



# The Queensland Government Industrial Gazette

PUBLISHED BY AUTHORITY

PP 451207100086

Annual Subscription \$358.62 (GST inclusive)

ISSN 0155-9362

Vol. 177

FRIDAY, 12 NOVEMBER, 2004

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
CA511/04	Townsville Turf Club – Certified Agreement 2004	21/10/04	
CA508/04	James Cook University Halls of Residence – Catering Staff – Certified Agreement 2004	26/10/04	CA378/02
CA510/04	Kings Christian College Enterprise Bargaining – Certified Agreement 2004	26/10/04	CA262/03
CA515/04	Downer Electrical Pty Ltd – Certified Agreement 2003 – 2005	27/10/04	
CA516/04	Hickman Pickett and McCaig Electrical and Fire Pty Ltd t/as Fireworx and Electrical Trades Union of Employees of Australia, Queensland Branch – Certified Agreement 2003/2005	27/10/04	
CA334/04	Staverton Kindergarten Association – Certified Agreement	28/10/04	
CA517/04	Barcoo Shire Local Government Employees' – Certified Agreement	28/10/04	
CA504/04	Swickers Kingaroy Bacon – Certified Agreement 2004	29/10/04	CA407/02
CA518/04	MRAEL Limited – Resource Industries – Apprentice – Certified Agreement 2004	29/10/04	CA54/99
CA519/04	MRAEL – Dalrymple Bay Coal Terminal – Apprentice – Certified Agreement 2004	29/10/04	CA168/98
CA521/04	AMWU and F. C. I. Connectors Australia – Certified Agreement 2004	29/10/04	

G.D. SAVILL,  
Industrial Registrar.

INDUSTRIAL COURT OF QUEENSLAND

*Industrial Relations Act 1999 – s. 335 – application for costs*

**Honeycombes Townsville Pty Ltd AND David Williams (No. 2) (No. C25 of 2004)**

PRESIDENT HALL

28 October 2004

C:\DOCUMENTS AND SETTINGS\NSIM\DESKTOP\04.DOC GAZETTE

## DECISION

The appellant was convicted of a breach of s. 24 of the *Workplace Health and Safety Act 1995* in failing to discharge a workplace health and safety obligation imposed upon it and prescribed by s. 30(1)(a) of that Act. The appellant appealed against the conviction and against the penalty imposed by the Industrial Magistrate. By a decision of 26 August 2004, now reported at 177 QGIG 84, I dismissed the appeal against conviction and dismissed the appeal against sentence. Costs were reserved. The respondent now seeks costs.

It is common ground that the source of the power to award costs is s. 335 of the *Industrial Relations Act 1999*. The case developed is that there is power to award costs because the appeals were instituted without reasonable cause in that the appeals had no reasonable prospect of success.

With the very great benefit of hindsight, I am satisfied that the appeal against conviction had no objective prospect of success. Whether a prudent practitioner unaided by the benefit of hindsight would have recognised the appeal as having no objective prospect of success, is quite another matter.

The appellant is a body corporate. It was free of the risk of serving a custodial sentence. However, the effect of the conviction was to subject the appellant to stigma. Additionally, the conviction was the appellant's third conviction under the *Workplace Health and Safety Act 1995*. It seems to me that those advising corporations such as the appellant about whether an appeal should be launched should be allowed a measure of latitude, compare *Brambles Australia Ltd v Clive John Newman* (No. 2) (No. C1 of 2003) 172 QGIG 1846 at 1846. I am not satisfied that the appeal against the conviction was so obviously doomed to failure that the power to award costs at s. 335 was triggered.

On the hypothesis that the Industrial Magistrate was right to convict, I rather think that the appeal against the quantum of the fine imposed was recognisable as an appeal which had no objective prospect of success. The fine was modest compared to the allowable maximum and the appellant was, as previously mentioned, a third offender. However, the appeal against sentence added little to the length of the appeal against conviction and added little to the complexity of the issues. Indeed, to the extent that the appeal against the quantum of the penalty relied upon lack of blame worthiness, it was the same lack of blame worthiness which was said to undermine the decision to convict.

