



The Queensland Government Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$358.62 (GST inclusive)

ISSN 0155-9362

Vol. 176

FRIDAY, 30 JULY, 2004

No. 14

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
CA301/04	Trexway Pty Ltd – Certified Agreement 2003-2005	13/7/04	

G.D. SAVILL
Acting Industrial Registrar

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 699 – obsolete industrial instrument

ACTING INDUSTRIAL REGISTRAR

21 July 2004

NOTICE
(Correction of Error)

WHEREAS an error occurred in the Notice as published in the *Queensland Government Industrial Gazette* of 19 December 2003, Vol. 174, pages 1445-1454, the following correction is made to be effective as from 19 December, 2003:

By deleting the following from the Schedule to the Notice:

IA77/95 WOODFORD CORRECTIONAL CENTRE EMPLOYEES INDUSTRIAL AGREEMENT (1996) 151 QGIG 444

Dated 21 July 2004.

G.D. SAVILL,
Acting Industrial Registrar.

INDUSTRIAL COURT OF QUEENSLAND

Workplace Health and Safety Act 1995 – s. 164(3) – appeal against decision of industrial magistrate

Central Scaffolding & Rigging Services Pty Ltd AND Glenn Shane Verrall (No. 2) (No. C106 of 2003)

PRESIDENT HALL

DECISION

15 July 2004

By decision of 2 February 2004 now reported at 175 QGIG 578, I dismissed an appeal against the decision of an Industrial Magistrate on a prosecution under the *Workplace Health and Safety Act 1995*. All questions as to costs were reserved. The respondent subsequently sought costs.

With a view to expedition and frugality, directions were issued for submissions in writing. The respondent complied with the directions. The appellant did not comply with the directions. Notwithstanding that the appellant was subsequently served with a letter over the signature of the Acting Industrial Registrar reminding the appellant of its obligation to file submissions and notifying the appellant that, if need be, the matter would be determined in the absence of submissions from the appellant – no submissions from the appellant have been received.

The power to award costs against an unsuccessful party on a prosecution under the *Workplace Health and Safety Act 1995* does not arise under that Act but under s. 335 of the *Industrial Relations Act 1999*, compare *Golden Video Pty Ltd v. Chief Executive, Department of Employment and Training Industrial Relations* (2000) 164 QGIG 298 and *Marfleet v. The Brisbane City Council* (2000) 164 QGIG 362.

Materially, it is necessary for the appellant to show that the appeal was launched “vexatiously” or “without reasonable cause” relevantly. An appeal will be held to be launched without reasonable cause if it is launched in circumstances in which it has no reasonable prospect of success, compare *Marfleet v. The Brisbane City Council* (2000) 164 QGIG 362.

This is such a case. The appeal was based on argument about s. 165 of the *Workplace Health and Safety Act 1995* which was abandoned at the hearing, and on a submission about the Industrial Magistrate’s rejection of an application for further and better particulars which, to succeed, would have required this Court to reverse each of three recent decisions upon the same point.

The submission about failure to order further and better particulars was not based on an argument that the earlier decisions were given *per incuriam* but, on the very argument previously rejected. The decisions are all reported: see *Parr v. NQEA Australia Pty Ltd* (2001) 167 QGIG 913, *Newman v. Holyoak Industries (Qld) Pty Ltd* (2002) 171 QGIG 390 and *Bowpark Pty Ltd v. Williams* (2003) 174 QGIG 531.

I can think of no reason to decline to exercise the discretion at s. 335 of the *Industrial Relations Act 1999*. An appellant is entitled to challenge a line of authority, but a respondent should not be exposed to the costs of an audacious challenge which fails.

I order that the appellant pay the respondents’ costs of and incidental to the appeal. In the absence of argument between the parties the costs are to be assessed by the Industrial Registrar in the same way as if this had been a Supreme Court matter.

Dated 15 July 2004.

D.R. HALL, President.

Appearances:

Ms J. Cameron of the Division of Workplace Health and Safety
for the Respondent.

Released: 15 July 2004

No appearance for the Appellant.

#####

INDUSTRIAL COURT OF QUEENSLAND

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

Woolworths Limited (Fruitex-Richlands) AND the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (No. C38 of 2004)

PRESIDENT HALL

15 July 2004

DECISION

This is an appeal against a decision of the Queensland Industrial Relations Commission now reported at 176 QGIG 147. The critical issues before the Commission were:

- (a) whether the now appellant’s dismissal of a Mr Stephen Barker was harsh, unjust and reasonable; and
- (b) if the answer to (a) was affirmative, whether Mr Barker’s reinstatement was practicable. The appellant failed on both issues.

The Commission’s summary to the background of the application was both accurate and sufficiently brief to warrant reproduction:

“The events leading to Mr Barker’s dismissal are not substantially in dispute. On or about 26 June 2003 Mr Barker injured his back in the course of lifting a box of cauliflowers above his head to a height of approximately seven feet. Mr Barker slipped backwards and felt a sharp pain in his lower back. As a result of this injury Mr Barker made an application for worker’s compensation. The treating medical practitioner identified Mr Barker as suffering an L5 lumbar strain caused by the lift. Mr Barker was certified as being totally incapacitated until 2 July 2003 when he was able to return to work on restricted duties. He continued on those restricted duties until 21 August 2003 when he was certified fit to resume his pre-injury duties.

On 26 October 2003 Mr Barker suffered a recurrence of his earlier injury as a result of lifting a box of carrots. Mr Barker did not report the injury that day as he had been told to expect his back pain to recur periodically as a result of the earlier injury. However, the next day Mr Barker sought medical attention as he was seriously incapacitated. As a result Mr Barker’s duties were again restricted, this time to visual inspections and clerical work only.

