Whilst in no way suggesting that any Respondent in this proceeding would countenance any such conduct we wish to assure couriers that the Act contains protections against any such conduct on the part of any Respondent: see Chapter 4 of the Act.

[15] We have decided not to strike out the TWU application at this time. We will give the TWU a further opportunity to particularise its claim to the extent that will enable the Respondents to know more precisely the case they have to meet. We do not require every contract with every courier to be attached as an exhibit to an affidavit filed in support of the application. Where a sample contract is in the possession of any courier engaged by a particular Respondent then the attachment of one such contract will be sufficient. Nor do we require each and every "memoranda, rates, sheets and other documents" forming the contracts or arrangements with each courier to be attached where such "memoranda, rates, sheets and other documents" are in the possession of couriers. This is an application under s. 275 of the Act and not one under s. 276. Where the couriers do not have the "memoranda, rates, sheets and other documents" but they are reasonably particularised in the pleading we do not require those to be attached to the affidavit.

[16] We will give the TWU until 4.00 p.m. on 16 December, 2002 to file and serve a sufficiently particularised amended application.

D.M. LINNANE, Vice President.

A.L. BLOOMFIELD, Commissioner.

K.L. EDWARDS, Commissioner.

Consolidated Transport Industries Pty Ltd t/a CTI Couriers, Couriers "R" Us (Qld) Pty Ltd t/a ASAP Couriers, Brisk Couriers Pty Ltd t/a Brisk Couriers and Lindcastle Pty Ltd t/a ABS Courier Services.

Mr D. Pratt of The Queensland Road Transport Association Industrial Organisation of Employers on behalf of Zip Express Couriers Pty Ltd, Deplin Pty Ltd t/a Team Taxi Trucks and Couriers, Edgcote Pty Ltd t/a Metropolitan and Southern Queensland Couriers, Allied Express Transport Pty Ltd, GTM Holdings Pty Ltd t/a Black Thunder Express and Kentlands Pty Ltd t/a Bluebird Taxi Trucks.

Appearances:

Mr S. Ross of Reidy and Tonkin for the Transport Workers' Union of Australia, Union of Employees, (Queensland Branch).
Mr A Horneman-Wren of counsel instructed by Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers on behalf of Snap Express Pty Ltd t/a SNAPX, Reliable Couriers Pty Ltd t/a Reliable Couriers,

Mr M. Rogers of Livingstones (Australia) on behalf of All Purpose Enterprises Pty Ltd t/a All Purpose Transport Services is being represented by Livingstones (Australia).

Hearing Details:

2002 2 August

Released: 1 October 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Trading (Allowable Hours) Act 1990 – s. 21 – trading hours orders on non-exempt shops

Retailers' Association of Queensland Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers) and Others (No. B1156 of 2002)

TRADING HOURS ORDER – NON-EXEMPT SHOPS TRADING BY RETAIL – STATE

VICE PRESIDENT LINNANE
COMMISSIONER EDWARDS
COMMISSIONER SWAN

1 October 2002

Application to amend *Trading Hours Order – Non-Exempt Shops Trading by Retail – State* – Concerns with the limited nature of the application given the Explanatory Notes and the Second Reading Speech to the *Trading (Allowable Hours) Amendment Bill 2002* – Whether the application should be limited in its effect to one store or extended to a currently defined area in the Order – Commission will proceed to hear application – *Trading (Allowable Hours) Act 1990* – s. 21.

DECISION

- [1] This is an application by the Retailers' Association of Queensland Limited, Union of Employers (RAQ) to amend the *Trading Hours Order – Non-Exempt Shops Trading by Retail – State*. The application seeks to extend trading hours for one Coles Express store located in the Myer Centre.
- [2] On 27 August 2002 the Full Bench raised some concerns we had about the limited extent of the application given comments made in the Explanatory Notes and the Second Reading Speech of the Minister for Industrial Relations to the *Trading (Allowable Hours) Amendment Bill 2002*. We asked the parties to address us on those concerns and issued directions to hear submissions on that issue on 10 September 2002.
- [3] The particular comments in the Explanatory Notes to which we have had regard are as follows:

"Additionally, the Bill will provide for a **single trading hours zone**, including uniform Sunday trading and public holiday trading, in the south-east coastal area of Queensland.". (Emphasis added)

and further

"A further issue raised was the current unsatisfactory situation whereby numerous trading hours zones exist between the Sunshine Coast Area and Gold Coast Area resulting in inconsistencies and both industry and consumer confusion.

The Government is committed to addressing these concerns by way of improving the Commission's decision in the interests of both the retail industry try and consumers."

- [4] The comments of the Minister in the Second Reading Speech to which we have had regard are as follows:

"A further important issue raised in consultation with various industry parties is the current unsatisfactory situation whereby numerous trading hour zones exist between the existing Sunshine Coast area and Gold Coast area, resulting in both industry and consumer confusion. Separate trading hour zones that fall within this area include the Sunshine Coast Area, Near North Coast Area, Inner City of Brisbane Area, Area of the City Heart, Area of New Farm of Inner City of Brisbane and the Gold Coast Area. These areas all have individual trading hours, with different trading applying for the areas in between."

and further:

“The changes as proposed will introduce uniformity of hours on Sundays and public holidays within the one trading hours zone.”.

- [5] This uniformity of trading hours was expressed to be “in the public interest”.
- [6] At no time did the Full Bench indicate that we did not have jurisdiction to hear the application currently before us. The issue on which we sought submissions was whether, in light of the abovementioned comments, the application should be limited in its effect to the one store or whether the application should be extended to the Area of the City Heart, Inner City of Brisbane area, the South East Queensland area or some other area.
- [7] We see merit in the submissions of Mr Wotherspoon for the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers that the “landscape” with respect to trading hours cases has changed since the *Trading (Allowable Hours) Amendment Act 2002*. It may be that there is now a heavier onus on an applicant “seeking to secure any different hours than the standard hours” within a particular zone. As we see it, the granting of different trading hours within particular zones has the potential for this Commission to create further confusion – something which the *Trading (Allowable Hours) Amendment Act 2002* sought to address by providing for uniformity of trading hours on Sundays and public holidays.
- [8] We will however proceed to hear the application and will list the matter for directions on 7 October 2002 at 9:30 a.m.

D.M. LINNANE, Vice President.

Mr L. Gillespie for the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees.

K.L. EDWARDS, Commissioner.

Mr D. Matley for the Queensland Retail Traders and Shopkeepers Association (Industrial Organisation of Employers).

D.A. SWAN, Commissioner.

Mr R. Wotherspoon for the National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers.

Appearances:

Mr G. Black for the Retailers’ Association of Queensland Limited, Union of Employers.

Hearing Details:

2002 10 September

Released: 1 October 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 280 – procedures for reopening
s. 125 – making, amending and repealing awards
s. 126 – content of awards

Brisbane City Council AND Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch (No. B1174 of 2002)

APPLICATION FOR REOPENING OF PROCEEDINGS AND FOR VARIATION OF AN AWARD

COMMISSIONER BLOOMFIELD

26 September 2002

Application to reopen proceedings and/or vary Award retrospectively – Extensive involvement of Commission in previous matters – Parties interpreting Award differently to the way it was intended – Unintended consequences of that interpretation – Matters of public interest – Reopening is an exercise of discretion – Appropriate to exercise discretion on this occasion to reopen proceedings in relation to two matters – One other matter referred to another Member of the Commission.

DECISION

Background

The Commission has before it an application by Brisbane City Council (the Council) made pursuant to s. 280, s. 125 and s. 126 of the *Industrial Relations Act 1999* in relation to the Brisbane City Council – Bus Transport Employees’ Award (the Award).

The application asks the Commission to:

- (a) reopen proceedings in No. B1881 of 1997 and, more particularly, to vary the Award made by the Commission as presently constituted on 16 March 1998;
- (b) reconsider the terms of the variation to the Award insofar as they relate to casual bus drivers; and
- (c) further vary the Award with retrospective effect to 16 March 1998 making clear casual employees are not entitled to:
 - (i) payment of special night allowance;
 - (ii) payment of broken shift allowance; and
 - (iii) payment of compounded casual and weekend penalty rates.

The application for reopening and/or retrospective variation of the Award was opposed by the Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch (the Union).

The Council contended that the Commission’s decision of 16 March 1998 had been the subject of extensive discussion between the parties at which time the implications of the introduction of casual employment provisions were exhaustively discussed and subsequently settled and apparently agreed. The Council said it had paid casuals in accordance with the agreed arrangements with the apparent concurrence of the Union from 1998. However, in 2001 the Union had begun to dispute aspects of the application of the Commission’s decision based upon its (then) interpretation of the Award provision. The Council denied the interpretation contended for by the Union and continued to pay casuals in accordance with the alleged agreed procedure. Subsequently, the Union had commenced proceedings in the Commission (No. W29 of 2002) in which it sought recovery of amounts allegedly underpaid based upon its interpretation of the Award provision.