Whilst I think that the power to award costs has been triggered in the case of the appeal against sentence, it seems to me that the forensic decision to pursue the additional issue was so understandable that the proper course is to refrain from exercise of the power. (The issue whether the discretionary power at s. 335, which on any view of it arises only in limited and unusual circumstances, should be further limited by a principle that costs on appeals against conviction should be awarded only in exceptional circumstances, compare *Loneragan v The Queen* [1963] TAS. S. R. 158 at 164 to 165, may be left to another day.)

I dismiss the application for costs.

Dated 28 October 2004.

D. R. HALL, President

*Appearances:*

Ms J. Cameron directly instructed by Workplace Health and Safety for the Respondent.

Released: 28 October 2004

Mr A. J. Moon instructed by Connolly Suthers Solicitors for the Appellant.

#####

## 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-GOVERNMENTAL SCHOOLS 2003**

PRESIDENT HALL  
COMMISSIONER BROWN  
COMMISSIONER ASBURY

1 November 2004

## DECISION

**1. Background**

By a decision released on 28 May 2002, now gazetted at (2002) 170 QGIG 146, this Full Bench decided that a new Level 7 should be inserted into the classification structure in the *School Officers' Award – Non Governmental Schools* (the Award). It was also decided that there should be some level of exemption from hours of work provisions in the Award for a new Level 7 to be inserted into the Award classification structure. Further, it was determined that the evidence called by the Queensland Independent Education Union of Employees (QIEU) in B1732 of 2000, had established anomalies or deficiencies in the classification structure contained in the Award in the following areas:

- assistance with student learning and the performance of this work with different levels of autonomy and supervision;
- the requirement for employees to hold and use first aid qualifications in the increasingly complex circumstances of medication which students require;
- holding of qualifications required by workplace health and safety legislation; and
- responsibility under legislation for the documentation of systems to implement workplace health and safety requirements.

In this regard we were of the view that there had been changes in the level of skill and responsibility required of School Officers, which should be recognised by some minor amendments to the classification structure limited to the Levels between 2 and 5. This Full Bench determined that it would be preferable for amendments to the Award should be formulated in the way in which the existing structure was set, *viz*, by consent. To this end, the parties were directed to hold discussions in relation to these matters. With the agreement of the parties, those discussions were facilitated by a member of this Full Bench. While some amendments to the classification structure in the Award were agreed during these discussions, the parties were unable to reach agreement on the following matters:

- remuneration level and relativity for the proposed Level 7 classification;
- the terms of the partial exemption to apply to the proposed Level 7 classification; and
- the basis upon which employees holding first aid qualifications and/or performing or being required to perform first aid duties, should be compensated.

This decision deals with those matters.

## 2. Remuneration and Relativity for Level 7

In submissions the respondent employer organisations referred the Commission to the evidence of Lovaas and argued that for consistency, the Commission should have regard to the current structure and the relativities existing within the current structure when determining the rates at Level 7.

The respondent's proposal encompassed 5 Steps within Level 7 as follows:

"Level	Step	Relativity	Award rate per week \$
7	1	163	801.00
	2	166	813.90
	3	169	826.10
	4	172	838.60
	5	175	855.10".

The QIEU proposal is for 4 Steps:

"Level	Step	Relativity	Award rate per week \$
7	1	165	810.30
	2	170	829.60
	3	175	855.10
	4	180	878.50".

We believe that the employer submissions have merit with respect to the approach that the Commission should adopt regarding the relativities within the current structure and the number of steps within Level 7.

The average movement between the top step in each level and the bottom step in the level above between Level 1 and Level 6 is 2.4%. We believe that this figure, rounded to the next whole number (3%), is an appropriate gap between Level 6, Step 5 and Level 7 at Step 1. Therefore Level 7, Step 1 will be 164%.

Regarding the movement between Step 1 and Step 5 of Level 7, the average movement between each step in Levels 1 to 6 of the existing structure is 3.5%. Given that there are 4 movements from Step 1 to achieve Step 5, this brings about a total movement of 14% within the band which the Commission determines should be expressed as follows in order to avoid percentage fractions:

"Level	Step	Relativity %
7	1	164
	2	167
	3	170
	4	174
	5	178".