Mr Barker remained on restricted duties until 28 November 2003 when he was certified fit to resume his pre-injury duties. His certificate noted that further treatment was still required.”

Immediately prior to his return to work Mr Barker was interviewed by a Mr Dalton. Mr Dalton is the Proprietor of Jimbale Pty Ltd t/a Work Place Injury Advisory Services, a company which consults with the appellant as a Rehabilitation Case Manager and to whose case list, Mr Barker had been allocated.

Mr Dalton decided to seek the opinion of Dr English, an Orthopaedic Surgeon. Dr English’s report, which was addressed to the appellant, came into the hands not of Mr Dalton but of Ms Pashen (relevantly) the employee with managerial responsibility for the appellant’s rehabilitation section. Ms Pashen prepared an email succinctly summarising the report and sent the email to Mr Barker’s immediate line supervisor, viz., Mr Patterson. The email was in the following terms:

“Russell,

As you are aware this man has a current workers’ compensation claim for a back injury. I have just been made aware of a recent medical report regarding his condition. Dr Hugh English, and Orthopaedic Specialist, requested that we obtain a MRI examination of Stephen’s spine. This has shown that he has degenerative change, which is suggestive of old trauma. Based on this finding Dr English has indicated that he would be at risk for further episodes of aggravation. Dr English also states that Stephen should avoid repetitive lifting and bending in the long-term. I therefore have concerns about his capacity to continue to work as an order-assembler in the long term, given our responsibilities under the Workplace Health and Safety Act. If you require any further information regarding this matter, please feel free to give me a call.”

It has been the respondent’s submission on the appeal that so far from being a communication about Mr Barker’s rehabilitation, the email was a document designed to initiate a process by which the termination of Mr Barker’s employment was managed. Howsoever that may be, it is clear that the email was a (very) inaccurate summary of Dr English’s report. The report (formal parts omitted) was in the following terms:

“Mr Barker underwent MRI examination of his lumbar spine on 18 December 2003. A copy of the report is attached for your records. MRI demonstrates degenerative change with disc desiccation at L1-2 disc and an infraction of the inferior end plate of L1. This is suggestive of past trauma or overload to the spine, however, this injury is at least several years old.

I believe Mr Barker has experienced an aggravation of degenerative changes within his lumbar spine, rather than a musculo-ligamentous injury. There is no evidence of disc prolapse or new structural injury. In view of the degenerative changes at this young age, I think Mr Barker would be wise to consider a change of career in the medium to long-term. He would certainly be at risk for further episodes of aggravation. No specific treatment rehabilitation is likely to be of benefit at present, however, if a further aggravation spinal rehabilitation program may be of benefit to improve his knowledge and care of spine. I would be concerned that Mr Barker should avoid repetitive lifting and bending in the long-term.”

It is apparent from the decision at 176 QGIG 147 that the Commission treated the report as a medical opinion that Mr Barker faced potential problems in the medium to long-term if he continued in the calling within which he was engaged but, that there was no present impediment to his return to normal duties.

Coupling that evidence with the opinion of the treating doctor and the evidence of Mr Barker the Commission went on to find that it was harsh, unjust or unreasonable for the appellant to dismiss Mr Barker on the ground that his medical condition presently and permanently prevented him from undertaking his normal pre-injury duties.

The view taken by the Commission seems to me to have been reasonably open. In particular, the conclusion that there was no present need for Mr Barker to be given the benefit of an education about the care and rehabilitation of his spine indicate absence of immediate threat. The appellant’s contention that the report suggests frequent aggravation of Mr Barker’s existing condition in the immediate future seems to me to be artificial and strained. The passage in the transcript of the evidence of Dr English to which I have been taken, which were not responsive to the questions asked, seems to me to go no further than suggesting that a person with Mr Barker’s history was more likely to experience incidents of aggravation than a person without that history.

In any event, the test of whether a conclusion was “reasonably open” is appropriate on an appeal by way of re-hearing. Here, it is necessary for the appellant to show that the Commission erred in law or exceeded its jurisdiction. The conclusions of the Commission being based on evidence and being neither perverse nor untenable are not impeachable on those grounds.

The Commission developed an alternative basis for its decision founded on the proposition that the use made of Dr English’s report contravened s. 110 of the *Workers’ Compensation and Rehabilitation Regulation 2003*. It is unnecessary to determine the point, since resolution of the point may require a finding about the true purpose of the email, it is better that I say no more than that the commission was not obviously correct. However, I should record that the debate about the confidentiality of information obtained during rehabilitation has raised issues:

- (a) about the extent to which an employer and a Workers Compensation Insurer, who are presumably parties to a contract *uberrimae fidei*, may exchange information about a worker;
- (b) about the extent to which information about a worker undergoing rehabilitation may be circulated with an employers’ enterprise;
- (c) about whether the use of the noun “insurer” at s. 110(3) places a self insurer in a special position; and
- (d) about the interpretation of the duties under the *Workers’ Compensation and Rehabilitation Regulation 2003* and the duties under the *Workplace Health and Safety Act 1995*.

The issues may be better resolved by policy makers than by lawyers.

It was for those reasons that on 13 July 2004 I dismissed the appeal.

Dated 15 July 2004.

D. R. HALL, President.

Appearances:

Mr P. Rashleigh instructed by Deacons Solicitors for the Appellant.

Mr J. Murdoch SC, instructed by Sciacca’s Lawyers for the Respondent.

Released: 15 July 2004

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s.156 – certifying an agreement

The Pine Factory – Certified Agreement 2004 (CA285 of 2004)

COMMISSIONER BLADES

15 July 2004

Certified Agreement – Application for approval of – “No-disadvantage” test – Cashing out of sick leave entitlement – Employees employed since 1 October 1999 have no accrued sick leave – Held a reduction in entitlements and not in the public interest – Agreement returned to parties for amendment.