The Council's application went on to state:

- “(h) *Having regard to the history of this matter, and the apparent intent of Commissioner Bloomfield as disclosed in his reasons for decision of 16 March 1998, and the subsequent dealings between the parties concerning the implementation of that Award variation, the Council asserts that the Union is now seeking to take advantage of the economical wording of the Award to advance unjustifiable arguments, and make claims, which were not intended by the Commission or the parties to be available to the Union when the Award variation was implemented in 1998. If those arguments are to succeed, much of the stated purpose and intent of the decision of the Commissioner will be defeated and frustrated.*
- (i) *In order to clarify the true meaning and intent of the Commissioner's decision in 1998, and to eliminate the possibility of the arguments now brought by the Union in Matter No. W29 of 2002, and to achieve a fair and just result as between the parties in Matter No. W29 of 2002, the Council now seeks to reopen the proceedings number B1881 of 1997 and to further vary the Award, with retrospective effect to 16 March 1998, to give true expression to the intent of the Commission, and the understanding of the parties as evidenced by their actions between 1998 and 2001.*
- (j) *As the Council has proceeded to implement the decision of the Commission in an open and transparent manner and in good faith for some three years before this issue was raised, and some four years to the present time, the consequences of the Award now being interpreted in a manner which is at variance with the Council's actions, will be that the Council is exposed to back payments of wages of substantial proportions, which payments have not been accounted for or budgeted for in the activities of Brisbane Transport.*
- (k) *As a consequence of the foregoing, the Council seeks reopening of the proceedings and a full re-examination by the Commission of the outcome of those proceedings, in order to ensure that the intent of the Commission is given effect to, and another member of the Commission is not now required to embark upon an analysis of the earlier decision of Commissioner Bloomfield in circumstances where the matter might be more expeditiously rectified by a determination by Commissioner Bloomfield.”.*

In a very vigorous defence Mr S. Ross, on behalf of the Union, submitted that the application sought to avoid the due processes of the Commission and sought to circumvent the proceedings under way in Matter No. W29 of 2002. Mr Ross said a reopening should not be granted (in the absence of substantial merit) where the confidence of the persons using the processes set out in the legislation would be undermined. Such users needed to have confidence that reliance upon the provisions of the legislation is sufficient, especially in relation to procedural aspects. (*United Fire Fighters' Union of Australia, Union of Employees (Qld) v Queensland Police Union of Employees* (1995) 148 QGIG 437).

Mr Ross said the purpose of reopening was explained by Moynihan J. in *re FEDFA (Qld)* (1987) 126 QGIG 340 in which His Honour adopted the formulation of a Full Bench of the Commission in *re Teachers' Award – State* (1974) 86 QGIG 611 that, in order to found an exercise of a jurisdiction to reopen, it is to be shown that “*some vital and relevant material which was not available at the hearing is now available.*”.

Mr Ross said to retrospectively vary the Award would be to undermine the confidence of the people working under the Award. Drivers and others were entitled to place reliance on the terms of the Award as they have existed for the last 4 years.

Mr Ross said “*any reworking of the existing provisions may well require a reconsideration of those components of the decision that went to the relationship with the Award variations and the Safety Net. It is not in the public interest to overturn established Award clauses that emerged out of hotly contested proceedings in which the issues were fully canvassed and open up a Pandora's Box of issues ...*”. He said the attempt by the Council to reopen the proceedings could only be seen as an attempt by a party “*wise in hindsight and enlightened by failure*” (see Moynihan J. in *re FEDFA (supra)*) attempting to create an opportunity to retrieve its position. Such attempt should be rejected. The Council had failed to show any vital or relevant material that had come to light which was not available at the original hearing.

Mr Ross said if the Commission was to allow the Council application, then in every case in which an industrial organisation attempted to enforce the terms of its Award, a party would be able to stop the Commission (or a Magistrate) from proceeding with the matter before it by simply lodging an application to retrospectively vary an Award (*Perkins v Offset Alpine Printing Limited* – unreported decision of (NSW) Chief Industrial Magistrate G.A. Miller, 9 August 2002).

Evidence

Evidence was given by Mr J. Thompson, Mr M. Bentley and Mr P. Chicoteau on behalf of the Council and by Mr D. Matters on behalf of the Union.

Mr Thompson's evidence concentrated on the background to the lodgement of application B1881 of 1997 and various other proceedings which were conducted in the Commission both prior to, and subsequent to, the Commission's decision in that case. In particular, he highlighted the existence of D332 of 1997 which related to the Council's attempts to introduce changes to work practices so as to achieve efficiency targets for the Brisbane Transport bus system. Those proceedings had commenced before Commissioner Fisher on 22 September 1997.

During the currency of that dispute the Council had lodged application B1881 of 1997 on 20 October 1997. The application was wide ranging and sought not only the right to engage casual bus operators but variation to a whole range of other provisions including: special night allowance, hours of work, days off, spread of hours and late services. It first came before the Commission as presently constituted on 24 November 1997. Initially, the application was not progressed pending developments in D332 of 1997. However, by 6 February 1998 the Commission as presently constituted had decided to hear and determine B1881 of 1997. A decision on the matter was issued on 16 March 1998 when the Commission determined that the case in support of the Council's application to allow it to engage casual bus operators was overwhelming.

Mr Thompson also indicated that shortly after I issued my decision a dispute arose between the Union and the Council about the implementation of the decision, and other matters. That dispute also came before the Commission as presently constituted as D72 of 1998. At the same time, at the direction of the Chief Commissioner, I was assigned matter D332 of 1997. The records of the Commission show that between 26 March 1998 and 16 September 1998 the Commission as presently constituted chaired 13 conferences in relation to matters D332 of 1997 and D72 of 1998. Mr Thompson said it was his recollection that, in addition to the conferences before the Commission, the parties met on other occasions to discuss all of the issues in dispute. These included the other matters in B1887 of 1997. It was his recollection that the discussions also covered issues surrounding the implementation of the new casual bus operator provision in the Award.

Mr Thompson said the Council first engaged casual bus operators in about May 1998. At no time since their engagement had they been paid broken shift allowances, special night allowances or cumulative weekend penalties. Mr Thompson said that on 27 March 2001 the Union first notified the Commission of a dispute about the non-payment of special night allowance and payment of broken shift penalties. Until just before that time the Council had believed it was paying its casual employees in line with the Award provision and in accordance with the understandings reached with the Union in the various conferences during 1998.

Mr Bentley gave evidence about the rules for payment of casual bus operators which he had programmed into the Council's payroll calculation database called "Award Interpreter". He said the Award Interpreter database had been implemented for casual bus operators on 13 August 1998. Prior to that, payments to casual bus drivers had been calculated manually. The payroll system showed that one casual had been employed on 1 April 1998, 2 in May 1998, 12 in June 1998, 13 in July 1998 and 15 in August 1998. Since that time casual bus operators had regularly been recorded on the system.

Mr Bentley said that on the basis of the program casual bus operators were not, and never have been, paid a special night allowance or broken shift penalties. He also said that the database disclosed that there were approximately 20 people who had elected to convert from permanent bus operators to casual bus operators.

Mr Bentley also said that there had been some other changes made to the database after it was first introduced. One such change was to calculate overtime payments after 9 hours per day or after 62 hours per fortnight. This had occurred on 12 October 1998. There had also been a change in May 1999 to provide for a minimum payment of 2 hours to casuals for each engagement. Previously the system had shown this to be a daily minimum.

Mr Chicoteau said he participated in discussions during 1998 in a joint committee of senior Brisbane City Council officers and Union officials. He said the implementation committee, as it was known, discussed a whole range of issues associated with the introduction of a local area agreement covering Brisbane Transport, including the new Award provisions relating to casual bus operators. Some of these issues flowed over into conferences in the Industrial Relations Commission – including an issue in relation to overtime arrangements for casuals. The arrangement for payment of overtime to casuals was included in a range of understandings placed on the record after a full day of discussions on 3 September 1998.

Mr Chicoteau said that on 3 September 1998 he was well aware that casual bus operators had not to that point in time been paid a special night allowance and/or broken shift penalties and if some suggestion had been made by the Union on that day that those things should be paid he would have been particularly surprised. He said his recollection of the series of discussions in the Industrial Commission was that whilst the Union did raise some issues about the payment of a special night allowance and broken shift payments it only did so in the context of full-time bus operators. He said if the Union had any concerns about the Council's practices in relation to casual bus operators it did not raise any of these concerns during the conferences in circumstances where it had every opportunity to do so.

Mr Chicoteau also said he had arranged to extract the employment records of 3 casual bus operators engaged by the Council in April, May and June 1998 respectively. As a result of the examination of their employment records, covering their first 6 weeks of work as casual bus operators, he established they had worked a variety of work patterns, including two episodes of work on a day, straight through episodes of daily work, night work and weekend work. He said the 3 casual bus operators referred to above were amongst a number of bus operators who converted from permanent to casual status. Prior to converting to casual status those bus operators would have been entitled to receive broken shift payments and special night allowances whilst working as permanent bus drivers. However, when they converted to casual bus operator status they did not receive such payments. Mr Chicoteau said neither the operators or the Union had complained about the changed pay arrangements after the employees converted to casual bus operator status.

Mr Chicoteau also confirmed that, as a result of an approach from the Union, the Council had accepted in early 1999 that it had incorrectly been paying casuals for a minimum payment of 2 hours per day rather than 2 hours per engagement. This practice had altered in May 1999 (see Mr Bentley's evidence above) and appropriate back-pay had been made to casuals affected by the Council's error.

Mr Matters recalled that during the course of 1997 the Council sought to pursue a number of variations in relation to the way it operated and the Union was involved in extensive discussions with the Council on those matters. This included several conferences before Commissioner Fisher. Towards the end of 1997 the Council filed application B1881 of 1997 which sought to pursue its reform agenda by way of a variation to the Award. Specifically, the application sought amendments to the Award going to casual employees, special night allowance, hours of work, meal time, minimum hours, days off, spread of hours, late services, statutory holidays, time for signing on and signing off for bus operators and conductors.

Mr Matters said the contents of the application were the subject of a series of further conferences before Commissioner Fisher as well as other meetings between the parties. In or about February 1998 the Council requested that the matter of casual employees be prised off from the remainder of the matters and that it be dealt with by arbitration. Ultimately, after a very hotly contested case, the Commission as presently constituted handed down a decision on 16 March 1998 granting the Council's application to be allowed to engage casual bus operators.

Subsequent to the decision of the Commission the Union continued to negotiate about the implementation of the decision as well as a whole range of other matters relating to working arrangements for bus drivers. Some of those discussions resulted in a local area agreement on hours of work. The negotiations on casual employees included the application of overtime provisions to casual employees. Mr Matters said there were further agreements to bring casual employees subject to the operation of the local area agreement. However, the agreement did not settle all matters and further conferences were held before the Commission. One such matter was the issue of broken shifts which was the subject of a conference on 3 September 1998.