## 3. Partial Exemption for Level 7 Employees

QIEU submitted that the proposed partial exemption should apply only to employees classified at Level 7. In support of this submission, it was contended that the Award should provide a secure and effective platform from which the parties could embark on enterprise bargaining. Further, QIEU contended that a common feature of State awards containing exemption provisions was that the exemption applied to employee receiving the highest rate in the award. In this regard, reference was made to the *Hotels, Resorts and Certain Other Licensed Premises Award – State (Excluding South East Queensland)*, *Clerical Employees Award – State* and the *Hairdressers' Industry Award – State*. Another option was said to be the identification of a set remuneration level as an "exemption level", as was the case with respect to the *Medical Imaging and Radiation Therapy Employees (Private Sector) Award – State* where the exemption level is \$60,000.00 per annum for an award which has as its highest wage rate, \$54,746.00 per annum.

The employer parties, with the exception of the Catholic education employing authorities, proposed an exemption from Award provisions relating to hours of work, breaks, overtime, shift work and weekend work, for employees paid a wage in excess of the highest wage rate prescribed for employees classified at Level 6 of the Award. It was also contended that the wage rates prescribed for Level 6 of the Award were in excess of the wage rates in other awards by which exemption levels were fixed, such as the *Clerical Employees Award – State*. In this regard it was submitted that the exemption level in the *Clerical Employees Award – State* was set by reference to a rate in that Award which was equivalent to that prescribed for a Level 5 Step 2 employee under the Award subject of these proceedings. It was also submitted that in determining the exemption rate for employees classified at Level 7, the Commission should give consideration to the fact that the application in these proceedings sought the extension of the current Award classification structure and hours of work provisions of the Award, to positions not previously covered.

As a Full Bench observed in *Re: Kindergarten Teachers' Award – State* (1996) 154 QGIG 4 at 6, the concept of an exemption rate is not new to awards of this Commission. Exemption clauses generally provide a reasonable financial benefit to an employee, in exchange for some form of flexibility, often in relation to hours. Thus generally the employee is reasonably compensated for giving up the benefit of certain award provisions. There may be cases where employees receive additional remuneration in exchange for non-application of rigid award provisions, but there may also be cases where employees suffer detriment at the hands of unreasonable or unscrupulous employers: *Re: Engineering Award – State* (1994) 146 QGIG 595 at 596 per Bougoure C.

In refusing an application for a partial exemption from the *Café, Restaurant and Catering Award – South Eastern Division*, Peebles C held that the proposed variation did not specify the particular employees to whom it applied and sought to exempt all or any employees being paid 25% above the minimum award rate, and that this would be a small price to pay for an unscrupulous employer to achieve unlimited working hours and no obligation to observe other provisions of the Award: (1981) 108 QGIG 189.

In our view an exemption rate should be set primarily by reference to the particular award with respect to which it is intended to operate. A simple comparison with the dollar value of the exemptions rate in other awards is of limited relevance to the issue before the Commission in this case, particularly where there is no evidence of any relationship between the Award (or the classification structure within it) subject of these proceedings and other unrelated awards with which the comparison is sought to be drawn.

An exemption rate in our view should *prima facie* be set by reference to the wage rates in the award in respect of which the exemption will operate. Further, an exemption rate should *prima facie*, be set by reference to the highest rate in the Award in respect of which it will operate. We do not rule out circumstances where the history or specific circumstances in which an award was made will justify a departure from these propositions. However, on the material before us in this case, there is no justification for such a departure. We are also of the view that where an exemption rate is set by reference to the highest wage rate in an award, the capacity to exempt an employee from the operation of certain provisions of that award should not be limited to employees classified at that highest level, but rather, should apply in respect of employees paid at that level. This is particularly so in the present case, where we have expressed concerns about the fact that the evidence established that there may well be employees both under and over-classified in terms of the Award.