DECISION

S:\QIRCDEV-BASE\QGIG\2004\VOL 176\NO.14 30.07.04.DOCno.14 30.07.04

Pine F Holdings Pty Ltd and the employees of the company seek the certification of *The Pine Factory – Certified Agreement 2004*. The Agreement is intended to replace the *The Pine Factory – Certified Agreement 1999 (CA161 of 1999)*, which was originally certified on 29 April 1999 but substantially amended by way of an approval issued on 8 December 1999. A problem arises as to the application of the “no-disadvantage test” to the provisions of the Agreement which result in the cashing out of sick leave entitlements.

Employees are offered three options for sick leave. Option 1, which is carried over from the *The Pine Factory – Certified Agreement 1999* provides that employees will be paid their sick pay weekly at a rate calculated at 8 days per annum. Under Option 2, employees are to provide details of a bank account separate from their normal wages deposit account and the sick pay at the above rate will be deposited to that account weekly. Under Option 3, sick pay at that rate is to be deposited into individual employee superannuation funds as an employee contribution.

The option to cash out sick leave was first approved by the Commission when the *The Pine Factory – Certified Agreement 1999* was amended on 8 December 1999 and provided in clause 3.2(a) that “Sick pay will be paid weekly with wages...” and that payments would commence on 1 October 1999. It would appear that no reasons were published for the approval. However, of some significance at that time was that all accrued sick leave up to a maximum of 20 days accumulated prior to 1 October 1999 was preserved and able to be accessed at some later stage. The relevant clause (3.2) in that amended Agreement read:

“(c) Accrued sick leave prior to 1st October, 1999 will be preserved and will be able to be accessed in the following manner. 152 hours (20 days) held for later use and any excess balance may be paid out, in five 5 day increments over subsequent annual Christmas holiday periods or by arrangement between the employee and employer until extinguished.”

That position is still retained in the *The Pine Factory Certified – Agreement 2004* but the difference is that there is a number of employees who have commenced work since 1 October 1999 and obviously, have no accrued sick leave at all on which to fall back.

The argument advanced by Mr Loane for the company on 2 November 1999 on the occasion of proceedings involving the amended certified agreement made reference to a Federal Award, probably the *Furnishing Trades - General - Victoria, South Australia and Tasmania Award 1998* which authorised the cashing out of sick leave – see clause 35.3.7(a). But of some significance to this application is that that Award required 3 days of the 8 day annual entitlement carry over into the following year. It was not the case that an employee could cash out the whole 8 day entitlement.

Section 160 of the *Industrial Relations Act 1999* (the Act) provides:

“160 When an agreement passes the no-disadvantage test

- (1) An agreement passes the no-disadvantage test if it does not disadvantage employees in relation to their employment conditions.
- (2) An agreement disadvantages employees only if the commission considers it would result in a reduction in the employees’ entitlements or protections.
- (3) ...
- (4) Subsection (2) does not apply if the commission considers that, in the context of the employment conditions considered as a whole, the reduction is not against the public interest.
- (5) ...
- (6) In this section –
 - ‘entitlements or protections’ means the entitlements or protections under –
 - (a) a relevant award, designated award, industrial agreement or order under chapter 5, part 5; or
 - (b) chapter 2, including as reviewed by a general ruling of the full bench.”

Sick leave entitlement is to be found in s. 10 of the Act (in Chapter 2) and generally means 8 days for each completed year of service and *pro rata* otherwise. Sick leave accumulates unless an industrial instrument provides otherwise [ss. (6)].

It is my view that to permit the cashing out of the whole of the sick leave entitlement without some “reserve” is a reduction in an employee’s entitlements and is not in the public interest.

In this regard, reference is made to an *obiter* statement by his Honour the President in *Wade Sawmill Pty Ltd v Ussher* (2003) 173 QGIG 1029, a statement which is not binding but which clearly deserves appropriate respect:

“Notwithstanding that the current Certified Agreement relevantly reproduces earlier certified agreements and with due respect to those who have certified them, there is an issue about whether a ‘cashing out’ clause which does not require the preservation of a minimum quantity of leave in the ‘leave bank’ can satisfy the no disadvantage test.”

The Agreement does not preserve any period of sick leave except that which was preserved as at 1 October 1999 and remains unused at this date. The Options allow for payment in various forms to be made to employees and in the event of illness or non-work related injury, employees who have no banked sick leave would be entirely unprotected for it is unlikely that the employee would make any provision for that eventuality. That does not appear to be in the public interest. In the words of Fisher C in *John Goss Electrical Pty Ltd v The Employees of John Goss Electrical Pty Ltd* (1998) 158 QGIG 218, “Australians are not noted for being prodigious savers”.

There is also a public interest argument whether an employee should not be able to access Centrelink allowances for sick leave benefits already paid to that employee. The Commission is not aware at what stage Centrelink benefits commence but the possibility of a double dipping might well arise, depending on Centrelink rules. (Why should the community pay sickness benefits to an employee who has cashed in their sick leave entitlement?). The Company points to clause 3.2.1 in the proposed Agreement, reproduced from the 1999 version which provides:

“(f) An employee who has no accrued sick leave and becomes absent from work due to illness and is not eligible for government assistance may ask the company to review their case with the view of giving financial or other assistance, depending on their length of service and personal circumstances.”

While employee evidence was that this is a caring Company, the provision really means nothing.

Some level of sick leave benefit should be retained to cater for unforeseen circumstances. The certification of the previous Agreement is easily distinguished by the then requirement to carry forward up to 20 days entitlement. Employees commencing work since that previous Agreement was certified (and there are some) have no preserved sick leave at all.

