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No. 11

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	Certified on and certificate issued	Cancelling
CA203/04	S Kriaris – Certified Agreement 2003	11/06/04	CA469/01
CA230/04	Hymix Australia Pty Ltd Concrete Cartage – Certified Agreement 2004 South East Queensland	11/06/04	CA551/01 to CA558/01
CA231/04	Queensland Showerscreens & Wardrobes Pty Ltd – Certified Agreement	11/06/04	
CA232/04	Interline Plasterers Pty Ltd – Certified Agreement	11/06/04	
CA233/04	JM & JJ Torrasi t/a Rainbow Renderers – Certified Agreement	11/06/04	
CA234/04	Kirkbuild Systems Pty Ltd – Certified Agreement	11/06/04	CA400/95
CA224/04	T & S Huntley Security Consultants Pty Ltd (ACN 091 651 571) t/as Western Suburbs Security – Certified Agreement 2004	15/06/04	CA30/02
CA240/04	United Developers (Brisbane) Pty Ltd – Certified Agreement	16/06/04	CA556/02
CA241/04	Citicrete Pty Ltd – Certified Agreement	16/06/04	CA315/00
CA242/04	Karen Maree McGrath & Tyrone John McCann t/a Cleaners MC – Certified Agreement	16/06/04	
CA243/04	Rylehall Pty Ltd t/a Australand Holdings Commercial & Industrial Dv – Certified Agreement	16/06/04	
CA244/04	D B Farell's Pty Ltd – Certified Agreement	16/06/04	
CA245/04	Dig It Landscapes Pty Ltd – Certified Agreement	16/06/04	CA116/00
CA248/04	Bartter Enterprises – Ipswich Engineering Maintenance – Certified Agreement 2003	18/6/04	CA503/01
CA261/04	Down To Earth Dingo Hire Pty Ltd – Certified Agreement 2003 – 2005	18/06/04	
CA239/04	C E Marshall & Sons Pty Ltd – Certified Agreement 2004	21/06/04	
No/s	Title	Certified on and certificate issued	Cancelling

CA257/04	Barbera Packers Pty Ltd – Certified Agreement	24/06/04	CA184/01
CA267/04	Dunn & Son Pty Ltd – Certified Agreement	28/06/04	
CA268/04	Aura Sports Pty Ltd – Certified Agreement	28/06/04	CA456/02
CA269/04	AF Sarri Pty Ltd – Certified Agreement	28/06/04	CA202/01
CA270/04	Marrvale Pty Ltd – Certified Agreement	28/06/04	CA496/00
CA277/04	Iezzi Constructions Pty Ltd – Certified Agreement	28/06/04	
CA278/04	KTM Rigging & Scaffolding Services Pty Ltd – Certified Agreement	28/06/04	
CA281/04	Brigford Pty Ltd t/a Ascot Demolitions – Certified Agreement	28/06/04	
CA282/04	A & T Commercial Door Hanging Pty Ltd – Certified Agreement	28/06/04	

The following Agreement has been amended by the Commission:

No/s	Title	Date amended
CA447/02	PresCare Allied Health Professional Staff – Certified Agreement 2002	18/05/04
CA910/03	Trinity Petroleum Services Pty Ltd – Certified Agreement	15/06/04
CA300/02	Eastern Tree Service Pty Ltd – Certified Agreement 2002-2005	18/06/04

G.D. SAVILL,
Acting Industrial Registrar.

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INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 – s. 341(1) – appeal against decision of industrial commission

Denny Realty Pty Ltd trading as Mackay Business Brokers AND Peter Herbert Hodge (No. C30 of 2004)

PRESIDENT HALL

DECISION

25 June 2004

This is an appeal against a decision of the Queensland Industrial Relations Commission released on 7 April 2004 and now reported at 175 QGIG 1287. By that decision the Commission ordered Denny Realty Pty Ltd to pay \$9,575 to Peter Herbert Hodge by way of unpaid “wages” in the expanded sense of the noun at Schedule 5 of the *Industrial Relations Act 1999* (the Act). Both at first instance and on the appeal, the parties were at *idem* as to many of the facts.

It was common ground that Mr Hodge (the respondent) commenced employment as a real estate salesperson/business broker on 22 January 1996. His employer was a partnership trading as Mackay Business Brokers. The partners were Denny Realty Pty Ltd (the appellant) and Paycliff Pty Ltd. The Commission found that the engagement was within the scope of the *Property Sales Award Queensland – State* (the Award) in the form which it took over the material period, *viz* 23 September 2000 to 28 February 2001. That conclusion, which was disputed by the appellant at first instance, has not been challenged on the appeal. The Award, of course, makes provision for employer and employee to opt out of the Award by the device of executing an “individual employee flexibility agreement” under Part C of the Award and registering the agreement with the Property Salesmen’s Association Queensland, Union of Employees. Notwithstanding the point taken about the applicability of the Award by the appellant at first instance, it was and is common ground that in fact, Mr Hodge and the partnership did execute and register such an “individual employee flexibility agreement”. The agreement was renewed from time to time as required by the Award.

On 23 September 2000 Paycliff Pty Ltd resigned from the partnership. It is common ground that Denny Realty Pty Ltd continued to trade as Mackay Business Brokers, that Mr Hodge continued to work as a Real Estate Salesperson/Business Broker within the business trading as Mackay Business Brokers and that his employer was (in truth) Denny Realty Pty Ltd. The Commission found that Mr Hodges’ engagement by Denny Realty Pty Ltd as and from 23 September 2000 was a new engagement. That is the finding which is the focus of the appeal. It was a finding which acquired significance because the Commission also held that:

- (a) the *Property Sales Award Queensland – State* applied to the engagement;
- (b) Mr Hodge and Denny Realty Pty Ltd had not executed and registered a new “individual employee flexibility agreement”; and
- (c) the original “individual employee flexibility agreement” had not been transferred as required by Part C of the Award.

The consequence was found to be that the wages payable to Mr Hodge after 23 September 2000 were to be assessed under the Award. In fact, Denny Realty Pty Ltd had paid Mr Hodge in accordance with the “individual employee flexibility agreement” previously referred to. The amount of “wages” ordered to be paid by the Commission was the discrepancy between the Award amount and the agreement amount.

The Commission gave no reason for the conclusion that, after the resignation of Paycliff Pty Ltd, Denny Realty Pty Ltd and Mr Hodge had entered into a new engagement. Examination of the transcript and, in particular, the exchanges between the Bench and the Advocate for Denny Realty Pty Ltd in the course of closing submissions, makes manifest that the Commission was of the view that resignation of a partner terminates the engagement of all employees of the partnership. On that hypothesis, the conclusion that Mr Hodge, who in fact continued to work for reward for Mackay Business Brokers, had entered into a new contract of employment with the company trading as Mackay Business Brokers, *viz* Denny Realty Pty Ltd, was unimpeachable. However, with respect to the Commission, the proposition that the resignation of a partner discharges all employees of the partnership, seems to me not to be supported by authority. It is certainly true that some, “older” text cite *Brace v Calder* [1895] 2 QB 253 as authority for that proposition, but *Brace v Calder*, *ibid*, has become distinguished in the less flattering sense of the adjective.

Tunstall v Condon [1980] ICR 786 is a case in which the Employment Appeal Tribunal had to consider two submissions. One of those submissions was that termination of employment followed by operation of law from the dissolution of a partnership. At 790 to 791 Talbot J, delivering the unanimous decision of the Tribunal, observed:

“We will deal with the first submission. It is based upon an old authority though one that is still cited in the textbooks, *Bruce v Calder* [1895] 2 Q. B. 253. In that case, there was a partnership consisting of four members and the plaintiff was employed in their business by a written agreement for a period. Before the expiry of the period of his employment, two partners retired and the business was transferred to and carried on by the other two. The continuing partners were willing to employ the plaintiff (the manager) on the same terms as before, but he declined to serve them. He then brought an action for wrongful dismissal. It was held by the majority, Lopes L. J. and Rigby L. J., that the dissolution of the partnership operated as a wrongful dismissal of the plaintiff. Lord Esher M. R. dissented, but it would seem from a reading of his judgement that his dissent was that the dismissal was wrongful. It would seem that the unanimous decision of the Court of Appeal in that case was that the dissolution did terminate the plaintiff’s employment. Thus, it is argued here, the dissolution terminated Mr Condon’s employment and, indeed, Mr Biddle’s employment. It is clear, in our view, that this is a decision that we should follow, but it is also clear that it is not every case of dissolution of partnership that necessarily terminates the employment of the servants of that partnership. We have been referred to the opinions expressed in *Grunfeld, The Law of Redundancy*, 1st ed. (1971). His book dealt with dissolution of partnership, and the passage at p.50 reads:

‘A partnership is dissolved if a partner dies or retires. But, contracts of employment of the partnership’s employees do not automatically end with the technical dissolution of the partnership. Essentially, it is a question of the scope and meaning of the particular contract of employment.’

He then goes on to deal with the case, the report of which we have not seen but which is set out in the text of the professor’s work, *Phillips v Alhambra Palace Co.* [1901] 1 Q.B. 59, which was an instance where the partnership dissolution did not terminate the employment. In that case Kennedy J. had said, at p. 64—and again we take this from Professor Grunfeld’s work—“...no absolute rule can be laid down which shall be applicable to all cases”—namely, whether there shall be termination or not. We would adopt as being correct the principles expressed by Professor Grunfeld, and it is our view that we have to look to the contracts in this case and the circumstances of the dissolution in order to determine whether the dissolution of this partnership terminated Mr Condon’s contract and that of Mr Biddle. It is our view that their contracts were terminated by the dissolution. One of the relevant factors that has influenced us is that this was a complete split up of a solicitors’ partnership. It is not a case merely of one partner leaving or dying; that decision would have to be argued in the light of the particular circumstances of the case. But in this case the break-up of the partnership involved one part of the partnership business, which was being carried on at Epsom, going to four of the partners, and that other part of the partnership business which was carried on in London going to Mr Tunstall the other partner. There was therefore a complete break and alteration and, in our view, that must mean that there was a termination of the service contracts of Mr Condon and Mr Biddle.”.

On the proposition that a major split will suffice, the decision in *Tunstall v Condon, op.cit.*, was followed in *Barnes v Leavesley* [2001] ICR 38 at 42 to 43. But here there was no major split. The business activity engaged in under the trading name Mackay Business Brokers was carried on as before. It was a case of “business as usual”. Counsel for the Respondent rightly identifies that the alter-ego of Paycliff Pty Ltd, negotiated a restraint of trade clause excluding Denny Realty Pty Ltd from the market in hotels/motels for six months from the date of dissolution of the partnership, but there is no material on which to find that the passing change was a major split rather than a hiatus.