Mr Matters claimed that the Union had first disputed non-payment of broken shift allowances to casuals by way of correspondence to the Council on 20 January 1999. He also said the Union had filed a dispute notification in respect of that matter which had come before the Commission as presently constituted as Matter No. D188 of 1999.

Mr Matters said the Union had contacted the Council on 20 December 2000 drawing to its attention its failure to pay the special night allowance to casual bus operators. He said the Union had again raised the issue of Council's failure to pay broken shift penalties in February 2001 and that matter had later come before Commissioner Asbury as a dispute conference on 12 April 2001. Following consideration of comments made by the Commissioner the Union had sought legal advice which culminated in the lodgement of W29 of 2002 by way of a test case.

Mr Matters was extensively cross-examined by Mr Herbert, Counsel for the Council, about correspondence which the Union had written to the Council and about the various proceedings which had occurred in the Commission during 1998 and subsequently. In particular, Mr Matters was questioned about the Union's current interpretation of the Award provisions *viz a viz* the way it had acted in the past. Mr Herbert especially took Mr Matters to the Union's correspondence of 20 January 1999 where Mr Matters alleged the Union had claimed broken shift payments for casuals. Mr Matters was also questioned about the Union's attitude to that same matter as demonstrated in the transcript in D188 of 1999, especially at page 14.

Relevant Case Law

Each of Mr Herbert and Mr Ross referred me to a number of leading cases which record the types of matters the Commission has traditionally taken into consideration when determining whether to reopen a matter. Without being exhaustive the cases they highlighted were *re Teachers Award – State* (1974) 86 QGIG 611, *R v Queensland Assn of Teachers in Independent (Non-Governmental) Schools, Union of Employees* (1991) 138 QGIG 90, *re FEDFA (Qld)* (1987) 126 QGIG 340, and *United Fire Fighters Union of Australia, Union of Employees (Qld) v Queensland Police Union of Employees* (1995) 148 QGIG 437.

A number of other authorities are canvassed in the annotated version of Butterworths "Industrial Law of Queensland", including *R v QATIS* (1991) 138 QGIG 90 where a Full Bench said, at 93:

"We make it clear that reopening of a decision could not be justified merely because it is perceived as inappropriate and may have been made upon issues which were canvassed less than adequately. There are wider considerations to which we must direct our attention including those pertaining to public interest"

In *Queensland Nurses Union of Employees v Aged Care Queensland Inc* (1996) 152 QGIG 1857 de Jersey J. referred to a number of the authorities and observed, at 1858:

"Section 46 of the Act accords an unfettered discretion to reopen. Had the legislature intended to limit the exercise of that discretion in any particular way, it could have done so, but has not. In the Teachers' Award case, a Full Bench of the Commission expressed this view:-

'This Commission holds the strong view that a matter which has been fully argued by all of the parties, and in respect of which a decision has been given on the merits, should only be reopened if it can be shown that some vital and relevant material which was not available at the hearing, is now available or that the Commission has made an obvious error or created clear anomalies or has been in some manner misled in arriving at its original decision.'

That highly persuasive statement provides most helpful and compelling guidance as to the manner in which the discretion under s.46 should ordinarily be exercised. But in the end, it can offer no more than a "guideline". As said in Stollznow v Calvert (1980) 2 NSW LR 749 at 752 (adopting a statement by Walsh J. in Witten v Lombard Australia Ltd (1968) 88 WN (Pt 1) NSW 405 at 411):-

'There is a tendency to propound rules which are to govern the exercise of (a) discretion in the sense that it will be fettered by them. It is entirely proper that, in the exercise of a judicial discretion, guidance should be sought and obtained from decided cases of a similar kind, but I think that care must be taken to ensure that a discretionary power is not trammelled by set rules, by means of which one conclusion is to be automatically reached, regardless of other factors on the case which may point to the opposite conclusion.'

Chief Industrial Commissioner Hall (as he then was) also noted in *United Fire Fighters' Union of Australia, Union of Employees (Qld) v Queensland Police Union of Employees* (*supra*) that the provisions of s. 46 of the (then) Act vests the Commission with a discretion.

However, although the power to reopen is clearly discretionary, the relevant authorities make it clear that the discretion must not be exercised lightly or without good reason. Factors which have grounded the exercise of the discretion to reopen proceedings in the past have included:

- (a) the availability of vital and relevant material which was not available at the original hearing;
- (b) an apprehension that the Commission has made an obvious error or created anomalies;
- (c) information that the Commission has been in some manner misled at arriving at its original decision;
- (d) the creation of undesirable outcomes as a result of a decision; and
- (e) public interest considerations.

Should the discretion to reopen be exercised on this occasion?

The history of this matter makes it clear that the application to reopen and/or vary the Award retrospectively is not a case of *"a party wise in hindsight and enlightened by failure"* seeking to retrieve its position. Rather, it is a case where the single employer party to an Award has applied the provisions of an Award limited in its scope in a way which it believed, from discussion, the Commission had intended and the other party to the Award had agreed.

The application arises because actual, or possible, unintended consequences of the variation to the Award as a result of proceedings in B1881 of 1997 have become apparent as a result of recent events.

After considering all of the evidence, exhibits and submissions I have decided that it is appropriate on this occasion for me to exercise my discretion to reopen proceedings in Matter No. B1881 of 1997.

In deciding to exercise my discretion to reopen the proceedings I have particularly drawn on my extensive knowledge of the history of this matter – including my knowledge of the negotiations between the Union and the Council concerning the ultimate implementation of certain parts of the provision which allows the Council to employ casual bus operators. In that regard, the Commission as presently constituted chaired 13 conferences between the parties following the determination in B1887 of 1997, being conferences in relation to matters D332 of 1997 and D72 of 1998. During those extensive conferences the parties discussed a whole range of issues going to hours of work, broken shifts, late night penalties, weekend work, spread of hours and so on. Those discussions occurred in the context of the Council's desire to improve the efficiency of its bus service in order to gain continuing State Government funding. Although these discussions extensively focussed on the conditions of employment of full-time bus operators there was also specific discussion about certain aspects of the employment of casual bus operators at the same time. For example, the transcripts of the above disputes show that the parties specifically discussed the method of paying overtime to casuals and that they also discussed the maximum hours that casuals might work on a fortnightly basis.

Further, the record of proceedings in D188 of 1999 makes it clear that the parties discussed the applicability of broken shift penalties to casual employees following which the Commission itself, for the benefit of the parties, explained in detail the rationale behind clause 3.1(9)(iii) and the reasons why casual bus operators were not entitled to payment of the broken shift payment in context of the issues raised by the Union at that time.

However, the most important aspect which I have taken into consideration when determining to exercise my decision to reopen the proceedings was the evidence of Mr Chicoteau and Mr Matters. Their evidence made it clear to me that each of the parties to the Award is interpreting the provision dealing with the engagement of casuals in at least one way which was not intended by me when I made the Award variation in its current form. If those interpretations are allowed to stand unintended consequences and clear anomalies will result.

In particular, based upon my actual knowledge of discussions between the parties (particularly in D188 of 1999), the Union's claimed interpretation of the provision dealing with broken shifts is now inconsistent with understandings which I believed the parties had previously reached, and with the effect which I had intended the provision should have.

In that regard, Mr Matters' evidence convinces me that the Union is now seeking to interpret the terms of the Award provision going to broken shift penalties in a way which was not intended by me when I inserted it and also in a way which is contrary to the Union's earlier expressed interpretations of the same provision.

Mr Matters' Exhibit DM3 is a letter to the Council, dated 20 January 1999, in relation to broken shifts. The Union's interpretation of the provision at that time is, in my view, clear on its face. The letter is in the following terms:

“In relation to the use of casuals, we note that casuals have been worked broken shifts with excessive spread of hours. We believe that this is not a very humane way to treat employees and what we understand occurs, is that casuals brought in for a couple of hours in the morning then signed off for up to 7 hours and then returned to work in the afternoon to work maybe 4 or 5 hours.

This appears to be an evasion of the award condition or payment of broken shifts with award condition of broken shifts having been brought in to restrict excessive hours and excessive spreads of hours.

We ask you to change this practice.”.

Although Mr Matters claimed in his evidence that the letter was a claim for payment of broken shift allowance and that his Union was disputing the Council’s practice of not paying it at the time, such reading is not available.

In my view, the Union was objecting to the practice of employing casuals on broken shifts because it allowed the Council, in the Union’s view, to avoid paying the same broken shift penalties which it would have to pay to full-time employees.

Confirmation that the Union’s interpretation in 1999 was as I have stated is shown in the transcript of D188 of 1999. At page 14 Mr Matters observed, in relation to casuals, that:

“... an advantage is given to the employer where they work two portions of work effectively now, in a broken shift arrangement, in which they don’t have to treat that as if it was a broken shift”.

Importantly, having regard to the issues then under discussion, the Commission clarified for the benefit of the parties at pages 17 and 18 of that transcript the rationale behind the meaning of clause 3.1(9)(iii) and the fact that broken shift payments were not payable to casuals who were engaged for 2 work periods during a day. Indeed, the Commission’s explanation was merely endorsement of the general views expressed by Mr Matters and his colleague, Mr Ferguson, about the operation of the broken shift payment. The Union’s subsequent actions demonstrated to me that the Union did not have any issue with the Council’s application of the provision as such at that time but, rather, disputed how the provision was being used by the Council. Had the Union disputed the application of that provision in the conference on 20 July 1999, or subsequently, I would have acted to vary the Award to make its intent absolutely clear.

Similarly, the evidence of Mr Chicoteau also discloses to me that the Award provision dealing with special night allowances is not being applied in a way which I had intended nor in accordance with the general outcomes reached during the 13 conferences which I chaired between March and September 1998.