Otherwise I have considered that the Agreement meets the “no-disadvantage test” and complies with other provisions of the Act. I indicate to the parties that I am prepared to certify the Agreement should an additional sentence be included at clause 3.2 “Sick Pay” to the following (or similar) effect:

“The operation of this clause is subject to at least 5 days’ sick leave entitlement having accrued to and remaining available to the employee.”.

The matter will be re-listed upon notification of the intentions of the parties.

There is a further short matter to be mentioned. At the conclusion of the hearing, Mr Reeves produced a document he claimed was an Enterprise Flexibility Agreement signed by three employees covered by the *Transport, Distribution and Courier Industry Award – Southern Division 2003* for approval. The three employees requested to be included under the terms and conditions contained in this new Certified Agreement. Mr Reeves was unable to point to any provision of the Act which authorised such a procedure. Indeed such a procedure may not have been found under the former *Workplace Relations Act 1997*. It would seem that any Enterprise Flexibility Agreements under earlier legislation have now well and truly expired and there is no intention to regurgitate the practice. Some authority will need to be cited for the procedure claimed. Both Awards, i.e. the *Furniture and Allied Trades Award – State 2003* and the *Transport, Distribution and Courier Industry Award – Southern Division 2003* have an “Enterprise flexibility” clause at 2.1. However, under clause 2.1.3, any proposed genuine agreement is to be submitted to the Commission in accordance with Chapter 6 of the Act. Chapter 6 refers to Certified Agreements and Queensland Workplace Agreements. In the absence of authority, the oral application is dismissed.

B.J. BLADES, Commissioner.

Hearing Details:

2004 13 July

Released: 15 July 2004

Appearances:

Mr M. Reeves, for the Furnishing Industry Association of Australia (Queensland) Limited Union of Employers, with him Ms J. Macombie, for Pine F Holdings Pty Ltd t/a The Pine Factory.

Mr J. Smith, Employee Representative.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**The Australian Workers’ Union of Employees, Queensland (Eric Collis) AND QNI Pty Ltd
(No. B114 of 2004)**

COMMISSIONER BECHLY

DECISION

20 July 2004

The Applicant in this matter Mr Eric Noel Collis was initially employed by the respondent QNI Pty Ltd as a temporary refinery worker from 18 April 2000 at its refinery at Yabulu. This employment was expected to cease on or before 20 October 2000. The temporary employment was later converted to permanent employment. Except for a transferral to “other duties” as a result of a medical condition Mr Collis at all times worked in what is known as the 330 area, if only for a limited time. The precise place of work is not referred to either in the letter of offer of employment of 11 April 2000, the letter of 16 June 2000 confirming an offer of appointment as a temporary refinery worker or the letter of 11 August confirming that a probationary period had been successfully completed.

Mr Collis’ employment was terminated on 12 January 2004 by written advice by way of payment of four weeks’ wages in lieu of notice. The impending termination was known to Mr Collis prior to 12 January 2004 as a result of meetings to consider his capacity to perform work for which he was engaged but which had diminished because of an illness.

During the proceedings it became apparent that material which ordinarily should have been available for discovery had not been listed. The Australian Workers’ Union of Employees, Queensland (AWU) sought further discovery of relevant material thought to be in the possession of the respondent. Further material was provided to the Commission by both parties following the hearing and an opportunity given for submissions to be made on that material. The parties decided that no further submissions would be made on the new material. That material forms part of the case before me.

Inspections of the site were held on 18 May 2004 to familiarise the Commission with the various work areas.

Mr Collis underwent three performance assessments in the first three months of employment and rated very highly. On all except one area of assessment he rated at the top level. In that one assessment he rated at the “satisfactory” level in one area. That area, “work performance” returned to the highest level of standard of assessment in the final report.

A distilled summary of the history of Mr Collis’ employment and medical history follows:

After twelve months on shift work Mr Collis was transferred to day work. This resulted in loss of shift penalty of about \$200 per week. About a month after this event Mr Collis complained of skin irritation and subsequently made a WorkCover Claim. A rehabilitation program was introduced with work being provided away from the heat and dampness of the production environment. At least two separate rehabilitation programs were undertaken and Mr Collis returned to production operations on three occasions but the skin irritation reoccurred on return to the plant area. Several WorkCover claims about the skin irritation were made by Mr Collis over the period and benefits were paid, however in November 2002 the then existing claim was ceased by WorkCover. An appeal was later lodged and that appeal rejected. Several months later his employment was terminated.

One facet of one of the claims for WorkCover was that the change to day work from shift work caused stress because of difficulties encountered in making repayments on a house purchased by Mr Collis subsequent to his employment.

The QNI Yabulu Refinery Enterprise – Certified Agreement provides at clause 31.4 that employees who have worked continuous shift work for two or more years prior to transferring to day work must receive three months’ notice of transfer or be paid at shift work rates if less than three months’ notice is given.

Mr Collis had not worked on shift work for two years. However, following representation from the AWU on his behalf, the company agreed to continue to pay the shift loading from the time he was transferred off shift. This payment continued for a period of two years.

Mr Collis applied for various positions advertised by the company during this period but was unsuccessful. The respondent’s evidence is that it also considered him for a number of other positions as they arose and for which it was not necessary for him to apply as all his details were on record. It is the company’s evidence that there were no positions available suited to Mr Collis’ capabilities.

Subsequent to the termination Mr Collis was successful in gaining a position as a rigger apparently in a temporary or casual role working for a contractor on the Yabulu site. There was an implication proposed in the material for Mr Collis that the respondent somehow was involved in Mr Collis' cessation in that role. The matter was raised in cross-examination of the respondent's witnesses. There was no evidence that the respondent played any part in that termination.