With respect to Professor Grunfeld, *op.cit.*, the decision in *Phillips v Alhambra Palace Co* [1901] 1 Q.B. 59 went beyond determining that “—no absolute rule can be laid down which shall be applicable to all cases”. The full passage is:

“It is clear that no absolute rule can be laid down which shall be applicable to all cases. The case of the *Tasker v Shepherd* (1) has certainly gone as far as any case. But even there the judges did not go upon the ground that the case fell within the principle of those cases in which the contract has been held to be put an end to by reason of the personal skill of the parties being involved. They only said that it might be so. They expressed no opinion upon it. The real ground of the decision was that the contract had reference to the existing partnership business only. So I can conceive that a contract such as we have to deal with in the present case might be made under circumstances under which it would be unjust to compel the plaintiffs to perform for the surviving partners, and under which it would be equally unjust to compel the surviving partners to employ them. But here, if the plaintiffs are provided with the agreed stage on which to perform, and are only required to perform at the agreed time and under the agreed conditions, it surely cannot matter to them who the particular persons are by whom they are to be paid. The case does not fall within the decision of *Tasker v Shepherd*. (1).”.

[*Tasker v Shepherd* is reported at 6 H&N 575]

To understand the reference to “agreed stage” and “perform” it is perhaps necessary to know that the partners operated a music-hall and that the plaintiffs were a troupe of music hall performers Macken, O’Grady, Sappideen and Warburton, *Law of Employment*, 5th edition, contrast the decision in *Phillips v Alhambra Palace Co Ltd*, with the decision in *Harvey and Sons v The Tivoli, Manchester Ltd* (1907) 23 TLR 592. At 242 the learned authors observe:

“Contrast this with a case where a troupe of ‘speciality entertainers’ consisted of three brothers one of whom died, but was replaced. The employing theatre company was held not liable to be sued on the original contract (which it had purported to cancel, unnecessarily it seems). The judgments do not refer to the personal nature of the services to be rendered, but the case is consistent with the earlier authorities and can be explained on the basis that the death of one partner frustrated the contract which depended on the continued existence of the lives of those who initially contracted to perform these specialised, personal services.”.

Here, before and after the dissolution, the business in which the Respondent was employed was carried out from the same premises with the same equipment. The business traded under the banner and behind the reputation of Mackay Business Brokers. No attempt was made to show that Mr Doughty, the alter-ego of Paycliff Pty Ltd had such a reputation or such deep pockets as to make engagement otherwise than by the partnership different in nature or less secure. (And the assumption that one may go behind the corporate veil is untested.)

I quite accept that one must always have regard to the terms of the contract of employment. But where, as here, the terms of the engagement (and, in particular, the terms of the renewals of the engagement) suggest that the respondent’s employment was in the business carried on as Mackay Business Brokers, rather than employment by the two corporations who happened to be the partners at the time of the agreement – and that seems to be the critical issue, compare *Briggs v Oates* [1991] 1 A11 ER 407 at 415 per Scott J. I am unable to discern an intention that resignation of one of the two partners was to automatically terminate the respondent’s employment. The Commissions finding that the respondent was unaware that the appellant was his employer after the resignation is compatible only with the view that the respondent’s focus was the business, not the proprietor.

In my view the evidence does not support a conclusion that the dissolution of the partnership terminated the respondent’s existing contractual arrangement with Denny Realty Pty Ltd. Prior to the resignation of Paycliff Pty Ltd the respondent might have enforced any claim for wages against either of the partners. Almost certainly he would have sued the partners together lest by securing judgment against a partner who proven to be impecunious, he lost his right to bring a further action against the remaining partner, compare *Kendall v Hamilton* [1879] 4 App.Cas. 504 to 514 to 516 per Earl Cairns, L.C. But he was entitled to proceed against one partner only. After the resignation of Paycliff Pty Ltd he lost the right to proceed against Paycliff Pty Ltd (otherwise than for wages earned before the resignation). But he retained the right to proceed against Denny Realty Pty Ltd and it was the very same right which he held prior to the resignation, viz a right to proceed on the “individual employee flexibility agreement”.

Counsel for the respondent submits that the appellant is bound by the conduct of its case at first instance and may not, on an appeal, raise an issue conceded at first instance. The proposition of law is sound, compare *Coulton v Holcombe* (1986) 162 CLR 1 at 7 to 8 per Gibbs C J, Wilson, Brennan and Dawson J J and *Water Board v Moustakas* (1988) 180 CLR 491 at 496 to 497 per Mason C J, Wilson, Brennan and Dawson J J. However, in my view the appellant did not concede that the resignation, of Paycliff Pty Ltd had brought the respondent's existing employment to an end and that his subsequent employment by Denny Realty Pty Ltd was a fresh engagement. The position taken up by the appellant's lay advocate and the thrust of the evidence led for the appellant was that after the resignation the business had a new owner but that the business ran on as usual. Only in closing submissions, in response to a series of leading questions from the Bench and faced with an assertion that the original engagement had been terminated by operation of law, was such a concession made by the appellant's advocate. And it was always the appellant's submission that the "individual employee flexibility agreement" continued to apply to the respondent's employment. It was the respondent who had initiated proceedings in the Commission under s. 278 of the Act. It was the respondent who advanced the proposition that the resignation of Paycliff Pty Ltd terminated his "individual employee flexibility agreement" leaving him at liberty to enforce the Award against his new employer, viz Denny Realty Pty Ltd. It was for the respondent to make out his case. That he failed to do.

The *Industrial Relations Act 1999* is not the *Workers' Compensation and Rehabilitation Act 2003*. There is power to allow an appeal and remit the matter to the Commission to be heard and determined according to law s. 341(3)(d). It might well be that if that course was adopted the respondent would have additional evidence to lead upon the issue whether the resignation split the business or additional evidence to lead about the importance of the personality of Mr Doughty. However, it would be an odd system which allowed lay folk who have chosen to act for themselves to treat a subsequent appeal as an advice on evidence and relitigate the matter. The proper course is to rely on ss 341(3)(b) and 348(1) of the Act and to determine the matter on the record.

I allow the appeal.

I set aside the decision and order of the Commission in matter W140 of 2003. In lieu thereof I order that the application initiating W140 of 2003 be dismissed.

There can be no order as to costs.

Dated 24 June 2004.

D.R. HALL, President.

Appearances:

Mr K. Watson directly instructed for the Appellant.

Mr R. E. Reed instructed by P. K. Lawyers for the Respondent.

Released: 25 June 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 74 Application for reinstatement

Robert Grant Hastings Neville AND Blindside Pty Ltd (No. B302 of 2004)

Eve Alexandra Neville AND Blindside Pty Ltd (No. B303 of 2004)

VICE PRESIDENT LINNANE

25 June 2004

DECISION

- [1] This matter involves two applications for an extension of time within which to file an application for reinstatement. The applications are made pursuant to s. 74(2)(b) of the *Industrial Relations Act 1999* (Act). The first is by Robert Grant Hastings Neville (B302 of 2004) and the second is by Eve Alexandra Neville (B303 of 2004). Both applications seek reinstatement in the employ of Blindside Pty Ltd (Respondent).
- [2] The Respondent was incorporated on 25 September 2003 for the sole and specific purpose of acquiring a business known as Queensland Timber Blind Company. The shareholders in the Respondent are John Stanley as to 51% and Mr and Mrs Neville, the Applicants in this matter, as to 49%. The Queensland Timber Blind Company was previously owned by a company which had been controlled by the Applicants. The Queensland Timber Blind Company was under external administration with the administrator attempting to sell the business as a going concern. The business was not sold and was duly handed back to the secured creditor, namely Media Feature Services Pty Ltd. The business was then to be purchased by the Respondent from Media Feature Services Pty Ltd. Both Applicants had been employed in the business prior to its administration and it was intended by the Respondent that they be employed in the business in a sales capacity after its acquisition by the Respondent.
- [3] The Respondent commenced trading in the business prior to the actual purchase i.e. from 25 September 2003, under a provisional licence from Media Feature Services Pty Ltd. The Respondent ceased trading on 19 January 2004. It is the evidence of Trevor Knipe, formerly the General Manager and Financial Controller of the Respondent, that the Respondent has no assets other than a fax machine and certain stationery. The Respondent has not traded since 19 January 2004. According to Mr Knipe's evidence the Respondent is not capable of satisfying any relief the Applicants might achieve in the application whether it be reinstatement or compensation. The balance sheet shows a negative net worth.
- [4] The Respondent was financed in its trading activities by another company, Just Blinds & Shutters Pty Ltd. The Respondent, according to Mr Knipe, made no profit, it has no income and it has no means of satisfying the loans presently outstanding to Just Blinds & Shutters Pty Ltd.
- [5] Three separate but interrelated contractual arrangements were entered into at or about this time.
- [6] There was a Business Contract dated 15 December 2003 between the Respondent and Media Feature Services Pty Ltd for the purchase of the business. Clause 9 of the Business Contract made settlement of the Contract subject to the Respondent and Mr Stanley entering into a Shareholders' Agreement with the Applicants. That Shareholders' Agreement concerned the acquisition of the business and the respective rights and obligations of the parties. If such an agreement was not entered into by the date of completion, the Business Contract was expressed to be at an end. The date of completion was originally expressed as 28 November 2003 but was extended to 29 January 2004.
- [7] A Shareholders' Agreement was made between Mr Stanley, the Applicants and the Respondent dated 9 December 2003. Clause 16.1(c) of that Agreement permitted the termination of the Shareholders' Agreement if Mr Stanley took steps to cease operation and relinquish his interest in the business of the Respondent.
- [8] The third contractual arrangement comprised an offer of employment to each of the Applicants which is contained in a letter dated 8 October 2004. According to Mr Knipe, it was further agreed between the Applicants and the Respondent that the term of their employment would be for the duration of the Shareholders' Agreement.