At no stage in the arbitration proceedings leading to the introduction of the casual employees provision did Council foreshadow an intent to subsume any special night allowances into the casual loading. Further, and more importantly, the application of the special night allowance provisions were the subject of extensive discussion between the parties in the 6 months which followed my decision to insert a casual employees provision into the Award. At no stage during those 6 months of discussions did the Council indicate to the Union, in my presence, that the special night allowance provisions they were negotiating would not have application to all bus operators. Consequently, unintended consequences may flow unless this entitlement is, also, made clear.

In my considered view, if a provision in an Award is being applied (or if there is a risk of it being applied) contrary to the way that the Commission member who inserted it intended then that Member has a duty to the parties, in the public interest, to amend the variation to make its intent clear beyond any doubt. To do otherwise would leave either, or both, of the parties in the situation where they would have to suffer any unintended consequence, or result, of that Award variation.

Taking the whole of the history of the matter into account it is now clear to me that unintended consequences and anomalies could flow from the differing interpretations (above) being applied to the provision which I determined in March 1998. Consequently, as stated, I believe I have a duty to the parties, in the public interest, to reopen the proceedings so that I might further hear from the parties as to why I should not now further retrospectively vary the Award from 16 March 1998 to:

- (1) make clear that broken shift penalties do not apply to casual employees who might be engaged twice on the one day; and
- (2) make clear that casual employees are not excluded from an entitlement to special night allowances in circumstances which might otherwise give them a right to such allowance.

However, I have decided not to exercise my discretion to reopen the proceedings insofar as they relate to the issue of payment of compounded casual and weekly penalty rates. That matter, to the best of my recollection and research, was never discussed during the course of hearings into B1881 of 1997 nor during the 13 conferences which I chaired in relation to D332 of 1997 and D72 of 1998.

In addition, I did not have that matter in mind when I made the variation to the Award to insert casual provisions into the Award. Consequently, it could not be said that there are any unintended consequences which might flow from that variation. The issue simply was not considered by me and nor was it, to the best of my recollection, the subject of discussions between the parties.

That leaves me in somewhat of a quandary. The Council has made application pursuant to s. 125 and s. 126 of the *Industrial Relations Act 1999* (as part of this application) to retrospectively vary the Award to deal with the issue of payment of compounded casual and weekly penalty rates. At the same time, Commissioner Asbury has adjourned proceedings in relation to Matter No. W29 of 2002 pending the outcome of these proceedings.

In the circumstances, I believe it would be inappropriate for me to hear the Council’s application to retrospectively vary the Award in relation to the payment of compounded casual and weekly penalty rates. I have reservations about my capacity to deal with that matter with a totally fresh mind – especially the issue of retrospective variation to the Award – when that matter has previously not been argued before me in circumstances where I was responsible for the creation of the existing provision and have participated in extensive discussion with the parties. I think it is appropriate that that aspect of this application be allocated to another Member of the Commission and I do now allocate, in my position as Commissioner Administrator, that aspect of this application to Commissioner Blades (the Head of the relevant panel) to hear and determine.

It will be up to Commissioner Asbury to determine her approach to W29 of 2002 in light of this decision.

I will re-list the two matters to be continued before me (above) at 10.00 a.m. on Friday, 11 October 2002 to hear from the parties why I should not retrospectively vary the Award as indicated.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Commissioner.

Hearing Details:

2002 6 August
2002 11 September

Appearances:

Mr A. Herbert, of Counsel, instructed by Mr G. Evans of Brisbane City Council Legal Service, for the Applicant.
Mr S. Ross, of Reidy & Tonkin, with him Mr D. Matters for the Australian Rail, Tram and Bus Industry Union of Employees, Queensland Branch, for the Respondent.

Released: 26 September 2002

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Robert Harris and Wendy Harris (a Partnership) AND TDG Logistics Pty Ltd (No. B474 of 2001)

COMMISSIONER BROWN

26 September 2002

DECISION

In an application filed on 13 March 2001, Robert and Wendy Harris (a Partnership) (the applicants) sought an order amending a contract for services with TDG Logistics Pty Ltd (the respondent).

Following several adjournments at the request of the applicants, Mr Horneman-Wren, for the respondent at the substantial hearing of the matter commencing on 7 August 2002, advised the Commission that since the action was commenced, the named respondent had been acquired by Patricks Logistics Pty Ltd.

Following agreement between the parties, leave to amend the application so that Patricks Logistics Pty Ltd was the properly named respondent was granted.

The application was subsequently further amended by agreement with the respondent and with leave of the Commission, however, ultimately the remedy sought was contained in clauses D and F of the amended application which read:

“(D) that the respondent pay to the applicants the sum of \$93,750 being the value of the amount lost by the applicants as a result of the respondent’s failure to allow the applicants to assign the contract in accordance with clause 15.”.

“(F) that the respondent pay to the applicants the sum of \$19,464.31 being the estimate of the applicants’ loss as a result of the respondent’s breach of clause 14.1 and 14.2 of the contract as amended for the period 25 September 2000 to date.”.

Background

The applicants owned a prime mover and transported certain goods for the respondent.

In about August 1993, the applicants entered into a contract with Jepton Pty Ltd trading as Freezer Freight Services (FFS). The applicants paid \$65,000 to FFS and marked on a FFS receipt, No 107136 dated 3 August 1993, are the words:

“Received From

B & W Harris Ph 2731264
30 Callina St.
Algeria

the sum of sixty-five thousand dollars being full payment for Volvo F. 1023
Prime Mover with Work.
Reg. No 521 BBA.”.

The receipt is both initialled and signed by Mr Don Hill (the owner of Jepton Pty Ltd trading as FFS at the time). (Ex 6, Annexure A)

The 1993 contract was renegotiated and terms agreed between the applicants and FFS on 6 February 1998 (the 1998 contract), a copy of which was annexure B to exhibit 6.

The applicants believed that the contract assured them of certain rights and, in particular, the right to sell the vehicle with work, the right to a guaranteed minimum number of hours each week and preference in the allocation of work over certain other drivers.

The respondent acquired the business of FFS in September 1998 and continued to use the services of the applicants and others previously engaged by FFS and holding similar contracts as that of the applicants with FFS.

Mr Shepley, for the applicants, contended that the obligations on FFS in the 1998 contract transferred automatically and legally to the respondent as a result of a provision of the “Sale of Business Agreement” (Ex 1) between Jepton Pty Ltd and the respondent, or, in short, that the 1998 contract became automatically and legally the terms of the contract between the parties.

This is contested by the respondent and will be examined in more detail later.

In any event, subsequent to the purchase of FFS by the respondent, the applicants continued to provide service to the respondent more or less in accordance with the provisions of the 1998 contract until November 2000 when the hours allocated to the applicants were reduced by decision of the

respondent. That situation deteriorated from then until 9 January 2001 past which the applicants were allocated no work. According to the respondent's submissions the applicants have never been terminated. (T'cript p. 255, line 1)

In a letter dated 10 September 1998, the respondent advised the applicants *inter alia* as follows:

"We note that you currently have a subcontractors agreement with Freezer Freight Services.

New contracts will need to be entered into by TDG Logistics Pty Ltd. These will be available initially on a month by month basis.

After the purchase has been completed we will assess our operational requirements as quickly as possible and look forward to discussing these with you."

On 18 September 1998, representatives of the respondent met with subcontractor and employee representatives and Glen Williamson from the Transport Workers' Union of Australia, Union of Employees (Queensland Branch) (TWU) regarding working arrangements. The respondent's view of those events was as follows:

"It's not submitted for the respondent that the terms of the 1998 subcontractors agreement, the February 1998 agreement, can be put to one side, because we were never tied or bound by anything that appeared therein.

Quite clearly the letter of 10 September 1998 and the conduct in the meeting of 18 September 1998, where those on behalf of my client said, again to paraphrase, we'll observe the terms but on a month to month basis, had two effects. One, was that for the terms you go to that agreement and two, the only further additional or different terms, was that it was on a month to month basis."

The difference between the parties on this point was that the applicants believed that the month by month basis was wrongly imposed on a contract that legally existed between the parties as a result of the requirements of the contract of sale.

The respondent believed that no contract automatically existed pursuant to the sale/purchase. However having regard to the letter of 10 September 1998 and the meeting of 18 September 1998 mentioned earlier, the respondent accepted that the terms of the 1998 agreement were the relevant terms albeit on a month to month basis and that this was advised to representatives in the meeting of 18 September 1998 and conveyed to the applicants.

Putting aside the differences over the validity of the month to month basis. The Commission finds that the contractual terms governing the relationship from 18 September 1998 were the terms of the 1998 contract despite different views on how this came to be.

Mr Harris's evidence in cross-examination regarding the 18 September 1998 meeting was:

- Mr Harris could not attend the meeting due to work;
- Mr Harris was a member of the TWU;
- a TWU official attended the meeting;
- Mr Harris believed the TWU official was looking after their interests;
- the same official had represented them in the February 1998 negotiations with FFS;
- Peter Reilly, a fellow sub-contractor, attended the meeting also as a representative of the applicants;
- Reilly reported back to those drivers not in attendance; and
- the applicants understood that the arrangements post 18 September 1998 would be in essence the 1998 contract on a month by month basis initially. (See T'cript p. 182, line 55)

The Contract

If the 1998 contract was transferred to the respondent on 14 September 1998 as a result of the purchase of FFS as suggested by Mr Shepley, the contract would need to be amended if it was to contain a month by month term.

Mr Shepley submitted that the imposition of such a term by the respondent was impossible but concedes that this could have occurred by agreement. (See T'cript p. 264 and 265)

Mr Harris in evidence acknowledged that the month by month term was accepted, at least initially. (See T'cript p. 153 line 20).

Mr Horneman-Wren used the term "month to month" and the letter of 10 September 1998 used the term "month by month". I am satisfied that the terms have the same meaning.