There appears to have been some difference in opinion between treating doctors as to just what was the medical condition suffered by Mr Collis. It seems that the first diagnosis on 18 November 2001 had Mr Collis suffering from Psoriasis. Other specialist medical assessment in March 2002 advises that he is suffering from Vesicular Dermatitis and that Psoriasis is never a Vesicular condition. Later medical certification indicates that Mr Collis is suffering either from an unnamed medical condition or Psoriasis.

Whatever the condition was there is no doubt that it was exacerbated by the environment in the production area. A medical report of 2 September 2003 indicates that the most likely outcome of a return to the production area is a major flare-up necessitating a withdrawal from that line of work and permanent disablement. The report indicated that Mr Collis could reasonably choose either to go back to the production job or not.

Of some interest are aspects of a report by a Review Officer of the Workers Compensation Regulatory Service of Queensland of 6 November 2002 which is contained in the additional material provided as a result for the request for further discovery. Various aspects of that report would have some relevance to the matter before me but the most relevant is that some fourteen years previously Mr Collis had been treated for exactly the sort of problem he complained about in the hot processing plant. A further extract from a medical report contained in that document indicates that Mr Collis "has a skin condition probably caused by exposure at work. There is no evidence of aggravation or causation by stress. An alternative medical opinion is that [Mr Collis] has a constitutional skin condition which has been aggravated by the physical environment, not by stress."

There have been a number of meetings between the respondent's management and the AWU representing Mr Collis. Over time the issues under discussion ranged through retention of the shift loading, rehabilitation programs, alternative jobs and finally the intent to terminate Mr Collis' employment. There was full and open discussion on these issues. The projected termination was known well in advance.

The matter to be determined is whether the action to terminate the employment was harsh, unjust or unreasonable, or for an invalid reason. It was argued, amongst other things, that the termination ran counter to the BHP Billiton Guide to Business Conduct, a guide which is binding on the employer and which forms part of the contract of employment. The guide forms part of the Induction Manual and thus forms part of the contract between the parties.

That guide provides various standards to be observed by the company and its employees in the conduct of business ranging through occupational health and safety, employment, business standards, discrimination, international standards to be observed and ethical standards to be adopted.

There appears to have been no breach of any of the standards required to be observed in that publication. To the contrary Mr Collis appears to have been given every reasonable consideration in his employment. The payment of the shift loading for several years while employed on day work highlights the respondent's application of required policies.

It is abundantly clear that Mr Collis suffered from a medical condition and has for a good many years, which was exacerbated by the production environment in which he was required to work. Although there was a diminution of the condition when he was employed on rehabilitation duties the condition was never wholly cured. Mr Collis was still suffering from the condition at the time of the hearing many months after the last time he worked in the production environment.

The final medical advice was that the most probable effect of a return to the production work was permanent damage to Mr Collis. That report also indicated that Mr Collis may choose to take that risk. The respondent on the other hand chose not to allow the likely event of permanent damage to be caused to Mr Collis and, in an appropriate fashion, terminated the employment.

It was proposed that Mr Collis had not been given a fair chance at other jobs on the site for which he might have been suited and which did not affect his medical condition. Two such areas were the drawing office and the store where he worked during rehabilitation. One of these was in an air-conditioned environment. That was a position temporarily available. The difficulty is that while work in these areas did not produce the extreme reaction caused by the production environment the medical condition was not removed. Mr Collis' own evidence supports this. Also one aspect of the WorkCover claims was that stress at loss of shift loading caused the problem. While stress was eventually rejected on medical grounds as a basis for claim, the shift loading, by agreement early in the piece, was continued to be paid throughout the employment, thus removing the circumstance claimed to produce an injury.

The decision to terminate after several years of unsuccessful rehabilitation was not harsh, unjust or unfair. Neither was it an invalid reason for termination. While Mr Collis may have preferred a course which in all probability would have led to permanent injury, for obvious reasons the respondent was not prepared to put itself or Mr Collis with his long standing medical condition at that risk.

Mr Collis was not terminated because of a temporary absence from work because of a medical condition. While there had been no absence from the workplace there had been several long periods of absence from the production job which Mr Collis had been engaged to perform.

Considerable effort over a period of two years had been put into finding a solution which would enable him to continue employment in that role. Mr Collis was disappointed in his lack of success in applications for employment on the site other than that for which he was engaged. He was considered for a number of positions but was unsuccessful. The inspections revealed, and Mr Collis concurred, that the hot damp environment of the production plant, associated with the natural climate would cause a problem with any production position. The particular plant role for which Mr Collis was engaged was at the extreme range of hot and wet with steam shrouding much of the work area.

With respect to the allegation that the dismissal was for an invalid reason *viz.* a temporary absence, within the meaning of a regulation, from work because of illness or injury (other than an injury within the meaning of part 5) a difficulty is that Mr Collis has not been absent from work, or appears not to have been. He has been engaged on other duties. There may have been absences about other matters or matters peripherally related to his various WorkCover claims but the termination is not the result of such absences. If it is alleged, for the purposes of s. 73(2)(a), that the termination is the result of his absence from the work for which he was engaged Mr Collis has apparently been "absent from work" for a total period of more than three months during each of the past two years. (See Regulation 5 (4))

The application is refused.

R.E. BECHLY, Commissioner.

Hearing Details:
2004 17, 18 May

Released: 20 July 2004

Appearances:

Mr D. Broanda, of The Australian Workers' Union of Employees, Queensland, on behalf of the applicant.