- [9] Certain events occurred early in December 2003 which resulted in a notice dated 19 December 2003 being given to the solicitors for Media Feature Services Pty Ltd and the Applicants. That notice advised of the intention of the Respondent to withdraw from all contractual arrangements with the Applicants, including the Shareholders' Agreement. Further, by letter dated 19 December 2003, the Applicants were advised of the immediate suspension of their employment save for completion of any outstanding contracts.
- [10] Over the next few weeks negotiations occurred between the Respondent and Media Feature Services Pty Ltd in relation to the possible revival of the purchase of the business. On 13 January 2004 a facsimile was sent to solicitors acting for the Applicants wherein the Applicants were advised that the Respondent had no intention of (i) reinstating them in its employ and (ii) proceeding with any employment agreement with them.
- [11] By a letter dated 21 January 2004 to each of the Applicants, the Respondent gave notice that it considered that the "good faith" clause outlined in the Shareholders' Agreement had been materially breached, and that accordingly, the employment of each of the Applicants with the Respondent was terminated as at that date. The Respondent contends that the termination of the Shareholders' Agreement effectively terminated the employment contracts with the Applicants.
- [12] By letter dated 27 January 2004 solicitors acting for both Media Feature Services Pty Ltd and the Applicants terminated the Business Contract and expressly revoked the licence held by the Respondent to conduct the business. That correspondence indicated that Media Feature Services Pty Ltd had retaken possession of the premises and the business. The Respondent had ceased trading on 19 January 2004 and had been locked out of the business premises for a period prior to 27 January 2004. The Respondent contends that it has been permanently excluded by Media Feature Services Pty Ltd from any further conduct of the business.
- [13] Throughout the relevant period the Applicants were under the advice of solicitors. Correspondence from solicitors acting for the Respondent to solicitors acting for the Applicants states as follows:-
- "We refer to previous correspondence herein ending with your letter of even date received by facsimile transmission. We have been instructed as follows:-
1. Our client has no intention of reinstating the Nevilles' nor proceeding with any employment agreement with the Nevilles; ..."
- [14] As the topic of reinstatement had obviously been the subject of discussion, it raises the issue of why the Applicants were not advised of the 21 day time limit for lodging applications for reinstatement. Neither Applicants touched on the subject in their evidence.
- [15] Perhaps this is answered by the evidence of the Applicants that they had no desire to continue to work for the Respondent given the Respondent's attitude and the allegations made by the Respondent against the Applicants. It was not until the Applicants visited the Department of Industrial Relations at Gympie concerning an alleged underpayment of wages that they became aware that an order for compensation was available.
- [16] The Applicants assert that the time limitation period should commence from 27 January 2004 i.e. the date they returned to their home at Noosa and received the letters of termination. That is a delay of 10 days beyond the time limitation period. The Respondent contends that the time period should commence from 22 January 2004 i.e. the day after posting of the letters of termination. That is a delay of 15 days beyond the time limitation period of 21 days.
- [17] Section 74(2) of the Act provides as follows:
- "(2) The application must be made within –
- (a) 21 days after the dismissal takes effect; or
- (b) a further period the commission allows on an application made at any time."
- [18] The factors to be considered in any application for an extension of time for filing an application for reinstatement are outlined in *Tracey Colefax v Jupiters Limited* (2000) 166 QGIG 4. As Hall P. in *Rich v Chubb Protective Services* (2001) 167 QGIG 159 said in exercising the power under s. 74(2)(b) of the Act, the "legislature's choice of a 21 day limitation period must be respected" however the "limitation period of 21 days should not be seen as an arbitrary cut off point unrelated to the demands of justice and general purposes of the Act. It should be treated as representing the legislature's judgement that industry will best be served by applications about unfair dismissals being commenced within that brief limitation period, notwithstanding that on occasion the limitation period may defeat a perfectly good case."
- [19] The Applicants in this instance have a positive burden of demonstrating that the justice of the case requires the indulgence of the further period: see *Brisbane South Regional Health Authority v Taylor* (1966) 186 CLR 540 at 547 per Toohy and Gummow JJ and at 554 per McHugh J (with whom Dawson J agreed).
- [20] The delay in this instance is not substantial. At best it is 10 days and at worst 15 days. The reason for the delay is said to be that it was not until the Applicants went to the Department of Industrial Relations in Gympie about a wage recovery matter that they became aware of the fact that compensation was a remedy available on such applications, if reinstatement and reemployment were found to be impracticable. I have some difficulty with the reason for the delay. As mentioned previously the Applicants were under legal advice throughout the relevant period. The issue of reinstatement had been raised and the Respondent had specifically stated that it had no intention of reinstatement. This was at a time when the Applicants were under suspension.
- [21] I have formed the view that the Applicants, once the termination took effect and the business relationship between the Applicants and the Respondent soured, at no time wanted reinstatement. Yet reinstatement is the primary remedy in s. 74 proceedings.
- [22] What is the prejudice to the Applicants if the extension of time is not granted? Clearly the Applicants are not seeking reinstatement or reemployment. The Respondent ceased trading in January, 2004. The Respondent does not employ any person or persons. Assume a finding of reinstatement is thus impracticable, what prospect do the Applicants have of enforcing any determination in their favour? The Applicants point to the fact that they were paid by Just Blinds & Shutters Pty Ltd rather than the Respondent during their employment. According to the Applicants' evidence, Just Blinds & Shutters Pty Ltd continues to operate as a business and have the funds necessary to pay any award of compensation. The problem is that Just Blinds & Shutters Pty Ltd was not the employer of the Applicants. Nor is the application made against Just Blinds & Shutters Pty Ltd. Just Blinds & Shutters Pty Ltd apparently was the financier of the Respondent in its trading activities. Employment contracts were entered into between the Applicants and the Respondent. It seems to me that, in all the circumstances, little prejudice will be suffered by the Applicants if an extension of time is not granted given that the Respondent has no assets or funds other than a fax machine and some stationery.
- [23] The Respondent opposes the application on three main grounds:
- (i) that the Commission has no jurisdiction to hear and determine the matter as the Applicants had, prior to filing the application, formed the view that they did not want reinstatement;

- (ii) there is no satisfactory explanation for the delay within the meaning of the authorities. The Respondent submits that there is an affirmative duty on the Applicants to demonstrate that the interests of justice essentially require that an extension of time should be granted. The Respondent submits that this onus has not been met by the Applicants. It is submitted that the Applicants did not pursue their application within the specified time limit because they had decided that they did not want the remedy that the Act provides for. That they had a change of heart when given certain advice from the Department of Industrial Relations;
- (iii) the Respondent was a company specifically incorporated and acquired with the Applicants as shareholders for the purposes of acquiring and operating a business known as Queensland Timber Blind Company. The Applicants had been previously employed in that business and the Respondent sought, as a part of the taking over of that business from the liquidators, to employ the Applicants in that business and to give them some continuity of employment in sales in the business. The purchase of the business did not transpire. It was the third party, Media Feature Services Pty Ltd, that terminated the business contract in a letter dated 27 January 2004. It should be noted that the person behind Media Feature Services Pty Ltd is Mrs Neville's father. The Respondent submits that the only purpose for the incorporation of the Respondent was the acquisition of the business from Media Feature Services Pty Ltd and that purpose was certainly at an end on 27 January 2004. The evidence is that the Respondent will be wound up at the end of this financial year i.e. within the next few weeks.

[24]The Applicants may have remedies against certain persons and/or organisations in connection with the contractual arrangements. Those remedies, if available, would seem to be the province of other Courts and/or tribunals. It seems clear to me that even if the Applicants were entitled to pursue the Respondent in a reinstatement application (i.e. an extension of time were granted), and succeeded in that application, they could not benefit from any relief. The Applicants cannot be reinstated and there are no funds in the Respondent to meet any amount of compensation that may be awarded..

[25]If the Respondent is placed in the hands of liquidators in the near future, the Applicants would be put to the further cost of obtaining an order from the Supreme Court before continuing with this application. Whether such application would be successful in circumstances where the Respondent is currently unable to meet its debts would appear problematical.

[26]In all of the circumstances I have decided not to extend the time within which to file the applications for reinstatement. I understand that the circumstances surrounding the contractual negotiations, the entering into of the contractual arrangements and the ultimate outcome of those arrangements have been very difficult for the Applicants. The business relationship soured and the Applicants were left with nothing. Pursuing an application for reinstatement in the abovementioned circumstances, even if successful, would however be a hollow victory for the Applicants. In addition there is a very real question over whether the applications meet the requirement of s. 74 of the Act i.e. whether the Applicants, when they filed their applications, were seeking reinstatement.

[27]The public interest is not furthered by the granting of an extension of time in such circumstances.

[28]I dismiss both applications.

Order accordingly.

D.M. LINNANE, Vice President.

Hearing Details:
2004 26 May

Appearances:

Mr R.G.H. Neville on his own behalf

Mrs E.A. Neville on her own behalf

Mr A. Herbert, Counsel instructed by Greenstein Shakenovsky, Solicitors for the Respondent

Released: 25 June 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Gordon Fassifern Hobbs AND Roma-Bungil Showgrounds Saleyards Board (No. B1874 of 2003)

COMMISSIONER EDWARDS

23 June 2004

Application for reinstatement – Termination of employment – Dismissal – Application for legal representation – Granted – Provisions of *Local Government Act 1993* – Evidence – Establishment of market garden – Unacceptable – Deception – Dishonesty – Disciplinary action – No evidence to support – Dismissal harsh, unjust and unreasonable – Applicant reinstated to former position – Continuity of employment – Remuneration determined.

ASSOCIATED APPLICATIONS AND DECISIONS

Application B413 of 2004	Decision from the bench – 22 March 2004 Written decision 2 April 2004 (175 QGIG 1243-1244)
Application B659 of 2004	Decision from the bench – 14 May 2004 Written decision 20 May 2004 (176 QGIG 118-120) Further written decision 8 June 2004 (176 QGIG 221)

REPORT ON DECISION (as edited)
B1874 of 2003

In giving his decision from the bench on 20 May 2004, Commissioner Edwards said:

“The Commission indicates that it has arrived at a decision in relation to the matter in question. I shall release the decision today but will not give reasons. These will be available shortly.

The Commission is satisfied that the dismissal was unfair as it was harsh, unjust and unreasonable. The respondent did not lead any evidence to suggest that reinstatement is impractical. The Commission orders that Roma-Bungil Showgrounds and Saleyards Board (the Board) reinstate Gordon Fassifern Hobbs to his former position as Showgrounds and Saleyards Foreman with conditions at least as favourable as the conditions on which Mr Hobbs was employed immediately before the dismissal.

Mr Hobbs is to be available to comply with this direction as soon as practical but no later than normal commencing time on Monday 24 May 2004. Mr Hobbs is to report to the acting Chief Executive Officer who is directed to co-ordinate the implementation of this decision.

The Commission orders the maintenance of continuity of Mr Hobbs' employment and service. The Commission makes no order in regard to the amount paid to Mr Hobbs by the Board at the time of the dismissal. The Board is ordered to pay Mr Hobbs remuneration lost because of the dismissal taking into consideration any employment obtained. The Commission has not been provided with details of such amounts. The Commission acknowledges that remuneration includes all items such as accommodation.