I find that at this time (on or about 18 September 1998), the contract between the parties was the 1998 contract on a month by month basis.

The applicants believed that that condition was for an initial period to accommodate the upheaval accompanying a change of ownership. The respondent believed it to have been an ongoing part of the contract and on 13 November 2000 forwarded correspondence to the applicants that stated *inter alia*:

"In 1998 you were advised that you would be engaged on a month-by-month basis until an assessment of the operational requirements of TDG was completed. An assessment at this time was completed and it was decided that those Freezer Freight Services' subcontractors, who were offered work with TDG, would continue to be engaged on a month-by-month basis."

Mr Horneman-Wren submitted that the term "month to month basis" enabled the termination of the contract upon the giving of 1 month's notice and I accept that this is a normal interpretation of the words. (T'cript pages 246-247, lines 40 to 1 and page 252, line 41)

The definition of "Unfair contract" in s. 276 (7) states:

"**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.”.

The minimum period of notice required for a dismissal at s. 84(1) is:

“(1) The minimum period of notice is—

- (a) if the employee’s continuous service is—
 - (i) not more than 1 year – 1 week; and
 - (ii) more than 1 year, but not more than 3 years – 2 weeks; and
 - (iii) more than 3 years, but not more than 5 years – 3 weeks; and
 - (iv) more than 5 years – 4 weeks; and
- (b) increased by 1 week if the employee—
 - (i) is 45 years old or over; and
 - (ii) has completed at least 2 years of continuous service with the employer.”.

Considering the length of service and age of Mr Harris, had he been performing the work as an employee, he would have been entitled to 5 week’s notice of termination in that his length of service would have been calculated from 1993. (See s. 69 – Continuity of Service). There was no evidence of any severance benefit paid to him by FFS upon the sale of the business to the respondent. He would, had he been an employee, have been a transferred employee.

By definition (of Unfair contract (c)), the inclusion of the term “ month by month basis” renders the contract unfair.

This finding is only based on the fact that the 1998 contract provides for 4 week’s notice of termination and not 5 as would be the case had Mr Harris been an employee. Whether or not the term was part of the contract from the start or arose via amendment is not important.

I note with respect that Hall P in *TDG Logistics Pty Ltd and Peter William Reilly and P. W. and G. P. Reilly (a partnership)* (C25 of 2001) states with regard to termination of an indefinite contract:

“The absence of express provision is not decisive. The law notoriously permits termination of indefinite contracts of service and contracts for service by reasonable notice.”.

I find that the contract is unfair in that the month by month basis fails the test in (c) of the definition of Unfair contract.

The 10 September 1998 letter to the applicants indicated that the month to month basis would be for an initial period. The meeting of 18 September 1998 confirmed the month to month provision and in the letter of 13 November 2000 the respondent for the first time advised the applicants that an assessment of TDG’s operational requirements was made in 1998 and a decision was made then (1998) to continue the month by month basis. Management standards appear poor.

I further find that the month by month provision is unfair in that no details as to what circumstances might give rise to the termination of the contract by the issuing of a month’s notice and further there were no provisions as to what would be the applicants’ entitlements if the contract was terminated for reasons other than redundancy or breach of contract by the applicants.

Regarding allocation of work, the 1998 contract at clause 14 states:

“14. Guarantee of Work

- 14.1 The company agrees to provide the Sub-contractor with a minimum of 35 hours work per week at the relevant hourly rate, which would exclude public holidays or the unavailability of the Sub-contractor.
- 14.2 The Sub-contractor, if available to work over and/or above 35 hours a week will not be impeded by the company or have that work contracted out to casual outside vehicles.”.

Dealing firstly with 14.1. In a letter to the respondent dated 4 October 2000 drafted by Mrs Harris and signed by Mr Harris (Ex 6 attachment F) the applicants raised a number of concerns regarding their contract and stated *inter alia*:

“You have lived up to the conditions of hours and rates except that these rates should have been renegotiated annually.”.

Mrs Harris confirmed this in cross-examination. (T’cript p. 111, lines 45-55)

I accept that at the time, 4 October 2000, the provision regarding the minimum of 35 hours per week work was being honoured by and large.

Paul McCarthy, General Manager of the respondent, responded to the applicants by letter of 13 October 2000, acknowledging receipt of their correspondence and indicating that the matter had been referred to Head Office for specialist advice. (my emphasis) The letter advised the applicants that further queries were to be directed to Mr John Spana, National Human Resource Manager, at Prospect in New South Wales.

The applicants forwarded a copy of the 1998 contract and the 10 September 1998 letter from the respondent to Mr Spana. The applicants received a response dated 13 November 2000, signed by Mr Mowday, Queensland Transport Manager, (Ex 6, attachment J) reading *inter alia*:

"In 1998 you were advised that you would be engaged on a month-by-month basis until an assessment of the operational requirements of TDG was completed. An assessment at this time was completed and it was decided that those Freezer Freight Services' subcontractors, who were offered work with TDG, would continue to be engaged on a month-by-month basis.

As you are aware, the workload for the subcontractors operating out of TDG's Brisbane depots has diminished over the past few months and is continuing to diminish. This has resulted in a reduced workload for all subcontractors engaged by TDG.

Due to the lack of work currently available, TDG's operational requirements necessitate a reduction in your regular hours worked.

You will still be engaged on an *ad hoc* basis, however, you will be contacted by TDG when work becomes available and you will be paid your current rate subject to any variations of this rate made on your annual review.

It is expected that you will continue to provide your services with due care and skill and to the best of your knowledge and expertise. Obviously we will not preclude you from providing services to any person other than TDG, however we trust that as soon as is reasonably practicable you will notify us of any potential conflict that may arise in your ability to perform work on behalf of TDG".

Despite the applicants receiving the letter some short time after 13 November 2000, the reduction in regular hours and the engagement on an *ad hoc* basis did result in less than 35 hours per week being allocated to the applicants at various times after that date.

In the view of the Commission this constituted a **significant variation** to the contract and a unilaterally imposed one at that.

There was no prior discussion with the applicants. There was no notice of the proposed reduction and considering that the advice of the reduction was contained in a letter purporting to respond to the applicant's concerns regarding their contract, the applicants could have been forgiven for suspecting that the cut in their work opportunities was in retaliation for their persistence in seeking to clarify their contractual position. I have considered the evidence that the respondent was experiencing a downturn in work during that period. However, the 1998 contract was varied significantly, unilaterally and to the detriment of the applicants and in writing via the 13 November 2000 letter.

There was a complete absence of consultation. The effect on the applicants was detrimental, significant and almost immediate. Regarding the allocation of work in clause 14.1, the Commission finds that in line with s. 276 (4)(b) the contract became unfair because of the unilateral variation imposed by the respondent after its commencement.

The effect of the allocation work on an *ad hoc* basis resulted immediately in a reduction in hours and ultimately to no allocation of work at all post 9 January 2001.

The Commission doubts that the term "month by month basis" would allow the respondent to vary any clause, especially one as important as this, without any consultation, simply by the issuing of a month's notice. This, in the view of the Commission, would render the concept of reasonable contractual certainty extinct and in any event no month's notice was given.

The Commission finds that the variation to the contract that allowed this to occur was harsh, and again by definition, unfair.

Clause 14.2 of the 1998 contract was not particularly well drafted if the intention was to ensure that the applicants were offered available work over the guaranteed 35 hours per week in preference to those without contracts or casuals.

Before determining whether or not the respondent complied or otherwise with this clause, its meaning must be clarified.

The Macquarie Dictionary definition of "impede" reads:

"**Impede** – to retard in movement or progress by means of obstacles or hindrances; obstruct; hinder."

The clause heading "Guarantee of Work" is clear and the procedure for allocating work was clarified during evidence i.e. representatives of the respondent allocated all work.

In clause 14.1 the onus was on the respondent to guarantee certain work and in clause 14.2 that guarantee went to available work in excess of 35 hours in certain circumstances.

Those circumstances, in the view of the applicants, were that any work over 35 hours per week that the applicants were available and capable of performing should have been offered to them (or other subcontractors with 1998 contracts) before it was allocated to anyone else. (See Transcript p. 105, lines 28-33)

The understanding developed by the applicants was wrong.

The Commission believes that the term "casual outside vehicle" referred to drivers with vehicles not owned and not regularly and systematically contracted to the respondent.

The view of the Commission is that clause 14.2 of the 1998 contract means that the subcontractor will not be hindered or obstructed by the respondent if the subcontractor is available for work in excess of 35 hours per week. Nor will the respondent allocate work able to be performed safely by the applicants to drivers with vehicles not owned by the respondent and not regularly used by the respondent.

Clause 14.2 does not provide any preference in or assurance of work in excess of 35 hours per week over any employee or regularly used subcontractor, regardless of what the contract arrangements may be or how long they were in place. Clause 14.2 did not prevent the respondent from engaging the services of new drivers and allocating work to them, be they employees or subcontractors with vehicles.

I find that the wording of clause 14.2 is not unfair and given my interpretation of the meanings of "impede" and "casual outside vehicle", has, in all probability, not been breached with the exception of certain work allocated to Watson. Mr Mowday in his statement (Ex 7) at paragraph 20(4) stated that "Watson was the only casual contractor". The evidence in Ex 5 at WH1 indicated that Watson was also used irregularly. The Commission finds that the actions of the respondent in allocating certain work to Watson when the applicants were not working was harsh and in line with s. 276(4)(b) unfair.

Regarding clause 13.1, the respondents either failed or refused to fulfil their obligations under clause 13.1 of the 1998 contract which reads:

"13.1 Cartage rates for Sub-contractors will be reviewed annually as at this agreement's implementation date, and adjusted fairly having regard for the TWU/QRTA Owner Driver Costing Formula, with consultation between management, Sub-contractors and the Union."