Accordingly, we have decided to grant the exemption in the terms outlined in the proposal put forward by Employer Services on behalf of the Grammar and Lutheran Schools, with the exception that the reference to the level for the calculation of the exemption rate will be Level 7 rather than Level 6. The exemption will be in the following terms:

“1.3.4 Partial Exemption

- (a) As an alternative to being subject to all Award clauses a full-time employee remunerated in excess of the highest award level prescribed in this Award for a Level 7 employee, may mutually agree in writing with the employer not to be bound by Part 6, namely:
  - hours of work;
  - breaks;
  - overtime;
  - shift work; and
  - weekend work.
- (b) A copy of the terms of the agreement will be supplied to the employee.
- (c) There will be taken to be mutual agreement for the purposes of clause 1.3.4(a) if an employer employed a School Officer and remunerated that employee at a level in excess of the highest award level prescribed for Level 6 in this Award prior to 15 November 2004.
- (d) The overall terms and conditions of employment agreed under clause 1.3.4 must not be less favourable than the provisions of this Award as a whole for an employee classified as Level 6 and the employee shall not be disadvantaged by the agreement, taking into the consideration the Award rate the employee would otherwise have been paid to the maximum of Level 6 under the Award, had the employee not entered into such agreement.
- (e) For any agreement entered into under clause 1.3.4 and, in accordance with section 366(2) of the Act, there will be no requirement for the employer to keep particulars of the employees' starting and finishing times each day.
- (f) If an employee considers that the employee has been disadvantaged by the agreement, this issue must be addressed between the employer and the employee in the manner prescribed in clause 3.1 (Grievance and dispute settling procedure). No claim for unpaid wages resulting from clause 1.3.4 may be made under the Act until the grievance and dispute settling procedure under this Award has been concluded.
- (g) If the employee subject to an agreement under clause 1.3.4 is required to work on a public holiday, the employee and employer may agree to either time off in lieu of the time worked on the public holiday, to be taken at a mutually agreed time or extra time (equal to the time actually worked on the public holiday) added to the employee's annual leave entitlement.”

#### 4. Compensation for First Aid Duties

QIEU contended in this case that the duty of care owed to students placed School Officers in a unique situation, and that the evidence before the Commission demonstrated that it was a common requirement for them to provide medical and/or health assistance to students across a range of circumstances. It was further contended that a School Officer could not direct a student requiring first aid to another employee appointed as a first aid officer, as the practicalities of school life did not allow for such a course of action. It was also submitted that it was not reasonable to suggest that all employees required to provide medical and/or health assistance to students, would be designated by their employers as first aid officers.

The employer parties submitted that QIEU had taken the position that it was assumed that every School Officer who had any contact with students, could potentially be required to provide some sort of first aid advice, qualified or unqualified, and should therefore receive an allowance. It was contended by the employer parties that it was inappropriate to differentiate the school environment from any other environment in which children were present, and the QIEU claim was flawed, on the basis that:

- teachers who had the most contact with students, did not receive a first aid allowance;
- there were many other environments, such as child care, sports supervision and other recreational supervision, where staff were not paid a first aid allowance unless qualified in first aid and appointed as a first aid officer; and
- a duty of care was presumed which could not be accepted by a person without the appropriate training ascribing a level of responsibility which was beyond the capacity of that person to accept.

It was also pointed out that the South Australian *School Assistants (Non-Government Schools) Award* contains a provision for first aid allowance payable to an employee who holds a current recognised first aid certificate and is a nominated person required by the employer to perform first aid duties. The employer parties submitted that any first aid allowances should be restricted in its application to employees who held first aid qualifications and were designated or appointed by their employer as a first aid officer.

In our decision issued on 28 May 2002 (170 QGIG 146), we found that there were anomalies or (perhaps) deficiencies in the existing classification structure in areas including the requirement for employees to hold and use first aid qualifications in the increasingly complex circumstances of medication which students require. In this regard there was evidence of a number of School Officers holding first aid qualifications but not being paid or classified accordingly, on the basis that they were deemed by their employers not to be required to use those qualifications. Further, there was evidence of increasingly complex medical conditions suffered by children, for example allergies and anaphylactic shock, of which School Officers, along with other staff, were required to be aware. School Officers along with other staff were also required to be aware of such conditions and able to administer treatment to children suffering such medical conditions on the basis of treatment regimes advised by parents. These may include administering medication and emergency treatment to those children as required.