Mr P. Gallagher, of the Australian Mines and Metals Association (Inc.) Queensland Branch, with him Mr M. Golding on behalf of the respondent.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for reinstatement***Karena Carol Tabah-Elliott AND Julie Jelonek t/a South Pacific Homes (No. B2135 of 2003)**

COMMISSIONER ASBURY

20 July 2004

Unfair dismissal application – Contention by respondent that applicant was an independent contractor – Respondent had onus of establishing applicant was an independent contractor – Respondent's evidence on key points uncontested – No evidence of control or even right to control on the part of the respondent – Evidence that applicant had the right to perform work for others – Absence of evidence about the *indicia* of an employment relationship – No evidence that voluntary relationship was intended to be or became one of employment – Case law – On the balance of probabilities applicant was not an employee – Application dismissed.

DECISION

By application under s. 74 of the *Industrial Relations Act 1999* Karena Tabah-Elliott (the applicant) seeks reinstatement with Julie Jelonek trading as South Pacific Homes (the respondent). The first three days programmed for the hearing of this matter were vacated as a result of failure on the part of the respondent to comply with Directions Orders. The parties reached agreement in relation to costs thrown away for those days. It should be noted that the solicitors for the respondent had not been involved from the outset and were confronted with the non compliance as a *fait accompli*.

When the matter came on for hearing, it was contended by the respondent that the applicant had been engaged as an independent contractor rather than an employee. The respondent was not in a position to conduct its case with respect to anything other than this issue. It was clear that this contention was not new to the applicant or her representative and had indeed been expected. Given that three days had already been vacated, and the fact that the representatives for both parties indicated that they were in a position to proceed with the argument as to whether the applicant had been an employee or an independent contractor, the Commission decided to hear and determine that issue.

The respondent had the onus of establishing that on the balance of probabilities the applicant was an independent contractor. In this case, much of the evidence of Ms Jelonek, the witness for the respondent, was effectively not contested. This was because Ms Jelonek gave evidence to contradict the material contained in the applicant's witness statement and was not cross-examined in relation to that evidence. Further, the majority of the applicant's evidence did not go to key *indicia* of an employment relationship, notwithstanding the fact that it was contended in submissions for the applicant that these *indicia* were present in the relationship between the applicant and the respondent.

The evidence establishes the following relevant facts. Ms Jelonek operated a business involved in finance and real estate, from her home. Ms Jelonek met the applicant when she purchased a block of land. At some point after meeting Ms Jelonek the applicant requested that Ms Jelonek provide her with work experience and agreed to work with Ms Jelonek on a voluntary basis to obtain experience in a clerical role. The applicant's objective was to put into practice training she had undertaken through a TAFE Course and a medical receptionist's course.

Ms Jelonek said that she had agreed that the applicant could undertake work experience in her business, but had not stipulated a starting date or working hours. On 14 July 2003 the applicant commenced work on a voluntary basis for the respondent. There was no dispute between the parties that the work initially performed by Ms Tabah-Elliott had been voluntary. Ms Jelonek said that it had been agreed that the applicant would start by answering telephone calls. This arrangement continued for approximately four weeks. At that point the applicant started to assist Ms Jelonek with compiling BAS receipts. The applicant had also created some computer templates. Ms Jelonek said that the applicant was proactive about making suggestions as to how she could help in the office and that she had complimented the applicant on this. There was little cross-examination of Ms Jelonek in relation to the work performed by the applicant. Ms Jelonek said that the applicant answered the telephone; took messages and "nagged" her to return calls. Ms Jelonek also said that the applicant had made it easy for her to take time away from the telephone to perform other duties and that she had derived benefit from the applicant's work.

The applicant said in her witness statement that she had performed reception work; prepared draft loan applications; typing; filing; sending facsimile transmissions; preparing documents; banking; preparing packages of promotional material and contracts relating to land sales; collection and sorting of receipts for BAS statements; invoicing; debt collection and general secretarial work. The applicant also said that she had worked in Ms Jelonek's premises and used her equipment to perform this work. The applicant was not cross-examined in relation to the work she claimed to have performed.

The applicant also contended by way of a table appended to her witness statement that she had worked a total of 235.30 hours of overtime for which she had not been paid. However, there was no evidence from the applicant about what the agreed ordinary hours of work were and no evidence of any ordinary starting or finishing time being agreed to by the applicant or required to be observed by the respondent. Further, a significant portion of the overtime the applicant claimed to have worked involved babysitting Ms Jelonek's children. Ms Jelonek disputed the overtime hours the applicant claimed to have worked and said in her evidence that she and the applicant had enjoyed a close friendship. As the applicant had worked at Ms Jelonek's home, she had frequently stayed at Ms Jelonek's home of her own volition. Ms Jelonek said that she had frequently told the applicant to go home, but she had declined to do so. Ms Jelonek also said that the applicant had not mentioned overtime or that she felt compelled to remain at work in what she believed were overtime hours. Further, the applicant had not been required to work on public holidays. Ms Jelonek was not cross-examined in relation to this evidence or the applicant's claimed overtime or in relation to her contention that she had not stipulated working hours for the applicant, and accordingly this evidence was uncontested.

In approximately mid August 2003 Ms Jelonek commenced to pay the applicant an amount of \$500 per week. Ms Jelonek said that this payment had been instituted following a discussion with the applicant about the applicant's lack of success in finding clerical work. Ms Jelonek had suggested to the applicant that she start a business involving the provision of assistance with BAS returns to small business owners operating from home, and that the payment was to assist the applicant until that business became established. This amount was paid on the basis for hours worked by her on a "contra" basis against which the \$500.00 payments would be credited. Ms Jelonek said that when the applicant had asked her about tax on that amount she had contacted her accountant and in a three way discussion with the applicant and Ms Jelonek via a conference telephone, he had told the applicant that she would have to put away \$50.00 to \$60.00 per week to meet tax liabilities. In her evidence in chief, Ms Jelonek denied that she had ever employed the applicant, and there was little if any cross-examination in relation to this point, resulting in this evidence also being effectively uncontested.