Accordingly, the Board is required to advise the Registrar in affidavit form of the remuneration that Mr Hobbs would have received between the date of the dismissal and the resulting date of resumption of work.

Mr Hobbs is required to provide in affidavit format the value of any employment benefit or wages received since the dismissal.

Affidavits are to be exchanged and provided to the Registrar by 12 noon on 27 May 2004. If the parties wish to raise any issues in regard to the contents of the affidavit they should advise the Registrar by noon on 28 May 2004.

The parties are directed to negotiate where necessary. There shall be no order for costs. The Commission orders accordingly.”.

REASONS FOR DECISION
B1874 of 2003

By application filed on 14 November 2003 Gordon Fassifern Hobbs sought relief under the provisions of the *Industrial Relations Act 1999* (the Act).

At the hearing on 13 April 2004 Mr Wright submitted that under s. 319 of the *Industrial Relations Act 1999* there are special circumstances which make it desirable for Mr Hobbs to be legally represented. Mr Wright cited:

“*Le Pierres v Herzfeld Pty Ltd* (2000) 163 QGIG 124 in which the Linnane VP formed the view that there were special circumstances which made it desirable for the applicant to be legally represented and said:

“There are clearly questions of law to be determined in any unfair dismissal application. In the present application, the commission will be required to determine, amongst other matters, whether the evidence of misconduct, if any, is of such a serious nature as to warrant summary dismissal of the applicant. I concur with the view expressed by *Drake-Brockman J. in Re Metal Trades Award* (1948) IIB 289 where it was stated that in matters involving points of law it is important to have legal representation to assist the court.

In addition, I am of the view that skillful cross examination of witnesses can only assist the commission in determining the matters it has before it in any unfair dismissal application...Lawyers are trained and experienced in advocacy....

In my view to deny legal representation in circumstances where questions of law will need to be determined and where extensive or skillful cross examination is desirable, is to preclude an effective investigation of the matters at the heart of the dismissal, and this cannot be desirable”.

Mr Beer on behalf of the Board advised that there was no consent to legal representation and he had nothing further to add. The Commission granted the application for legal representation.

During the hearing the Commission has considered a number of instruments including:

- *The Roma-Bungil Showgrounds and Saleyards Board Local Law No. 2 (Operation of Board's Saleyards) 2000*;
- *Local Government Act 1993*

Section 1131 which states, inter alia:

- “(1) The chief executive officer of a local government has the role of implementing the local government's policies and decisions.
- (2) On a day-to-day basis, the chief executive officer's role includes managing the local government's affairs.
- ...”.

Section 1129(2) (Employment of Staff) states:

“The chief executive officer is to appoint the other employees of the local government.”.

The role of other local government employees is determined by s. 1136 which states:

“The employees of a local government, under the chief executive officer's direction, help the chief executive officer to implement the local government's policies and decisions.”.

Section 1145 (Limitations on who may take disciplinary action) states:

“Disciplinary action against an employee of a local government may be taken only by the appointer of the employee.”.

Section 1146 (When disciplinary action may be taken) states:

“The appointer of a local government employee may take disciplinary action against the employee if the appointer is satisfied the employee –

- (a) has engaged in misconduct; or
- (b) has been incompetent or neglected the employee's duty.”.

Section 1134 states:

“A local government may appoint a person to act as its chief executive officer during –

- (a) any vacancy, or all vacancies, in the position; or

- (b) any period, or all periods, when the chief executive officer is absent from duty or can not, for another reason, perform the position's duties.”.

Section 466 states:

“The chief executive officer of a local government is responsible for safe custody of –

- (a) all records about the proceedings, accounts or transactions of the local government or its committees; and
(b) all documents owned or held by the local government.”.

The applicant commenced employment with the Board in November 2000 as a Showgrounds Foreman. He lived in the residence situated in Basset Park, Northern Road, Roma. From 23 September 2003 until 8 November 2003 the applicant was medically unfit to perform duties.

Following the resignation of the Saleyard Foreman, the Board on 11 February 2003 resolved:

“that for a trial period of three months that the staffing arrangements comprise one Foreman overseeing the Saleyards and Basset Park, a full time assistant for administration and finance, a casual assistant to perform weighbridge data entry and casual assistance for weekend work at the Saleyards”.

There was no written contract for the position of Foreman Showgrounds and Saleyards and as such it is not possible for there to be a breach of any written contract. So be it, the Commission was assisted by the Contracts of Employment (Exhibits 6A and 6B). As a result of discussions between the Chief Executive Officer (CEO) and the applicant a salary package was agreed. During the hearing the Board did not provide details of this agreement. It was the uncontested evidence of Mr Hobbs that the salary was \$52,000.00. Subsequently, in responding to a direction from the Commission, Mr Ian O'Donnell, Acting CEO by affidavit filed on 26 May 2004 outlined in paragraph 3 that the ordinary pay was \$2,000.00 per fortnight.

By letter dated 17 October 2003 the applicant was suspended on full pay in accordance with the provisions of s. 1149 of the *Local Government Act 1993*.

The applicant was terminated on 30 October 2003 (with effect from 5 p.m. on 31 October 2003) for reasons set out in the Notice of Termination of Employment (Exhibit 15). The three key issues upon which reliance was placed to justify the dismissal could be categorised as follows:

The establishment of a substantial vegetable and herb, irrigated, market garden (hereinafter referred to as “the market garden”) using Board funds and labour. A number of the applicant's actions were described as “unacceptable” and as amounting to “deception and dishonesty” including:

- Initiating and partly completing the project, despite it falling outside the scope of the Board charter or normal operational activities and without formal or informal approval of the Board or the CEO for this “unusual project”.
- Pursuing the project in clear disregard of Board directions regarding priority of projects and reduction of expenditure.

Approving the Special Sale held on 16 October 2003 and requesting Messrs Friend and Close of Grant, Daniel & Long Pty Ltd, Livestock & Property Agents, Roma (GDL) “to not write to the Board about their concerns regarding the Sale”. The approval of the Sale was said to be in contravention of Local Laws and was said to be a second offence.

Disregard for directions given by the CEO on 2 occasions “to not work and stay out of Board operational matters while on sick leave”. This alleged “refusal to follow reasonable instructions” was described as being “inconsistent with the basic contract of employment”.

As already indicated the applicant was medically unfit to perform duties from 23 September until 8 November 2003. By the correspondence of 17 October (Exhibit 12) he was instructed not to be involved in Board operations whilst on sick leave. During the period he was medically unfit he was being asked to be involved in matters affecting his employer/employee relationship. The unconfirmed minutes of the General Meeting of the Board held on 30 September 2003 indicate that the applicant presented a report as at 30 September 2003 and attended the meeting. It was the evidence of Mr T.G. Beck that the applicant attended the meeting as Foreman of the Showgrounds and Saleyards.

As outlined in my decision of 2 April 2004 the CEO was receiving medical treatment which resulted in significant fatigue and lethargy. It was envisaged that such treatment would last six months from 2 March 2004.

The Acting CEO is Mr Ian O'Donnell and in accordance with s. 466 of the *Local Government Act 1993* he is responsible for the safe custody of records. In this regard the Commission has conducted the hearing and made a decision on the basis that:

- correspondence prepared, written and signed by Mr Saxvik;
- policies, administrative and financial delegations; and
- all documentation including copies of receipts for prescribed fees and authorisations for the purchase of goods etc. and subsequent payment vouchers as authorised by delegated persons;

would be available to Mr O'Donnell for the preparation and submission in the appropriate format to the hearing.

In submissions the Board outlined that the requirements of s. 1145 to s. 1150 of the *Local Government Act 1993* have been met. By letter dated 10 October 2003 the applicant was given the opportunity to state reasons why the Board should not institute procedures to terminate the employment. An examination of each of the events detailed in the letter referred to alleged establishment of the market garden, contravention of Board policies, Codes of Conduct, Employment Contract and a provision of Local By-Laws. In drafting the letter the Board has made reference to general applications of the relevant instruments. Before the Board invoked the provisions of the *Local Government Act 1993* in relation to Part 5 – “Disciplinary Action” the persons so delegated by the Board had a responsibility to ensure that any show cause letter was based on the relevant instruments. Except for general references the evidence provided by the Board did not specify which provisions of the instruments had been breached.

An examination of the instruments indicates that there is a lack of detail and the allegations as presented cannot be substantiated based on either general or specific provisions. In this regard the letter makes reference to the Board's Local Law No. 2, Section 6(2) (Exhibit 32) which states

“Upon written application by an owner of stock, the Board may grant the owner permission in writing to conduct a sale of stock at the Board's saleyards on a day other than a regular sale day, upon such terms and conditions (including as to the payment of any prescribed fee) as the Board determines.”.

There is no evidence to the Commission of the payment of any prescribed fee and there is no avenue under that provision for any employee including the CEO to authorise a sale. The day in question was a regular sale day and the provision refers to a day other than a regular sale day.

The Commission accepts the evidence of Mr Kelly that he did not ask Mr Hobbs for approval and Mr Hobbs did not give approval to hold the special store sale on 16 October 2003. Further, the Commission accepts his evidence that at no time between 9 October 2003 and 30 October 2003 was Mr Kelly contacted by anyone from the Board about his dealing with Mr Hobbs regarding the special sale.

Mr D.A. Friend, Stock and Station Agent, GDL advised that he had no discussions with Gordon Hobbs about any aspect of the Special Store Sale and consequently Mr Hobbs did not say anything that he approved or otherwise of the sale. The Commission accepts Mr Friend had very limited involvement with the event. So be it, the Commission accepts his evidence.

The Commission has reviewed and examined the evidence of Mr C. Close, Livestock Manager with GDL. There were no discussions that justified the allegations in paragraph 2 of Exhibit 12 and paragraph 39 of 14B together and paragraph 6 of Exhibit 15.

Market Garden

The Commission accepts that the market garden was openly established on the showgrounds premises (Exhibits 17 and 18). The evidence reveals it was not a private garden at the applicant's home and the plants, seedlings and/or trees were to be planted on Board premises. In evidence, Mr Bannerman confirmed that the market garden was discussed at morning tea amongst staff at Bassett Park (showgrounds). In view of the fact that Mr Saxvik (CEO) was not available to give evidence, the Commission has weighted that aspect of Mr Bannerman's evidence accordingly.

The parties agree that the establishment of the garden was not approved by the Board. There was no evidence suggesting concept plans for the showgrounds but the unchallenged evidence of the applicant was that the type of seedlings planted and located were determined by the employees.