The obligation on the respondent was not to automatically award an increase annually but to hold appropriate consultations with subcontractors and the union annually. This may have resulted in an increase or may not have. The respondent failed to hold consultative sessions in February 1999 and February 2000, however, in writing, raised the issue of a review with the applicants in late 2000.

Because of the actions of the respondent after the 1998 contract was entered into, I find that the conduct of the respondent in relation to clause 13.1 renders the contract unfair in line with s. 276(4)(b).

Regarding clause 16:

"16 OTHER THAN METRO WORK

16.1 Any work undertaken by a Sub-contractor outside of metro work eg Toowoomba, Warwick, Gympie etc will be negotiated at the relevant time between the company and the Sub-contractor as to a cartage rate and agreed upon by both the company and the Sub-contractor."

On the evidence, the respondent has failed to abide by the terms of the clause. Again, there was no onus on the respondent to agree to a rate, but there was an obligation to negotiate.

Again, in line with s. 276(4)(b), I find that the contract is unfair because of the conduct of the respondent after entering the contract.

Mr Mowday, despite his evidence and the submissions of the respondent that he lacked knowledge and experience with respect to contracts, in particular the law, should have, given his position, been aware of the respondent's contractual obligations. Mr Mowday had previously worked for FFS as Manager and was, previous to that, himself a subcontractor to FFS. He attended the meeting of 18 September 1998 (referred to wrongly in his statement as 10 September 1998) as a management representative. That meeting resolved that the contractual arrangements with Jepton Pty Ltd would form the terms of the agreement on a monthly basis. He acknowledged this in his statement at paragraph 4 where he stated:

"The purpose of the meeting was to discuss the terms upon which the subcontractors might work for TDG. Mr Tait lead the discussion for TDG. He made it clear to the drivers through their representatives that TDG had not made any long term decision about what it might do in relation to the subcontract drivers. However, for the time being TDG would continue to provide them with work on the same basis but that it would be from month to month."

At paragraph 8 of his statement Mr Mowday stated that he regarded Mr Harris as a "reliable subcontractor".

Mr Mowday referred to the applicant's letter of complaint dated 4 October 2000 as raising "serious complaints" against the respondent and himself and stated that certain matters referred to by the applicants in the letter had not been previously raised with him and in particular there had been "no discussion about the terms offered by TDG".

This was contested by the applicants.

Mr Mowday accepted that he had knowledge of the 1993 FFS contract but claimed that his knowledge of the 1998 contract first came about in mid to late 2000 to the best of his recollection. (See Transcript p. 199, lines 21-26)

What is clear, however, is that the applicants asserted the existence of the 1998 contract in the letter of 4 October 2000 and further pointed out areas of concern.

One such concern clearly stated in the 4 October letter was:

"We (my partner and myself) would also point out that we have the right to sell our vehicle to someone else to work (clause 15.1). Or you have the option of buying us out, but Mr Mowday categorically states "I can not sell", which denies the contractor rights in 15.1. "the Sub-contractor shall have the option to sell outside the company".

Clause 15 reads:

"15 SUB-CONTRACTOR SELLING VEHICLE

15.1 Freezer Freight Services to be given first option when vehicles are to be sold. If the Sub-contractor fails to reach agreement with Freezer Freight Services, the Sub-contractor shall have the option to sell outside the company the vehicle with work providing the buyer meets the company criteria and the incoming Sub-contractor is aware of the terms and conditions of the arrangement governed by the Sub-contractor's agreement."

The response from TDG, signed by Mr Mowday, dated 13 November 2000, already discussed, failed to address the serious concerns raised by the applicants. The concerns were further raised by the applicants' solicitors in correspondence to the respondent dated 27 November 2000. (Ex 6, annexure M)

In a reply dated 30 November 2000, the solicitors for the respondent failed to respond to the offer to sell and did not address the specific concerns of the applicants i.e. selling their business.

Mr Mowday denied making the statements regarding the sale of the vehicle with work claimed by the applicants in the letter of 4 October 2000. However, it is clear that the respondent did nothing to correct or clarify matters afterwards.

Whether by design or because of misunderstanding Mr Mowday and the respondent failed to act in a responsible or communicative manner to allay or clarify the fears and concerns of, in the words of Mr Mowday "a reliable contractor" and this after so called specialist advice. The respondent and Mr Mowday at that stage clearly knew that the applicants believed that they had been told that they could not sell their business and did nothing to address or correct the situation. The applicants concluded that they were being denied their contractual rights.

I draw no conclusions regarding the action of the applicants in advertising their business for sale earlier in 2000. They did not sell it.

That they failed to firstly offer the vehicle to the respondent is, in the view of the Commission, irrelevant. They advertised the business. They did not sell it. It may well have been that they were testing the market prior to negotiations with the respondent. Alternatively, had they found a buyer, the respondent might have pointed out their obligations under clause 15.1 of the 1998 contract. It is all speculation. The clause was not breached by the applicants while the contract was in force which, in the view of the Commission, was until 9 January 2001.

However, I reject the claim at (D) in the amended application. Despite Mr Mowday and the respondent's ill informed views, the applicants displayed a willingness to assert their rights post 4 October 2000 with respect to their contract, and ultimately, in line with the requirements of the contract (clause 15), did offer the business for sale to the respondent. (Ex 6, attachment M)

That attachment, a letter dated 27 November 2000 from the applicant's solicitors to the respondent, reads *inter alia* as follows:

"Our client would like to see this matter resolved without the necessity for recourse to formal proceedings. We are instructed that our client is willing to resolve the matter upon the basis that you purchase the contract from him for the sum of \$115,349.00. . . ."

I accept that the applicants did seek to give first option to purchase the business to the respondent in this instance.

The respondent's legal representatives responded by letter dated 30 November 2000 (mentioned earlier) in a manner which, in part, was both chronologically and factually incorrect. Also, the response did not acknowledge any contractual obligation other than to state *inter alia*:

"Our instructions are that in or about February (sic) 1998, when our client acquired certain aspects of the business of Jepton Pty Ltd, your client was advised that our client was not in a position to make any long term arrangements, but for the time being would engage your client from month to month. Your client accepted that arrangement."

Despite the respondent's submissions to the contrary (T'cript p. 248, line 21), the effect of all this is that the applicants did attempt to sell to the respondent. The respondent did not accept the proposal. The applicants did not subsequently present a potential buyer to allow the respondent to determine whether the potential buyer met the respondent's criteria in line with clause 15.1. The situation remained unaddressed, however, there was no evidence that the respondent prevented the applicants from seeking out a potential purchaser or further advertising the business for sale.

In any event with respect to the possible value of the contract, the evidence of the value of the business from Onus Maynes (Chartered Accountant) on behalf of the applicants was provided on the basis that the applicants had the "unequivocal right to assign the contract on the base of a minimum of 35 hours per week work" and did not take into account the possibility of termination of the contract with notice which Mr Maynes acknowledged would have a bearing on his estimate. (See Ex 3, T'cript p. 65, lines 35-57)

Having regard to the views of Hall P on the ability to terminate an indefinite contract, I do not believe that the evidence of Mr Maynes is helpful. However, I would add that the estimate provided by Mr Maynes was prepared on the instructions provided to him and the unhelpfulness of his efforts in this matter in no way reflects on his professionalism.

Further, the correspondence from Deacons Lawyers on behalf of the respondent dated 30 November 2000 and addressed to Primrose Couper Cronin Rudkin (solicitors for the applicant) still did not address what is now conceded, that the applicants had a contract for services with the respondent and that contract for services was the terms contained in the FFS 1998 contract on a month by month basis.

Mr Don Hill gave evidence that he was unsure of the value of the prime mover in 1993 but acknowledged that the \$65,000 paid by the applicants to FFS was for the truck "with work". The applicants believed this represented the sum of \$35,000 for the prime mover and \$30,000 "goodwill".

The Commission accepts that the guarantee of work had a value. However, the Commission remains uncertain as to what that value in dollar terms might be to a potential buyer and with the passage of time and the changed circumstances (the sale of the vehicle by the applicants) we may never know.

It seems that the truck without work would be a liability rather than an asset. Conversely, being given work without a truck to perform the work would quickly place the applicants in breach of their contract. The truck and the work depended on each other if the potential value of the business was to be realised. The 1998 contract acknowledges the applicants to be a "small business".

Considering—

- the applicants' failure to attract a buyer at approximately \$55,000 in early 2000;
- the unhelpful nature of the evidence of Mr Maynes;
- the downturn in available work in late 2000 and the impact this may have had on the price and desirability of the business to a potential buyer;
- the failure of the applicants to again attempt to sell the business in late 2000 or early 2001 (after offering it first to the respondent); and
- the ultimate sale of the truck without work by the applicants in May 2001.

The Commission having rejected the claim in (D) of the amended application nonetheless considers the failure of the respondent to acknowledge the 1998 contract provision regarding the sale of the business as harsh in line with s. 276(4)(b).

The Commission agrees with the approach adopted by Blades C in *Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees v. Chubb Protective Services (No. 2)* (B1816 of 2001) where he states:

"Section 276(2) provides for certain considerations for the Commission when deciding whether to amend or declare void a contract or part of a contract. In an application under s. 276 there are three separate and distinct issues. Once a contract is found to be unfair, it does not automatically follow that an amendment or avoidance will be ordered. That is entirely an exercise of judicial discretion unfettered even by the terms of ss. (2)."

The Commission has found the contract to be unfair on the stated grounds.

Subsections (1) and (2) 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.”
- (2) In deciding whether to amend or declare void a contract, or part of a contract, the commission may consider—
- (a) the relative bargaining power of the parties to the contract and, if applicable, anyone acting for the parties; or
 - (b) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, a party to the contract; or
 - (c) an industrial instrument or this act; or
 - (d) anything else the commission considers relevant.”.

Regarding ss. (2)(a), the relative bargaining power of the parties is best demonstrated by reviewing the actions of the parties in the period 4 October 2000 onwards.