The applicant's version of the agreement was that the respondent had offered her full-time employment as a personal assistant with a net wage of \$500.00 per week. Further, the applicant said that Ms Jelonek had told her that she had sorted this matter out with her accountant. The applicant said that she had believed that tax was being paid on her behalf by the respondent but agreed under cross-examination that she had not completed a tax file number declaration form. The applicant had been paid in cash each week and was not provided with pay slips.

The applicant's version of the agreement in relation to the payment of the \$500.00 was not put to Ms Jelonek in cross-examination. Rather, cross-examination was confined to the proposition that Ms Jelonek had paid the applicant \$500.00 per week despite not being provided with any invoices by the applicant and had continued to do so when the applicant had not complied with her requests to provide those invoices. Ms Jelonek's evidence on the agreement was, therefore, uncontested.

On or around 23 September 2003 the applicant registered a business by the name of Karena's Book Keeping Services. On 23 September 2003 a confirmation of an application for an Australian Business Number (ABN) was emailed to the applicant by the Australian Business Register (Exhibit A1). Confirmation of the registration was forwarded to the applicant on 24 September 2003. That confirmation indicated that the ABN registration was effective from 1 July 2003. Ms Jelonek said that in her view the application for an ABN was made some 10 days after the arrangement for the payment of the \$500.00 per week to the applicant. Despite being given an opportunity to resume cross-examination of Ms Jelonek for the purpose of putting evidence to contradict her contention in this regard, the respondent's representative did not do so. Cross-examination was limited to putting the proposition to Ms Jelonek that the application for the ABN was made at some point after 12 August. Not surprisingly given that this had been Ms Jelonek's evidence in the first place, she agreed with that proposition.

The applicant's evidence about the circumstances in which she applied for the ABN was far from comprehensive and even less convincing. The applicant said that she had been in business on her own account previously in New Zealand and had a registered company in that country. The applicant also said that she understood that she was applying for an ABN and did so at the request of Ms Jelonek. The applicant said that she made the application for registration effective from 1 July 2003 because this seemed logical and coincided with the financial year. She had also requested Ms Jelonek's advice on this matter and had been told to insert 1 July 2003 in the appropriate part of the application.

There was also evidence that Ms Jelonek obtained a card to enable the applicant to collect rental cars on her behalf upon which the applicant's name together with the respondent's business name appeared. The applicant said that this had been done because Ms Jelonek did not have a Queensland licence and would have had difficulty in hiring a car. Ms Jelonek also arranged and paid for the applicant to attend a training course on financing. Ms Jelonek's evidence on this point was that if the applicant had enrolled in the course as an individual the cost of the course would have been \$1,500.00. Because the applicant had "come in" under the respondent's business name, the cost of the course was reduced to \$198.00. There was no evidence from the applicant or cross-examination of Ms Jelonek with respect to how if at all, a card or the arrangements surrounding attendance at the course was an incident of an employment relationship.

The entity which had conducted the course in question was issued with an attendance notice on behalf of the applicant to produce all documents held relating to the participation by the applicant in a course leading to the awarding of a Certificate of Mortgage Lending in or about October 2003. There was no issue of non-compliance with the attendance notice raised by the applicant's representative, nor was any document produced pursuant to this notice put into evidence.

Neither of these matters are conclusive as to the nature of the relationship between the applicant and the respondent, and on the uncontested evidence of the applicant and Ms Jelonek do not have appeared to have had any bearing on the putative employment relationship. The relationship between the applicant and the respondent ended according to the applicant, as a result of the respondent demanding that the applicant produce invoices to offset the amounts she had been paid and the applicant refusing to do so.

The question of whether a worker is an employee or an independent contractor is not determined by the nomenclature given to the arrangement by the parties. As Gray J said in *Re Porter: Re Transport Workers Union of Australia* (1989) 34 IR 179 at 184:

"A court will always look at all the terms of the contract, to determine its true essence, and will not be bound by the express choice of the parties as to the label to be attached to it. As Mr Black put it in the present case, the parties cannot create something which has every feature of a rooster, but call it a duck and insist that everybody else recognise it as a duck."

The whole of the transaction must be examined: *Hollis v Vabu Pty Ltd* (2001) 181 ALR 263 at 270; *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16 at 29. The *indicia* by which the question of whether a relationship is that of independent contractor or employee were summarised in *Kennedy v Oceania Aviation Services Pty Ltd* (2003) 174 QGIG 196 and *ALHMWU v Soutar* (2002) 170 QGIG 455. In this case there is little if any evidence by which the Commission could be satisfied that the relationship was one of employment. In particular there is no evidence of control or even the right to control on the part of the respondent in respect of issues such as working hours, manner of performance of work, the place at which the work was performed and the like. There was evidence that the applicant had the right to perform work for others and that the respondent encouraged this. There was also evidence that the applicant did some work for the respondent at her own home. The worker in this case registered an ABN effective from 1 July 2003 and did not give a satisfactory explanation of why this was done. There is insufficient evidence upon which I could be reasonably satisfied that the applicant was coerced into obtaining an ABN, Ms Jelonek paid the applicant notwithstanding the fact that she did not have an ABN: cf. *Soutar*.