The Commission was not provided with a copy of the delegation of authority as approved by the respondent. In evidence the applicant advised that until 30 September 2003 his authority to incur expenditure without the prior approval of the CEO was \$1,000 per project. On that day, this was increased to \$10,000. Mr Beer confirmed that there was no evidence from the Board to challenge the evidence of the applicant. At the time of the purchase for the garden the financial limit was \$10,000 for any one project. The evidence revealed the expenditure outlined in Exhibit 4:

	\$
(i) assorted vegetable seeds purchased from Home Hardware on 3 October 2003	19.55
(ii) assorted vegetable seeds purchased from Pohlman's Nursery on 3 October 2003	18.50
(iii) the Davey pump and camlock fittings purchased from Dore Power Equipment Pty Ltd on 7 October 2003	863.50
(iv) a maximum of 30 minutes use of the bobcat of 7 October 2003	38.50
(v) polythene pipe purchased from Home Hardware on 7 October 2003	262.50
TOTAL	\$1202.55

The applicant was undertaking a Certificate IV course in Business Administration. In evidence (Exhibit 20) Judi Cook, Training Manager, Productivity Partners Pty Ltd advised that the applicant wished to develop his managerial skills to support his new position as Manager of the Showground and Saleyards.

The CEO performed the role as Workplace Supervisor and the traineeship commenced on 14 July 2003. By affidavit she indicated that the training program was continuing. On 28 October 2003 she spoke to Mr Saxvik and requested him to check his documents and to make comments on the assessments. During her evidence Ms Cook was uncertain as to the status of the traineeship following the dismissal but she agreed to make enquiries and inform the Commission. At the hearing on 14 April 2004, Mr Wright reported as follows:

"Yesterday afternoon after close of proceedings Judi Cook phoned to advise the results of her further investigations as foreshadowed during her evidence. Judi Cook informed me that the Roma office of the Department of Education and Training has a document cancelling the traineeship between Mr Hobbs and the Board. Ms Cook advised that her information is the document is dated 31 October 2003 and it is signed on behalf of the Board as the employer but is not countersigned by Mr Hobbs as the employee but is nonetheless effective in cancelling the traineeship."

The Board did not provide the Commission with any documentation even though it was relevant.

The Board submitted no evidence to support the allegation that the actions of the applicant were unacceptable and amounted to deception and dishonesty.

The Macquarie Concise Dictionary (1988) states the meaning of "deception" is "the act of deceiving; the state of being deceived; something that deceives or is intended to deceive; an artifice; a sham; a cheat" and the meaning of "dishonesty" as the "lack of honesty; a disposition to lie, cheat or steal; a dishonest act as a fraud or theft".

In determining standard of proof the Commission refers to *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361-362, where Dixon J stated:

"The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this had led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequences of the fact or facts to be proved. The seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences."

Section 83(2)(d) of the *Industrial Relations Act 1999* states:

"83 What employer must do to dismiss employee

- ...
- (2) Misconduct under subsection (1)(b) includes—
- ...
- (d) other misconduct prescribed under a regulation.”.

The evidence of Mr Bannerman hypothesizes of what may have become of the resulting produce, if any, but imagination is not a reason to justify dismissal.

In view of the evidence the actions of the applicant could not be described as “deception and dishonesty”. The Board provided no evidence to suggest that the showgrounds site was the subject of concept plans which would assist in the future planning. It was the unchallenged evidence of the applicant that the employees determined which seedlings would be planted and locations. Furthermore, the Commission was provided with no evidence by way of minutes as to which direction of the Board had been disregarded. At the Board meeting of 30 September 2003 the Board directed the Foreman to cut back on maintenance expenditure at the Saleyards. No reference was made in the minutes presented to the Commission of expenditure at the Showgrounds. Page 96 of the unconfirmed minutes of the Board meeting of 30 September 2003 under the heading “Reports – Saleyards/Showgrounds Foreman’s Report” states:

“Board directed Foreman to ease up on maintenance expenditure and just do the worst of the yards at the Saleyards by filling up potholes and that the major expenditure items listed will need to be spread out over the next few years.”.

No evidence was provided to support the statement that the applicant prepared the project in clear disregard for Board direction regarding priority of projects and reduction of expenditure. As already mentioned the Board minutes concerning expenditure related to the Saleyards not the Showgrounds site. No Board minutes were presented which relate to Board decisions regarding priority of project or reduction of expenditure.

The Commission has examined Exhibit 9 (Code of Discipline), Exhibit 10 (Code of Conduct), Exhibit 32 (Roma–Bungil Showgrounds and Saleyards Board Local Law No. 2 (Operation of Board’s Saleyards) 2000) and Exhibits 6A and 6B (Contract of Employment).

By his letter dated 30 October 2003 (Exhibit 15) and letter of 10 October 2003 (Exhibit 8), the CEO does not specify the clauses of the documents upon which the Board placed reliance.

Whether this garden was created as a necessary ground beautification or vegetable garden for training purposes, there is no doubt it created a great deal of discussion. The Commission is concerned that the Board has arrived at conclusions that the garden was created for a private purpose and that the applicant attempted to conceal such. There is no evidence supporting this conclusion. As revealed in the photographs (Exhibits 17 and 18) it was in an open paddock on the showground premises.

All such decisions are made by employees and there is no evidence to suggest the Board has approved a concept plan on which the employees relied. The applicant accepts that the decision to establish this garden without the concurrence of the Board was an error of judgement. During the hearing no reference was made to s. 508 of the *Local Government Act 1993* which provides for the preparation and adoption of an operational plan.

The correspondence and exhibits suggest that on initial observation the operations of the Board are administered in an appropriate manner within the framework of the relevant legislative instruments. The uncontested evidence presented during the hearing does not support the initial observations of the Commission.

Mr D. Kelly, Livestock Agent of Elders Limited, Injune, was the manager of Primac Elders, Roma until 19 September 2003. His evidence indicated that the Board administration policy and procedures lacked details. In response to questions regarding approvals for the sale on 16 October 2003, he advised he had no idea as it is something that happens every Thursday.

In evidence Mr Close outlined that he is an auctioneer within the meaning of the *Auctioneers and Agents Act*. From an administrative perspective he receives no advice from the Board regarding sale dates. He conducts the auctions on Tuesdays and Thursdays because it is custom and practice. In response to questions from the Commission he stated:

“Our job is to run sales and when we’re sort of informed in whatever manner it takes to be informed of those sales, we then conduct the sales. That’s my job to conduct sales, . . .”.

Ms T. Harvey, Saleyard Administration Officer has worked for the Board for 13 years. Ms Harvey is a very loyal employee whose evidence was of great assistance. Ms Harvey works in a difficult environment and the Board has not documented the procedures that should be followed for submitting applications and paying prescribed fees in accordance with the By-Laws. The evidence of Ms Harvey indicated that the sales proceeded as a result of approval by the CEO. The Commission was not provided with any Board file notes, financial material or documents to support such a decision.

On consideration of the evidence of Ms Harvey and Messrs Kelly and Close there is no doubt that the Board’s operations would benefit from the Board initiating a review to ensure there is compliance with legislation, local By-Laws, policies and procedures as well as ensuring that contemporary administrative and accounting practices are in place.

It was the submission of the Board that there were matters raised in evidence which leaves questions unanswered as the Board was unable to call Mr Saxvik as a witness. The Commission observes that Mr Saxvik was in attendance at meetings of the Board even though evidence was presented by Dr Wellwood regarding Mr Saxvik’s capacity to give evidence in these proceedings. The Board suggested that issues of conflict are outlined in paragraphs 15 and 20 of their submissions. In regard to the question of the applicant working whilst on sick leave, the Board did not provide any evidence either by means of documentation or otherwise regarding the appointment of persons to act in the position held by the applicant. An examination of relevant legislative and policy documents suggests that from a contemporary and accountability point of view documentation would have been necessary, e.g. if a person is acting in a position and was paid a higher allowance or given authorities such would have been recorded in writing to enable higher duties payments to be made. The Commission is satisfied that the evidence of Mr Saxvik in regard to his instructions would have assisted but the nature of such instructions would not have been to a level that warranted dismissal. In relation to other matters the Board was given the opportunity to respond in a manner they considered appropriate by means such as compliance with the Directions Order of 20 January 2004. In this regard the Commission has already outlined that the management of the hearing on the basis of the legislative instruments, Board decisions and policy decisions etc. could have been accomplished by the person performing the position of CEO being called upon to assist. As previously outlined the Commission conducted the hearing giving due weight to a consideration of the obligations and duties attaching to the position of CEO.

The Commission has given consideration to all the evidence and submissions presented during the hearing. The Commission has also been conscious of the fact that there were instances where Board submissions were not based on evidence.

The Commission is satisfied that the dismissal was unfair as it was harsh, unjust and unreasonable.

Reinstatement

In evidence the applicant advised that by decision of 22 July 2003 the Board adopted the concept of the single position of Foreman Showgrounds and Saleyards.

By submission of the respondent the Commission was informed that the permanent staff structure at the time of the termination was as follows:

“Chief Executive Officer, (W. Saxvik); Foreman Showgrounds and Saleyards (G. Hobbs); Senior Employee Saleyards (T. Beck); Senior Employee Showgrounds (T. Bannerman); and Weighbridge Operator (P/T).”.

The *Local Government Act 1993*, Chapter 16 provides for the corporate structure which must be approved. Section 1127 states:

- “(1) A local government must have a corporate structure appropriate for the conduct of its affairs.
- (2) The corporate structure must be approved by the local government by resolution.”.

The Commission acknowledges that Mr Bannerman advised in evidence he was Foreman for Bassett Park. Mr T.G. Beck advised that in April 2004 he became Saleyards Foreman. In submissions the Commission was advised that the position of Foreman Showgrounds and Saleyards Board had not been filled and no longer existed.

Even though the submission by the Board makes reference to a new structure, no evidence was presented to suggest that s. 1127 had been invoked to vary the permanent staffing structure. The structure that provides for the position of Foreman is still the corporate structure.

The Commission refers to *Auto Logistics Pty Ltd trading as Pacific Auto Auctions v Kovacs* (1997) (155 QGIG 320) wherein de Jersey P. considered the meaning of the word “impracticable”. He said, “That word does in my view bear its ordinary meaning, and it is not enough to establish impracticability, to show that restoration of employment would be merely inconvenient or difficult. As the dictionaries confirm, the word means practically impossible. See *Liddell v Lembke* (1994) 127 ALR 342, 360 and especially 367-8.”.

Mr Bannerman advised in evidence that he would leave if Mr Hobbs was reinstated.

The evidence by a witness with an adverse personal feeling towards another employee is not a reason that would prevent the Commission from invoking the reinstatement aspects of the application nor is it evidence to support the argument that reinstatement is impractical. Rather it would be a reason for an employer to invoke contemporary industrial practices to assist employees manage such difficulties.