I accept that prior to this time the applicants had been represented by Reilly and Williams (TWU official) in the 18 September 1998 meeting that established the contractual position of the parties and despite the applicants being essentially a subcontractor at all times, the bargaining power of the parties was not vastly different or the relationship unusual from 1998 to October 2000.

From October 2000 onwards, however, the balance changed dramatically and did so solely because of the applicant’s attempts to assert or clarify their rights. Mr Mowday stated at paragraph 18 of his statement:

“It is apparent from the material that the relationship between Harris and the company started to sour in or about October 2000 with the letter dated 4 October.”.

And in paragraph 23:

“Because of the problems now being experienced with Harris I instructed the fleet controller to give preference to other subcontractors who were ready, willing and able to work. I did not instruct them that they should not contact Mr Harris but because of the difficulties he had created I instructed them to contact Mr Harris only if the work could not be done by the other subcontractors.”.

The applicants’ bargaining power was palpably eroded. Attempts by the applicants to negotiate or bargain had resulted in a direct and effective attack on the applicants’ guaranteed levels of work which could not be rectified at the time even with the support of a firm of solicitors.

With respect to ss. (2)(b), the actions of Mr Mowday in instructing the fleet controllers to only engage Harris if all other subcontractors could not do the work was an unfair tactic used against the applicants and in the view of the Commission this tactic ultimately resulted in the complete exclusion of the applicants from work. Had it (the reduction) been caused by a genuine downturn, the work would have or should have been distributed as equally as possible among the drivers. It was not. This action by Mr Mowday was not a result of downturn but arose from the claims pursued by the applicants.

The applicant’s refusal to accept work on 4 or 5 occasions (T’cript p. 146-147, lines 35-5) did not, in the view of the Commission, excuse the actions of the respondent or enable them to resile from their obligations under the contract. Had the respondent acknowledged the existence of the 1998 contract and properly dealt with the applicants, I am satisfied that this circumstance would in all probability not have arisen.

In light of the foregoing and having considered all the evidence and submissions, the Commission has decided to amend the contract between the parties in the following manner:

Firstly, with respect to termination of the contract, the Commission agrees with Hall P who has clearly stated that indefinite contracts can be terminated with reasonable notice (already mentioned). The finding of unfairness with respect to the month by month basis of the contract was based on the definition of “unfair contract” in s. 276(7). That is the contract provided less total remuneration in the event of termination than would have been the case if Mr Harris was an employee because of an absence of reference to entitlements should the contract be terminated or circumstances under which termination may occur.

It is not the view of the Commission that the unfairness would be addressed simply by ensuring the termination notice provision of the Act applied. Those provisions apply to employees. The applicants were not employees but a small business with contractual rights for which a premium was paid. The receipt for \$65,000 mentioned earlier related to the purchase of a Prime Mover “**with work**”. The 1993 subcontractors agreement and subsequently the 1998 contract gave effect to the term “**with work**” among other things.

The applicants knew the chances they took regarding possible redundancy because of business downturn. The 1998 contract contained provisions covering this contingency (Clause 12).

The applicants further knew or should have known that they would place their contract in jeopardy if they failed to provide the services properly and in the manner required by the contract.

I find that the contract was terminated by the respondent on 10 January 2001 when the respondent allocated no further work to the applicants. I find that the applicants did not act in a manner that constituted grounds for summary termination of the contract. I find that the applicants were not genuinely redundant.

The Commission has considered the question of what would constitute a fair approach to the termination of a contract such as this.

In determining the length of the notice of termination that would be fair, I have considered the likely effects on both the respondent and the applicants.

In the case of the respondent, if work for the applicants was still available yet the respondent had decided to perform the work in a way that did not involve the applicants, the respondent would have had the ability to give notice to the applicants and more over have work performed by the applicants up

to the completion of that notice. The effect on the respondent would be minimal, albeit the implementation of the changes decided upon by the respondent would be delayed for the length of the notice period.

If no work were available then the redundancy provision, by agreement, would accommodate the situation.

Should the subcontractor breach the agreement in a significant manner or fail to perform, then it would be the applicants not the respondent that would be responsible for jeopardising the arrangement leaving no financial onus on the respondent other than to replace the applicants.

There would be little or any adverse effect on the respondent if this contract were to include a six month's notice provision if the respondent chose to exercise its rights under the provision and issue the notice.

The applicants have a business providing a service to the principal contractor (the respondent). They paid for the business and provided they are performing in accordance with the agreement underpinning the relationship, have a right to rely on the agreement and the benefits that flow from it.

Put aside the clause relating to the ability to sell the business to another, if the respondent decided to perform all work in house by directly employed drivers in company owned vehicles or in some other way not involving the applicants, it should have those options provided the subcontractor and the respondent either reach agreement pursuant to clause 15.1 to sell the vehicle back to the respondent or alternatively the applicants receive reasonable notice. In the view of the Commission, reasonable notice should be no less than 6 months.

The Commission believes that it would be fair to expect that the subcontractor could secure alternate work within 6 months in a manner that could see the income from that work flow to the subcontractor in 6 months.

If, because of the unavailability of work, it were to take longer than 6 months resulting in a loss to the applicants, it could be argued that the applicants would have suffered a loss in any event as the respondent and the applicants both operated their businesses in the transport industry and general downturns which might cause difficulty in securing work could affect the applicants whether in the service of the respondent or not.

The Commission finds that the 1998 contract should be amended as follows:

Insert a new clause 17 – Termination of Subcontract:

“17. Should the carrier decide to terminate the subcontract for reasons other than performance deficiencies, breach of contract on the subcontractors part or genuine redundancy, the carrier may do so by providing the subcontractor with 6 months' notice of such termination or without notice provided that payment of 6 months' pay (calculated at \$41 per hour for 35 hours per week) is made in lieu of notice.”.

The contract is to be further amended from 1 October 2000 by altering clause 14.1 to read–

“14.1 The company is to provide the subcontractor with a minimum of 35 hours work per week at the relevant hourly rate. Where less than 35 hours work is allocated in any week the subcontractor will be paid for the full 35 hours: Provided that the subcontractor was available and capable of working. A deduction of 7 hours may be made for each day the subcontractor is not available and/or for each public holiday that the subcontractor is not required to work.”

The Commission has decided not to amend or order payment of any amounts pertaining to clauses 13 and 16.1.

With respect to clause 14.2, the Commission is loath to determine, on the information and evidence available, whether the hours worked by Watson on the days that the applicants also worked could have been allocated to the applicants.

However, on days that the applicants were not allocated any hours and Watson was allocated hours, I am of the view that an appropriate payment in line with s. 276(5) would be the equivalent to the number of hours worked by Watson multiplied by \$41.00 on the days in question being (See Ex 5, Attachment WH1):

Date	Hours
17 November 2000	8
20 November 2000	5.75
27 November 2000	15.25
4 December 2000	3.75
5 December 2000	6.25
7 December 2000	3
11 December 2000	3.75
13 December 2000	3.75
Total	49.5

I order the amount of \$2,029.50 be paid by the respondent to the applicants.

Regarding the 35 hour per week minimum, an appropriate payment from the respondent to the applicants would be such as to ensure that the applicants received no less than 35 hours at \$41.00 per hour for each week between 4 October 2000 and 9 January 2001.

In calculating the above I have had regard to Attachment WH1 and have allowed for the finding relating to Watson's hours. Monday to Sunday has been used for the basis of assessing a week's work, as clause 14.1 did not identify week days from week-ends. The weeks where less than 35 hours were allocated are as follows:

Week ending	Hours
26 November 2000	13.25
3 December 2000	11
10 December 2000	22
17 December 2000	15.75
24 December 2000	35
31 December 2000	0.75
7 January 2001	24.5
Total	122.25

I order that the further amount of \$5,012.25 be paid by the respondent to the applicants.

The applicants received no work from 10 January 2001 onward. I find this to be the date (10 January 2001) upon which the contract was terminated by the respondent.

With respect to the amended contract at clause 17, I find that the applicants' contract was terminated without notice for reasons other than performance deficiency, breach of contract on the part of the applicants or genuine redundancy.

For this I consider an appropriate payment in this instance in line with s. 276 (5) to be payment by the respondent to the applicants of 26 weeks at 35 hours per week at \$41.00 per hour being \$37,310.

I order that the respondent pay to the applicants the further sum of \$37,310.

In summary, the respondent is to pay to the applicants the amount of \$44,351.75 within 22 days of the date of release of this decision.

In respect to all orders made the respondent is to be Patricks Logistics Pty Ltd as agreed in the amended application.

Costs

As costs were sought in the amended application, however not examined during the hearing, the Commission will re-list the matter to hear cost arguments upon request by a party. However, s. 335 – Costs appears to deprive an applicant access to an order for costs.

Order accordingly.

D.K. BROWN, Commissioner

Appearances:

Mr J. Shepley (instructed by Primrose Couper Cronin Rudkin) for the applicants.

Released: 26 September 2002

Mr A. Horneman-Wren (instructed by Deacons Lawyers) for the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – application for unpaid wages

Electrical Trades Union of Employees of Australia, Queensland Branch AND Stork Electrical Pty Ltd (No. W106 of 2002)

COMMISSIONER BLADES

1 October 2002

Unpaid wages – *Tarong North Power Station Construction Project Certified Agreement 2000* – Living Away From Home Allowance – “Reasonably required to remain away from usual place of residence” – Mobilisation/demobilisation expenses – Application for living away from home allowance dismissed – Application for mobilisation expenses allowed.

DECISION

This is an application under s. 278 of the *Industrial Relations Act 1999* (the Act) by the Electrical Trades Union of Employees of Australia, Queensland Branch for an order against Stork Electrical Pty Ltd for the recovery of wages said to be due and unpaid on behalf of Terry Clarke. The amount comprises living away from home allowance of \$9,264.00 together with mobilisation/demobilisation expenses including travelling time \$129.00, fares \$63.00 and allowance \$17.00 totalling \$9,473.00.