At best the evidence establishes that the respondent turned an agreement for work to be performed by the applicant as a volunteer, into an agreement for payment for that work. Later the respondent attempted to formalise that relationship as one of independent contractor rather than employee. It does not follow that the relationship was ever intended to be, or became, one of employment, and there is uncontested evidence from Ms Jelonek that there was no such relationship between the respondent and the applicant. There is insufficient evidence from the applicant upon which the contrary could be established and I am unable to be reasonably satisfied that the respondent's evidence on this matter should not be accepted. In particular there is insufficient evidence from the applicant in relation to the *indicia* of employment which would be required to counter Ms Jelonek's evidence that there was no such relationship: cf. *Soutar* and *Kennedy* (supra).

If there was a finding that the applicant was an employee, the applicant would face an additional difficulty by virtue of the fact that she has provided no evidence to the Commission upon which there could be reasonable satisfaction that the employment was full-time or weekly. In this regard, the claimed "overtime" hours are irrelevant in the absence of any evidence about the ordinary hours worked by the applicant.

In my view, on the balance of probabilities the respondent has established that the applicant was an independent contractor, through the essentially uncontested evidence of Ms Jelonek. The balance in this case is fine, but the applicant's evidence was quite simply not sufficiently strong to displace the respondent's contention in this regard.

The applicant was not an employee and cannot bring an action under s. 74 of the Act.

The application is dismissed. I Order accordingly.

I.C. ASBURY, Commissioner.

Appearances:

Mr W. Turner of Turner IR Qld Pty Ltd for the applicant.

Mr A. Zaghini of Corporate Business Lawyers for the respondent.

Hearing Details:

2004 5 and 6 May

Released: 20 July 2004

QUEENSLAND INDUSTRIAL REGISTRAR

Industrial Relations Act 1999 – s. 482 – arrangement for conduct of elections**Queensland Teachers Union of Employees (No. Q18 of 2004)**

ACTING REGISTRAR SAVILL

20 July 2004

Request for Conduct of Elections – Prescribed Information – Casual Vacancies – Expired Terms – New and Unfilled Positions – Methods of Elections – Electoral Commission to Conduct Elections.

DECISION

On 15 July 2004 the Queensland Teachers Union of Employees lodged in the Registry under s. 481 of the *Industrial Relations Act 1999*, the information prescribed in s. 36 of the *Industrial Relations Regulation 2000*, in relation to the conduct of elections by the Electoral Commission of Queensland for the following positions of office:

Office	Number of Positions	Method of Election
<i>State Council Representative of an Area Council–</i>		
South Queensland Area Council (term expired)	1	Collegiate vote by members of the Area Council
<i>Area Council Officers</i>		
Metropolitan South and East Area Council		Collegiate vote by members of the Area Council
Treasurer 1, Secretary 1		
Metropolitan West Area Council		
Treasurer 1, Secretary 1		
North Queensland Area Council		
Treasurer 1		
Peninsula Area Council		
Treasurer 1		
South Coast Beaudesert Area Council		
Treasurer 1, Secretary 1		
<i>State Council Representative of a Branch –</i>		
Beenleigh (casual vacancy)	1	Direct vote by members of the Branch
Gold Coast North (casual vacancy).....	1	
Western Downs (casual vacancy).....	1	
<i>Area Council Representative of a Branch</i>		
Metropolitan North and Central Area Council		
Brisbane Central (term expired)	2	Direct vote by members of the Area Council
Camp Hill (term expired).....	1	
East Moreton (term expired).....	2	
The Gap (term expired)	1	
Metropolitan South and East Area Council		
Macgregor Rochedale (term expired).....	2	
Woodridge (term expired)	2	
Metropolitan West Area Council		
Centenary (new positions)	2	
Ipswich Central (term expired).....	1	
North Queensland Area Council		
Thuringowa (term expired).....	1	
Townsville (term expired)	1	
South Coast Beaudesert Area Council		
Gold Coast North (term expired).....	1	
Gold Coast South (term expired).....	2	
Merrimac (term expired).....	2	
South Queensland Area Council		
Balonne (term expired)	1	
Darling Downs Central (term expired).....	1	
Lockyer (term expired)	1	
Western Downs (term expired).....	2	
Sunshine Coast Area Council		
Caboolture (term expired).....	1	
Coolum (term expired)	1	
Pine Rivers North (term expired)	1	
Redcliffe (term expired)	1	

Timing of Elections

The Rules prescribe that nominations shall be called by advertisement in the "Queensland Teachers' Journal" with the closing date of nominations no earlier than twenty-one days after the date upon which such notice first appears in the Journal. I am advised that the next Journal is to be printed on 29 July 2004.

Methods of Election

I am satisfied that the method of election is as specified above for each type of office.

Conduct of Elections

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

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

Dated 20 July 2004.

G. SAVILL,
Acting Industrial Registrar.

Released: 20 July 2004

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 125 – new award

**Retailers' Association of Queensland Limited, Union of Employers and Another AND
Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees and
Others (Nos. R13-0, R16-0, R17-0 and R3-4 of 1989 and R34-1 of 1990)**

RETAIL INDUSTRY INTERIM AWARD – STATE

COMMISSIONERS BOUGOURE, SWAN, NUTTER

14 July 2004

**RESCISSION AND NEW AWARD
(Correction of Error)**

WHEREAS an error occurred in the Rescission and new Award as published in the *Queensland Government Industrial Gazette* of 10 December 1993, Vol. 144, No. 26, pages 777-803, the following correction is made to be effective as from 10 May 1993:

By adding the following to clause 3.1(23) after the words "BRISBANE CITY":

"and also including the Local Authority Area of the CITY OF REDCLIFFE (which includes Clontarf, Woody Point, Margate, Kippa-Ring and Scarborough)".

Dated 14 July 2004.

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

Operative Date: 10 May 1993
Rescission and New Award – C.O.E
Released: 19 July 2004