Clause 4 (Performance Review) of the Contract of Employment (Exhibit 6A) provides for the signing of a performance agreement which determines the performance measure and the monitoring arrangement.

Clause 5 (Performance Review) of Contract of Employment (Exhibit 6B) provides for the annual performance review. The Commission acknowledges that except for agreement of salary, the parties had not prepared a contract for the position of Foreman Showgrounds and Saleyards. So be it, the agreement on which the employer/employee relationship was administered provided for formal monitoring which the Commission believed in accordance with public accountability would be recorded in writing and be available to the Acting CEO. No evidence was presented by the Board to suggest that performance factors precluded reinstatement.

In terms of s. 78 of the *Industrial Relations Act 1999* no evidence was presented by the Board to suggest reinstatement was impractical.

Accordingly, the Commission ordered that the Roma-Bungil Showgrounds and Saleyards Board reinstate Gordon Fassifern Hobbs to his former position of Foreman Showgrounds and Saleyards Board with conditions at least as favourable as the conditions on which Mr Hobbs was employed immediately before the dismissal. Furthermore, he was directed to be available to comply with the direction as soon as practical but no later than Monday 24 May 2004. He was directed to report to the Acting CEO who was directed to co-ordinate the implementation of the decision.

Remuneration

In response to the timetable outlined in the decision of 20 May 2004 an affidavit was received from the applicant on the afternoon of that date. On 26 May 2004 an affidavit on behalf of the respondent was received. On 28 May the Commission received correspondence from the applicant. The Commission accepts the contents of the material and affidavits provided by the parties. The Commission is not aware of any negotiations regarding the home previously occupied by the applicant.

The Commission orders that the Roma-Bungil Showgrounds and Saleyards Board pay an amount of \$27,918.20 to Mr Hobbs within 22 days of the date of release of this decision.

The Commission orders accordingly.

K.L. EDWARDS, Commissioner

Hearing Details:
2004 9, 17 March, 13, 14 April and 20 May
Released: 23 June 2004

Appearances:
Mr B. Wright of Jonathan Whiting & Associates on behalf of the applicant.
Mr R. Beer of Local Government Association of Queensland (Inc.) on behalf of the respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – application to amend award

**Queensland Independent Education Union of Employees AND Catholic Education Employing Authorities in Queensland
(Nos. B1732 of 2000 and B440 of 2001)**

SCHOOL OFFICERS' AWARD – NON GOVERNMENT SCHOOLS 2003

PRESIDENT HALL
COMMISSIONER BROWN
COMMISSIONER ASBURY

25 June 2004

AMENDMENT

This matter coming on for hearing before the Commission at Brisbane on 20 May, 21 and 25 June 2004, this Commission orders that the said Award be amended as follows as from 12 July 2004:

1. By deleting PART 3 (Communication, Consultation and Dispute Resolution) and inserting the following in lieu thereof:

“PART 3 – COMMUNICATION, CONSULTATION AND DISPUTE RESOLUTION

3.1 Grievance and dispute settling procedure

The matters to be dealt with in this procedure shall include all grievances or disputes between an employee and an employer (including disagreements arising from the review of the classification level attached to an employees position, which has been dealt with in terms of clauses 5.1.2 and 5.1.3 of this Award) in respect to any industrial matter and all other matters that the parties agree on and are specified herein. Such procedures shall apply to a single employee or to any number of employees.

- 3.1.1 In the event of an employee having a grievance or dispute the employee shall in the first instance attempt to resolve the matter with the immediate supervisor, who shall respond to such request as soon as reasonably practicable under the circumstances. Where the dispute concerns alleged actions of the immediate supervisor the employee/s may bypass this level in the procedure.
 - 3.1.2 If the grievance or dispute is not resolved under clause 3.1.1, the employee or the employee’s representative may refer the matter to the next higher level of management for discussion. Such discussion should, if possible, take place within 24 hours after the request by the employee or the employee’s representative.
 - 3.1.3 If the grievance involves allegations of unlawful discrimination by a supervisor the employee may commence the grievance resolution process by reporting the allegations to the next level of management beyond that of the supervisor concerned. If there is no level of management beyond that involved in the allegation the employee may proceed directly to the process outlined at clause 3.1.5.
 - 3.1.4 If the grievance or dispute is still unresolved after discussions mentioned in clause 3.1.2, the matter shall, in the case of a member of the Union, be reported to the relevant officer of the Union and the senior management of the employer or the employer’s nominated industrial representative. An employee who is not a member of the Union may report the grievance or dispute to senior management or the nominated industrial representative. This should occur as soon as it is evident that discussions under clause 3.1.2 will not result in resolution of the dispute.
 - 3.1.5 If, after discussion between the parties, or their nominees mentioned in clause 3.1.4, the dispute remains unresolved after the parties have genuinely attempted to achieve a settlement thereof, then notification of the existence of the dispute is to be given to the Commission in accordance with the provisions of the Act.
 - 3.1.6 Whilst all of the above procedure is being followed, normal work shall continue except in the case of a genuine safety issue.
 - 3.1.7 The *status quo* existing before the emergence of the grievance or dispute is to continue whilst the above procedure is being followed.
 - 3.1.8 All parties to the dispute shall give due consideration to matters raised or any suggestion or recommendation made by the Commission with a view to the prompt settlement of the dispute.
 - 3.1.9 Any Order or Decision of the Commission (subject to the parties’ right of appeal under the Act) will be final and binding on all parties to the dispute.
 - 3.1.10 Discussions at any stage of the procedure shall not be unreasonably delayed by any party, subject to acceptance that some matters may be of such complexity or importance that it may take a reasonable period of time for the appropriate response to be made. If genuine discussions are unreasonably delayed or hindered, it shall be open to any party to give notification of the dispute in accordance with the provisions of the Act.”.
2. By deleting clauses 5.1 to 5.4 inclusive of PART 5 (Wage and Wage Related Matters) and inserting the following in lieu thereof:

“PART 5 – WAGES AND WAGE RELATED MATTERS

5.1 Classification process

- 5.1.1 An employer shall determine the classification of a position through the following process.
 - (a) An analysis is to be undertaken to establish the skills and responsibilities required for each identified position and a position description written for each position.
 - (b) Each position is classified by reference to the classification criteria set out in clause 5.1.2 using the position description developed in accordance with clause 5.1.1(a).
 - (c) Employees are appointed to a position at the appropriate level within the structure and to a step in the level according to experience based on years of service as defined in clause 5.3.1.
- 5.1.2 If at any time an employee or an employer considers that the skills and responsibilities as required by the employer for a position have altered or do not reflect the classification determined, a review of the classification applicable to the position is to be undertaken in accordance with clause 5.1.1 and an appropriate classification determined. However, except in exceptional circumstances such as a change in the skill and/or responsibility required, or a change in the conditions under which the work is performed, no employee shall be permitted to seek a reclassification of their position on more than one occasion in a 12-month period.
- 5.1.3 Where a disagreement arises as to the outcome of a classification review, it will be dealt with under the grievance procedure contained in clause 3.1 of this Award. However, the process shall commence at clause 3.1.4. At any meeting specified in clause 3.1.4 the person who made the decision about the classification review shall, wherever possible participate.
- 5.1.4 *Classification criteria*

- (a) Classification criteria are guidelines to determine the appropriate classification level under this Award and consist of characteristics and typical duties and skills.
- (b) The characteristics are the principal guide to classification as they are designed to indicate the level of basic knowledge, comprehension of issues, problem and procedures required, the level of autonomy, accountability supervision/training involved with the position. The characteristics of a level must be read as a whole to gain an understanding of the position and the performance requirements. Isolated characteristics should not be used to justify the classification of a position.
- (c) The typical duties/skills are a non-exhaustive list of duties/skills that may be comprehended within the particular level. They reflect the competencies of a particular level. They are an indicative guide only and at any particular level employees may be expected to undertake duties of any level lower than their own. Employees at any particular level may perform/utilise one such duty/skill or many of them depending on the particular work allocated to them. Typical duties/skills should not be used as the primary determinant in classifying employees but may be useful if the characteristics of a level cannot be easily applied in an individual instance.
- Some of the Characteristics have been included in the Typical Skills/Duties at each level. Where there is inconsistency between the Characteristics and the Typical Skills/Duties, the Characteristics will prevail over the Typical Skills/Duties.
- (d) The key issue to be looked at in properly classifying an employee is the level of initiative, responsibility/accountability, competency and skill that an employee is required to exercise in performing the employee's work within the parameters of the characteristics, read as a whole, of the position.
- (e) It should be noted that some typical duties/skills appear at one level only while others appear at more than one level. Because of this, the classification or reclassification of a position needs to be done by reference to the specific characteristics of the level. As an example, because an employee may be utilising a skill comprehended at a higher level than that to which the employee has been appointed, the employee assumes the level of initiative, accountability/responsibility, skill and competency envisaged by the characteristics of the higher level.
- (f) Level 1 in the structure may be applied as a level at which employees learn and gain competency in the basic skills required by the employer. In the event that the increased skills/competency are utilised by the employer, progression through the structure may be possible.

5.1.5 Classification levels

Subject to the provisions of clause 5.4 all employees shall be classified into one of the following levels:

LEVEL 1 Range 88 – 94%

Level 1 in the structure may be applied as a level at which employees learn and gain competency in the basic skills required by the employer. In the event that the increased skills/competency are utilised by the employer, classification to higher levels within the structure may be possible.

A position shall be graded at this level where the principal characteristics of the position, as required by their employer are identified as follows:

Characteristics

The Characteristics are to be read as a whole

Supervision of Employee

- Work is performed under close supervision either as an individual or in a team environment.
- Work is regularly checked.
- Less direct guidance and some autonomy may be involved when working in teams.

Competency required for position

- Competency at this level involves application of knowledge and skills to a limited range of tasks and roles.
- There is a specific range of contexts where the choice of actions required is clear.
- Competencies are normally used within established routines, methods and procedures that are predictable.
- Judgment against established criteria is also involved.

Formal qualifications/experience

Junior certificate is the minimum formal qualification. No experience is required.

Typical duties/skills

The Typical Duties/Skills are subject to the Characteristics clause

- Perform a range of general clerical duties at a basic level, for example, filing, handling mail, maintaining records.
- Operate routine office equipment, such as, computer, photocopier, facsimile, binding machine, guillotine, franking machine, calculators, etc.
- Operate audio visual equipment at a basic level.
- Attend to front counter and refer enquires to the appropriate member of staff.
- Carry out minor cash transactions including receipting, balancing and banking.
- Monitor and maintain stock levels of stationery/materials for office/department within established parameters including reordering.
- Prepare and clean away materials for display/use in classroom or libraries under instruction of a higher level officer or member of the academic staff.
- Carry out minor maintenance of equipment and material.