Mr Clarke worked for the company at the Tarong North Power Station from Monday 17 September 2001 until 26 April 2002 when he resigned.

The claim arises under the *Tarong North Power Station Construction Project Certified Agreement 2000* which provides at clause 6.5:

“6.5 - Accommodation/Living Away From Home Allowance

Employees engaged under this Agreement to work on the Tarong North Project and thereby reasonably required to remain away from their usual places of residence shall be entitled to elect one of the following at the point of engagement:–

- (a) *Free board and accommodation in the Project Accommodation Facility; or*
- (b) *A free caravan site, hot water, power, ablution facilities, including the use of washing machines and an allowance of \$81.50 per week; or*
- (c) *A living away from home allowance of \$289.50 per week.”*

Mr Clarke lived at Toogoolawah, 74 kilometres from Tarong and made the round trip each day. He was not given an opportunity to elect one of the options referred to in the Agreement because the Company believed that residents of Toogoolawah were classed as local. The offer of employment was made on the basis that it was local employment and this was accepted by Mr Clarke.

The claim is brought for the payment of the living away from home allowance under clause 6.5(c).

When he was offered the employment, Mr Clarke was told by Mr Hopkins the Project Manager not to bother applying for on site accommodation or living away from home allowance because he was not entitled to it because he lived just inside the circle. Taking Mr Hopkins' information at face value, Mr Clarke did not request accommodation, a caravan or living away from home allowance. When he commenced work, he found that almost every other employee was in receipt of the allowance or was provided with accommodation. He mentioned a Mr Hirst of Linville, situated closer to Tarong than Toogoolawah, who was provided with a living away from home allowance. Hirst was employed by Barclays. He was aware of a Mr Harry Van Dyke, also an employee of Barclays who was living in the project accommodation and whose address was Toogoolawah. Mr Clarke was told by a Mr Jim

Stanley who started work with Barclays in March 2002 that he was entitled to a living away from home allowance. It was this information which prompted him to contact the Union resulting in this application.

It should be emphasised that the only witness evidence in this case was that of Mr Clarke, Mr Hopkins and the Union Organiser Mr Peter Ong. The circumstances under which other employees might have been classed as entitled to the allowance or what criteria for payment was applied by those particular employers is not in evidence and the information relied upon by Mr Clarke is clearly hearsay although admissible in terms of s. 320 of the Act.

The "circle" referred to by Mr Hopkins was that drawn on a map using the nearest Post Office, Yarraman, as the datum point extending for 50 km "as the crow flies" and resulting in Toogoolawah being just inside the circle. What was exhibited to the Commission was a map using the Tarong Power Station as the datum point and which revealed that Toogoolawah was just outside the circle. The significance of the 50 km radius was an incorrect belief that the Award applied, either the *Building and Construction Industry Award – State* or the *Electrical Contracting Industry Award – State*. The datum point under the Award is 50 km from the nearest Post Office and Toogoolawah is within such a radius drawn from Yarraman.

It was common to both parties that neither Award applied and that the *Certified Agreement* was a stand alone document.

Nowhere in the Agreement is there a definition of what is meant by "reasonably required to remain away from home". The Company claims that Mr Clarke was not required to remain away from home and he was not required to travel an unreasonable distance to work. Travelling time, according to Mr Hopkins was approximately 50 minutes each way, according to Mr Clarke about 60 minutes each way.

This claim is brought on the basis of the provisions of clause 6.5 that Mr Clarke should have been given the opportunity to elect one of either (a), (b) or (c) at the point of engagement. Having been told he was not entitled, he made no election. Thus it is said he was misled. If that misinformation provides a basis for an alteration to the arrangement, which is doubted, to shift home liability for a payment under (c), the applicant must prove that Mr Clarke was "reasonably required to remain away from his usual place of residence". "Reasonably required" by whom or what? The answer seems to me to be "reasonably required by the employer or by considerations of safety".

Mr Clarke was not required by the employer to remain away from his usual place of residence. He travelled 74 km each way. Was he then required by considerations of safety to remain away from his usual place of residence? Whether the distance he had to travel was reasonable in terms of safety or not is a question of degree. Many employees travel similar distances to and from work without an entitlement to travelling expenses, e.g. Gold Coast to Brisbane; Caboolture to Brisbane and whether by motor vehicle, bus or train. It must be inferred I think that because of the sheer volume of those commuters traversing such distances it is not viewed by the general public as unsafe or as unreasonable and in the absence of any other evidence, may be used as a measure. In these circumstances, I am unable to come to a conclusion that travelling from Toogoolawah to Tarong North daily is unreasonable.

Mr Clarke made a binding contract at the point of engagement that he would not have the benefit of clause 6.5 because he was regarded as a local resident. He was bound by that agreement. It is unlikely that the statement by Mr Hopkins that he believed Mr Clarke was a local resident would be classed as a misrepresentation. That other people made differing contracts is not to the point. It was only if there was an Industrial Instrument which provided otherwise that could over-ride the agreement made by Mr Clarke.

The application for living away from home allowance must be dismissed.

Clause 6.6 of the *Certified Agreement* deals with mobilisation and demobilisation. It provides:

"Distant Travelling and Fares

6.6.1 Where an employee is engaged at another locality for work covered by this Agreement to work at Tarong North such employees will be paid travelling time and fares for mobilisation (once only) and demobilisation (once only) whilst travelling to or from such locality and Tarong North.

6.6.2 Travelling Time

In accordance with 6.6.1 time reasonably taken by any such employee in travelling to and from Tarong North shall be paid for at ordinary rates provided that no employee shall be entitled to paid travel time for more than 12 hours overall.

6.6.3 Fares

Any person travelling to or from the Project for the purpose of accepting engagement in accordance with 6.6.1 shall be entitled to be paid by the employer an amount equal to a coach fare, irrespective of the means by which such person travels to site. Provided that where the employer provides the means of transport to the site, the coach fare shall not be payable. An allowance of \$8.50 to cover expenses shall be paid to the employee whilst so travelling.

6.6.4 . . .

Note – Mobilisation means at the commencement of engagement on the Tarong North Project.

– Demobilisation means at the cessation of engagement on the Tarong North Project."

When Mr Clarke applied for the job at Tarong, he was already working for Stork in Brisbane. While working in Brisbane he resided in a caravan in Brisbane although his official place of residence was Toogoolawah.

I am satisfied that he was engaged at another locality (Brisbane) and should be paid travelling time and fares for mobilisation from Brisbane to Tarong North. There is no evidence as to what occurred after Mr Clarke resigned. He may have stayed on at Toogoolawah. If he did, I do not consider he was entitled to demobilisation expenses back to Brisbane. In the absence of any evidence, this aspect of the claim is rejected.

For similar reasons, I am satisfied that fares from Brisbane to Tarong, in this case, a bus fare to Nanango, should be allowed, but not for any return journey. The expense allowance of \$8.50 one way should also be paid.

To summarise, the following amounts should be paid:

Travelling time 2½ hours at \$25.80 per hour	64.50
Fares one way (Brisbane to Nanango)	31.50
Allowance	<u>8.50</u>
	<u>104.50</u>

I order that the amount of \$104.50 be paid within 14 days of the release of this decision.

B.J. BLADES, Commissioner.

Appearances:

Ms K. Inglis for the Electrical Trades Union of Employees of Australia, Queensland Branch.

Hearing date: 27 September 2002

Mr G. Power, from the Australian Industry Group, Industrial Organisation of Employers (Queensland), for Stork Electrical Pty Ltd.

Released: 1 October 2002

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QUEENSLAND INDUSTRIAL REGISTRAR

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

T.A.B. Agents' Association of Queensland Union of Employers (No. Q28 of 2002)

REGISTRAR EWALD

1 October 2002

Conduct of Election – Prescribed Information – Rule Changes – Methods of Elections – Electoral Commission to Conduct Elections.

DECISION

On 27 August 2002, the T.A.B. Agents' Association of Queensland Union of Employers, lodged in the Registry under section 481 of the *Industrial Relations Act 1999* the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* in relation to its request for the conduct of an election by the Electoral Commission of Queensland for the following positions of Office:

Office	Number of Positions	Method of Election
President	1	Direct vote by financial members
Council Members		
– Brisbane North	2	Direct vote by members of respective TAB Regional Zone
– Brisbane South	2	
– Gold Coast & Darling Downs	2	
– Sunshine Coast and Bundaberg	1	
– Central Queensland	1	
– North Queensland	2	
– Southern	3	
– Northern	1	
Management Committee		
– Vice-President	1	Collegiate vote by members of Council
– Junior Vice-President	1	
– Treasurer	1	
– Secretary	1	

Timing of Elections

Rule 33(a) provides for the calling of nominations for Council members 6 weeks prior to the date of the Annual General Meeting, in the year in which elections are due which this year, has been scheduled for 28 October 2002. Nominations for the President are to be called between the 1st and 7th of September every second year. The election process has been delayed this year waiting on Rule changes which have now been approved by the Commission. Section 36(4) of the *Industrial Relations Regulation 2000* requires the prescribed information to be filed by the prescribed day i.e 2 months before the first day on which a person may become a candidate in the election, under the organisation's or branch's rules. Therefore I find that, in this instance, the prescribed information was filed later than the prescribed day however I am prepared to extend the time for filing to 27 August 2002.

Methods of Elections

The methods of election are set out above. Direct votes are by way of secret postal ballot and the collegiate vote shall be conducted as a secret ballot.

Conduct of Elections

I have considered the request, the Act and Rules and I am satisfied that an election is required to be held under the Rules for the Offices as set out above. Under section 482 of the *Industrial Relations Act 1999*, I am making arrangements for the conduct of the election by the Electoral Commission of Queensland.

Dated 1 October 2002.

E. EWALD,
Industrial Registrar.

Released: 1 October 2002

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