LEVEL 2 Range 96 – 100%

An employee in a position at this level performs work above and beyond the skills of an employee in a position at level 1.
A position shall be graded at this level where the principal characteristics of the position as required by the employer are identified as follows:

Characteristics

The Characteristics are to be read as a whole

Supervision of Employee

- An employee in a position at this level works under direct and/or routine supervision depending on function.
- An employee's work is intermittently checked.
- Supervision may take the form of general guidance where working in teams is involved.
- Supervision may involve detailed instructions in some situations.

Supervision of Other Employees

- Within a team responsibility for some roles and coordination may be required.
- Provide guidance to other employees at a lower level.
- Provide assistance to less experienced employees at the same level.

Competency required for position

- Competency at this level involves application of knowledge and skills to a range of tasks and roles.
- There is a defined range of contexts where the choice of actions required is clear.
- There is limited complexity of choice of actions required.
- Competencies are normally used within established routines methods and procedures.
- Discretion and judgement about possible actions are involved in some cases.

Formal qualifications/experience

Junior certificate is the minimum formal qualification. No experience is required.

Typical duties/skills

The Typical Duties/Skills are subject to the Characteristics clause

- Perform a range of general clerical duties at a basic level, for example, filing, handling mail, maintaining records.
- Operate routine office equipment, such as, computer, photocopier, facsimile, binding machine, guillotine, franking machine, calculators, etc.
- Attend to front counter and refer enquires to the appropriate member of staff.
- Assist student learning, either individually or in groups, under the direct supervision of an academic staff member.
- Prepare and clear away materials for display/use in classrooms or libraries under instruction of a higher level officer or member of the academic staff.
- Process basic library transactions such as issues and returns, produce overdue lists, entry of orders in a computerised system, perform stocktakes, entering of accession information into computer.
- Operate and demonstrate the use of audio-visual equipment where there is limited complexity.
- Maintain a booking system for equipment use and organisation of repairs and replacement of equipment.
- Record audio/video programs and maintain a catalogue system of such recordings in accordance with established routines, methods and procedures.
- Carry out minor cash transactions including receipting, balancing and banking.
- Monitor and maintain stock levels of stationery/materials of an office/department within established parameters including reordering.
- Provide assistance with an academic programme where limited discretion and judgment are involved.
- Within a defined range of contexts, where the choice of actions is clear, maintain science equipment, materials and specimens.
- Under direct supervision, assist in design/demonstration of experiments and scientific equipment under the supervision of academic staff member.

LEVEL 3 Range 100 – 110%

An employee in a position at this level performs work above and beyond the skills of an employee in a position at level 2.

A position shall be graded at this level where the principal characteristics of the position, as required by the employer are identified as follows:

Characteristics

The Characteristics are to be read as a whole

Supervision of Employee

- An employee in a position at this level works under limited supervision.
- An employee's work may be checked in relation to overall progress.
- Supervision may take the form of broad guidance.
- A level of autonomy may be involved when working in teams.

Supervision of Other Employees

- Limited responsibility for the work of others may be involved.
- Team co-ordination may be required.
- Assistance and/or guidance may be provided to other employees.

Competency required for position

- Competency at this level involves application of knowledge with depth in some areas and a broad range of skills.
- There is a range of roles and tasks in a variety of contexts.
- There is some complexity in the extent and choice of actions required.
- Competencies are normally used within routines, methods and procedures.
- Some discretion and judgement is involved in selection of equipment, work organisation, services, actions and achieving outcomes within time constraints.

Formal qualifications/experience

Tertiary qualifications at certificate level or equivalent qualifications relevant to the position may be required or such knowledge, qualifications and experience that are deemed by the employer as necessary to successfully carry out the duties of the position.

Typical duties/skills

The Typical Duties/Skills are subject to the Characteristics clause

- Carry out a wide range of secretarial and clerical duties at an advanced level, including, typing, word processing, maintaining manual and computerised records, and shorthand.
- Handle administration enquires from staff/students/parents/public.
- Enter financial data into computer and prepare financial and management reports for review and authorisation by senior management.
- Prepare and process payroll within routines, methods and procedures.
- Carry out bank and ledger reconciliations.
- Maintain petty cash.
- Assist with preparation of internal and external publications.
- Provide administrative support to senior management. Arrange appointments and diaries and prepare confidential and general correspondence.
- Assist in the enrolment function including handling initial enquires and arranging interviews.
- Prepare government and statutory authority returns for authorisation under supervision.
- Provide academic programme assistance where some discretion and judgment are involved.
- Under supervision assist in the design/demonstration of experiments where some discretion and judgment are involved.
- Limited responsibility for the work of other assistants in a laboratory.
- Assistance and/or guidance may be provided for other assistants in a laboratory.
- Provide technical assistance in the operation of the library where some discretion and judgment are involved.
- Search and verify bibliographical data where some discretion and judgment are involved.
- Copy catalogue books, magazines, journals and recorded material, maintain library circulation systems.
- Produce display and publicity materials.
- Carry out liaison between the school, the student and the student's family where some discretion and judgment are involved.
- Assist staff and students in accessing library information where some discretion and judgment are involved.
- Assist staff and students in use of library equipment where some discretion and judgment are involved.
- Assist in supervision of students in the library where some discretion and judgment are involved.
- Assist student learning, where some discretion and judgment is involved, including evaluation and assessment, under the supervision of an academic staff member, of the learning needs of students.

LEVEL 4 Range 112 – 118%

An employee in a position at this level performs work above and beyond the skills of an employee in a position at level 3.

A position shall be graded at this level where the principal characteristics of the position, as required by the employer are identified as follows:

Characteristics

The Characteristics are to be read as a whole

Supervision of Employee

- Work is carried out under general supervision.
- Progress and outcomes sought are under general guidance.

Supervision of Other Employees

- The work of others may be supervised.
- Teams may be guided or facilitated.
- Responsibility for the work and organisation of others in limited areas.
- Training of subordinate staff may or may not be required.

Competency required for position

- Competency at this level involves the application of knowledge with depth in some areas and a broad range of skills.
- There is a wide variety of tasks and roles in a variety of contexts.
- There is complexity in the ranges and choice of actions required.
- Competencies are normally used within a variety of routines, methods and procedures.
- Discretion and judgement are required for self and/or others in planning, selection of equipment, work organisation, services, actions and achieving outcomes within time constraints.

Formal qualification/experience

Tertiary qualifications at certificate level or equivalent qualifications relevant to the position may be required by the employer or knowledge qualifications and experience as are deemed by the employers as necessary to successfully carry out the duties of the position.

Typical duties/skills

The Typical Duties/Skills are subject to the Characteristics clause

- Advanced application of computer software packages.
- Provide administrative support to senior management at a higher level than at level 3 where discretion and judgment are required.
- Initiate and handle correspondence, which may include confidential correspondence.
- Calculate and maintain wage and salary records for a large payroll utilising a variety of routines, methods and procedures.
- Apply inventory and purchasing control procedures, prepare monthly summaries of debtors and creditors ledger transactions and reconcile these.
- Control the purchase and storage function for a discrete department.
- Within a variety of routines, methods and procedures and with depth of knowledge in some areas, demonstrate to staff and students the use of complex audio visual or computer equipment.
- Within a variety of routines, methods and procedures and with depth of knowledge in some areas, monitor performance of and carry out repairs to specialised equipment.
- Within a variety of routines, methods and procedures and with depth of knowledge in some areas, supervise and maintain the hardware and software components of a computer network and provide user support.
- Assist student learning, either individually or in groups, under the general supervision of an academic staff member(s). Employees at this level are required to exercise discretion and judgment to modify education programmes to meet the learning needs of specific students.
- Carry out liaison between the school, the student and the student's family where discretion and judgement are required in relation to the planning, actions and achieving outcomes.
- Design and demonstrate experiments within a variety of routines, methods and experiences under the supervision of academic staff members where discretion and judgment are required.

LEVEL 5 Range 122 – 128%

An employee in a position at this level performs work above and beyond the skills of an employee in a position at level 4.

A position shall be graded at this level where the principal characteristics of the position, as required by the employer are identified as follows:

Characteristics

The Characteristics are to be read as a whole

Supervision of Employee

- An employee in a position at this level works under general supervision and/or broad guidance depending on function.

Supervision of Other Employee

- The work of others may be supervised.
- Teams may be guided.
- Responsibility for the planning and management of the work of others may be involved.
- Supervision and training of staff in lower level positions may or may not be involved.

Competency required for position

- Competency at this level involves self directed application of knowledge with substantial depth in some areas.
- A range of technical and other skills are applied to roles and functions in both varied and highly specific contexts.
- Competencies are normally used independently and both routinely and non routinely.
- Discretion and judgement are required in planning and selecting appropriate equipment, service techniques and work organisation for self and/or others.

Formal qualifications/experience

Tertiary qualifications at associate diploma/diploma level or equivalent qualifications relevant to the position may be required by the employer or knowledge, qualifications and experience that are determined by the employer as necessary to successfully carry out the duties of the position.

Typical duties/skills

The Typical Duties/Skills are subject to the Characteristics clause

- Provide executive support to senior management and associated committees concerning designated aspects of school management.
- Direct and supervise the work of other staff.
- Oversight the operations of the school's office and other administrative activities, in the areas of enrolment, equipment and statistical staffing returns.
- Ensure deadlines and targets are met. Prepare the accounts of the school to operating statement stage and assist in the formulating of period and year end entries.
- Provide specialist technical advice, direction and assistance in the employee's area of expertise using the application of knowledge gained through formal study/qualifications applicable to this level or knowledge and experience that are determined by the employer as necessary to successfully carry out the duties of the position in areas such as the operation of a library/resource centre, laboratory or information technology. This may also include developing the framework for and providing the instruction to students (within a structured learning environment) under the general supervision of an academic staff member/s.

LEVEL 6 Range 132 – 160%

An employee in a position at this level performs work above and beyond the skills of an employee in a position at level 5, demonstrating work of a professional nature.

A position shall be graded at this level where the principal characteristics of the position, as required by the employer are identified as follows:

Characteristics

The Characteristics are to be read as a whole

Supervision of Employee

- An employee at this level works under limited guidance in accordance with a broad plan or strategy.

Supervision of Other Employees.

- Responsibility and accountability is exercised within defined parameters, either for the supervision and monitoring of the work of employees of a lower level or for a defined work function.

Competency required for position

- Competency at this level involves the development and application of professional knowledge in a specialised area/s and utilising a broad range of skills.
- Competencies are normally applied independently and are substantially non-routine.
- Competency at this level involves the delivery of professional services within defined accountability levels.
- Employees may operate individually or as a member of a team.
- Significant discretion and judgement is required in planning, design, of professional, technical or supervisory functions related to services, operations or processes.
- Employees at this level are expected to plan their own professional development and such increased knowledge, relevant to the position held, will be applied to the work situation.

Formal qualifications/experience

Formal qualifications at degree level are required.

Typical duties/skills

The Typical Duties/Skills are subject to the Characteristics clause

- Operate and be responsible for a structurally and/or operationally defined section.
- Provide professional advice to staff and students in the officer's area of expertise.
- Prepare advice, reports, proposals or submissions for the senior executives of the school and/or outside bodies.
- Within defined accountability levels, perform professional activities which may include: Responsibility for planning and development of programs of structured learning activities; guidance and counselling services; and information services, within the employee's area of

expertise.

LEVEL 7 Range 163 – 175%

Level 7 will operate from a date to be determined by the Queensland Industrial Relations Commission. Further details in relation to Level 7 are contained in Schedule 1 of this Award.

5.2 Incremental advancement

- 5.2.1 Each level of the structure has varying pay steps which provide for yearly service increments within a level. Such increments are payable subject to satisfactory performance but will not be unreasonably withheld by the employer without due process.
- 5.2.2 For the purposes of establishing the entitlement of an employee to a yearly pay increment a year's service shall constitute 1976 hours of duty.
- 5.2.3 Progression from one level to a higher level is either by appointment to such higher level as a result of vacancy at that level or the employer requiring an employee to perform at a higher level in accordance with the classification criteria set out in clause 5.1.2.
- 5.2.4 An employee may be appointed to a higher level without having progressed through all paypoints within a lower level.

5.3 Recognition of previous service for salary purposes

- 5.3.1 Recognition of years of service for salary purposes shall include all previous service as a school officer within the non-government education industry at or above the classification level of the position to which the employee is appointed on and from the 27 February 1995.
- 5.3.2 The provision of documentary evidence of previous employment as a school officer shall be the responsibility of the employee in accordance with clause 4.5.2.
- 5.3.3 Notwithstanding the above other forms of documentary evidence may be accepted at the discretion of the employing authority.

5.4 Wages

5.4.1 Adults

The minimum rates of pay for adult employees per week in the Southern Division (Eastern District) shall be as follows:

Level	Step	Relativity	Award Rate Per Week \$
1	1	88	490.10
	2	90	498.50
	3	92	506.80
	4	94	515.20
2	1	96	523.50
	2	99	535.00
	3	100	542.20
3	1	100	542.20
	2	102	552.00
	3	107	571.40
	4	110	583.90
4	1	112	590.30
	2	115	602.80
	3	118	615.30
5	1	122	632.00
	2	125	644.50
	3	128	657.00
6	1	132	673.90
	2	139	703.90
	3	146	734.00
	4	154	764.50
	5	161	791.90
7	1	163	801.00
	2	166	813.90
	3	169	826.10
	4	172	838.60
	5	175	855.10

The percentage relativities column relates to percentages applying before the application of the \$8 arbitrated safety net adjustment made in accordance with the February 1994 Review of Wage Fixing Principles.

NOTE The rates of pay in this Award are intended to include the arbitrated wage adjustment payable under the 1 September 2003 Declaration of General Ruling and earlier Safety Net Adjustments and arbitrated wage adjustments. [Disputed cases are to be referred to the Vice-President.] This arbitrated wage adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated

by this Award which are above the wage rates prescribed in the Award. Such payments include wages payable pursuant to certified agreements,

currently operating enterprise flexibility agreements, Queensland workplace agreements, Award amendments to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

Increases made under previous State Wage Cases or under the current Statement of Principles, excepting those resulting from enterprise agreements, are not to be used to offset arbitrated wage adjustments.

5.4.2 Juniors

The rates of pay for junior employees at Level 1 only shall be as follows:

	Percentage of appropriate adult minimum rate
	%
15 and under 16 years of age.....	45
16 and under 17 years of age.....	50
17 and under 18 years of age.....	55
18 and under 19 years of age.....	65
19 and under 20 years of age.....	75
20 and under 21 years of age.....	85

Juniors appointed to level 2 positions or above shall be paid the appropriate rate for that level.”.

3. By adding a new Schedule 1 to the Award as follows:

“SCHEDULE 1

- 1 (a) The Characteristics, Formal Qualifications/Experience and Typical duties/skills for Level 7 employees (to be inserted into this Award *by consent*) will be as follows:

LEVEL 7

An employee in a position at this level performs work above and beyond the skills of an employee in a position at level 6.

A position shall be graded at this level where the principal characteristics of the position, as required by the employer are identified as follows:

Characteristics

The Characteristics are to be read as a whole

Supervision of Employees

- An employee in a position at this level is accountable to the school or college administration for the conduct of their work.
- Within the constraints set by management, an employee works autonomously and is responsible for the professional content of the work performed.

Supervision of Other Employees

- An employee at this level may be required to provide active supervision of and be responsible for other staff.

Competency required for position

- Within constraints set by management, employees exercise initiative in the application of professional practices demonstrating independent discretion and judgment, which may have effect beyond a work area.
- An employee at this level is expected to carry out a high proportion of tasks involving complex, specialised or professional functions.

Formal Qualifications/Experience

Formal qualifications at degree level are required, along with relevant post graduate qualifications or extensive and relevant experience, as required by the employer, to reflect higher levels of professional outcomes.

Typical Duties/Skills

The Typical Duties/Skills are subject to the Characteristics clause

- Undertake more complex professional activities above and beyond those required in Level 6, involving the selection and application, based on professional judgement, of new and existing techniques and methodologies.
- Provide advice to the senior executive of the school on the operational and/or future directions of the employee’s section and to contribute to the development of that section in the educational context of the school. Such advice may be given in specialist areas.

- 1 (b) The operative date for implementation, the rates of wages and any provisions relating to partial exemption from Part 6 (Hours of Work, Breaks, Overtime, Shift Work, Weekend Work) of this Award for Level 7 employees will be determined by the Queensland Industrial Relations Commission.”.

Dated 25 June 2004.

By the Commission,

Operative Date: 12 July 2004

[L.S.] G.D. SAVILL,
Acting Industrial Registrar.

Amendment – Dispute Resolution, Wages
Released: 30 June 2004

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999

NURSERY AWARD – STATE 2003

(Gazette 17 October 2003)

(AR133 of 2002)

DEPUTY PRESIDENT SWAN
COMMISSIONERS EDWARDS AND BECHLY

30 June 2004

AWARD REVIEW
(Correction of Error)

WHEREAS an error occurred in the Award as published in the *Queensland Government Industrial Gazette* of 17 October 2003, Vol. 174, No. 7, pages 608-624, the following correction is made to be effective as from 29 September 2003:

By deleting clause 5.5.3(b) and inserting the following in lieu thereof:

“(b) ‘Eligible employee’ means all:

- (i) full-time employees; and
- (ii) casual employees regularly working 8 hours per week or more in any one week; and
- (iii) trainees engaged under an appropriate Traineeship Industrial Agreement.

Where the employee has had 6 months’ service including regular working in terms of clause 5.5.3(b)(ii) above which averages 8 hours per week or more, in the employment of the employer and where the 3% contribution of such employee has averaged more than \$2.59 per week for such 6 month’ service.

Contributions are payable in accordance with 5.5.2 upon attainment of the qualifying period but are not retrospective.”.

Dated 30 June 2004.

G.D. SAVILL,
Acting Industrial Registrar.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s.125 – application for amendment

**LESF Pty Limited AND Australian Municipal, Administrative, Clerical and Services Union,
Central and Southern Queensland Clerical and Administrative Branch, Union of Employees and Others
(No. B883 of 2004)**

CLERICAL EMPLOYEES AWARD – STATE 2002

COMMISSIONER BECHLY

AMENDMENT

22 June 2004

THIS matter coming on for hearing before the Commission at Brisbane on 22 June 2004, this Commission orders that the said Award be amended as follows as from 22 June 2004:

By deleting clause 5.8.4 and inserting the following in lieu thereof:

“5.8.4 *For the purposes of this Award, an approved fund shall be*

- (a) Australian Retirement Fund.
- (b) Clerical Administrative and Retail Employees Superannuation Plan (CARE).
- (c) Sunsuper.
- (d) As to employees working in the legal industry, including employees of legal practices howsoever constituted, internal legal departments, the Queensland Law Society and the Law Council of Australia, the fund known as the Law Employees Superannuation Fund (howsoever named from time to time).
- (e) Any named fund as is agreed to between the relevant employer/Union parties to this Award and as recorded in an approved Industrial Agreement.
- (f) In the case of a minority group of employees of a particular employer, any industry, multi-industry or other fund which has been approved in an award or an agreement approved by an Industrial Tribunal whether State or Federal jurisdiction and already had practical application to the majority of award employees of that employer.

- (g) As to employees who belong to the religious fellowship known as the Brethren, who hold a Certificate issued pursuant to section 115 of the Act and are employed by an employer who also belongs to that fellowship any fund nominated by the employer and approved by the Brethren.
- (h) Any fund agreed between an employer and an employee who holds a Certificate issued pursuant to section 115 of the Act where membership of a fund cited in an award would be in conflict with the conscientious beliefs of that employee in terms of section 115 of the Act.
- (i) In relation to any particular employer, any other established fund to which that employer was already actually making regular and genuine contributions in accordance with clause 5.8.2 on behalf of at least a significant number of that employer's employees covered by this Award as at 29 September 1989 and continues to make such contribution.
- (j) The employer and employee may agree to have the employee's superannuation contributions made to an approved superannuation fund, other than those specified in this Award.
 - (i) Any such agreement must be recorded in writing and signed by the employer and employee and kept on the employee's file.
 - (ii) A person must not coerce someone else to make an agreement.
 - (iii) Such agreement, where made, will continue until such time as the employer and employee agree otherwise, and shall be made available to relevant persons for the purposes of sections 371 and 373 (time and wage records) of the Act.
 - (iv) Any dispute arising out of this process will be handled in accordance with the grievance and dispute settlement procedure in this Award."

Dated 22 June 2004.

By the Commission,
[L.S.] G.D. SAVILL,
Acting Industrial Registrar.

Operative Date: 22 June 2004
Amendment – Superannuation
Released: 25 June 2004