In our view, these types of duties are not typical of other industries, where it may be appropriate to have only a limited number of employees required by the employer to hold and use first aid qualifications, and designated accordingly. We are also of the view that where a school establishes a system whereby School Officers are required to be aware of particular students with such medical conditions and the treatment regime for those students in the event of an emergency, and to participate in that treatment regime, that there should be some form of financial recognition for these requirements.

After considering all of the evidence and material before us, we have concluded that the Award classification structure adequately compensates employees for the requirements outlined above, where employees are classified in any of the Levels 4 to 7. In circumstances where School Officers are classified in any of the Levels 1 to 3, in our view, there is currently insufficient recognition of the skill and responsibility associated with participation in the treatment regime of students with particular medical conditions. Accordingly, School Officers classified at Levels 1 to 3, and subject to these requirements should receive an allowance.

We are also of the view that School Officers classified at any level of the Award, who hold first aid qualifications, and are designated by their employer as first aid officers or similar, should also receive an allowance. Where a School Officer is designated by the employer as a first aid officer or similar, the allowances for such designation would also encompass the requirements to participate in treatment regimes for students with particular medical conditions, and such a School Officer would receive only one allowance. The quantum of the allowance we have determined to Award, is \$10.00 per week. Consistent with our decision of 28 May 2002, such an allowance may be absorbed into over-award payments, however those payments may arise.

The parties are directed to confer on the drafting of appropriate orders to give effect to this decision, and to provide such draft orders to the Commission within 14 days of the date of release of this decision. We have also determined that the amendments arising from this decision will operate from Monday 15 November 2004. We Order accordingly.

D.R. HALL, President.

D.K. BROWN, Commissioner.

I.C. ASBURY, Commissioner.

Mr R. Egan and later Mr C. Pollard of Jones Ross on behalf of Presbyterian and Methodist Schools Association, Moreton Bay College and Forest Lake College.

Mr J. Redsell on behalf of various Grammar Schools.

Mr G. Muir and later Mr J. Redsell of Employer Services with Ms S. Webecke on behalf of Queensland Lutheran Schools.

Mr C. Mason, later Mr O. Heather, later Ms S. Lovaas and later Mr G. Yates from Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers on behalf of Mueller College.

Released: 1 November 2004

*Appearances:*

Mr J. Spriggs for Queensland Independent Education Union of Employees.

Mr J. O'Dwyer and later Mr C. O'Neill on behalf of Catholic Education Employing Authorities in Queensland.

Mr L. Maloney of Livingstones Australia on behalf of the Diocesan Registrar, Church of England, Brisbane and the Anglican Diocese of North Queensland.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* – s. 149 – application for arbitration of certified agreement

**Ingham Enterprises Pty Ltd AND Australasian Meat Industry Union of Employees (Queensland Branch (No. B1324 of 2004)**

**INGHAMS ENTERPRISES (MURARRIE PROCESSING) – CERTIFIED AGREEMENT 2004**

COMMISSIONER BROWN

28 October 2004

DECISION

The parties, Australasian Meat Industry Union of Employees (Queensland Branch) (AMIEU) and Ingham Enterprises Pty Ltd (Inghams), agreed that the AMIEU had carriage of the proceedings.

This matter commenced as an application pursuant to s. 148 of the *Industrial Relations Act 1999* (the Act), that the Commission assist the parties to make a certified agreement.

During a series of conferences involving the Commission (not as currently constituted) all but one of the issues between the parties was resolved. The outstanding issue was the level of wage increase to flow to employees during the life of the Agreement.

In a joint statement (ex 1), the parties said (*inter alia*):

“2. The negotiating parties consider conciliation has been unsuccessful in regard to wage increases and have asked the Commission to determine the quantum of wage increases by arbitration within the parameters set out in paragraph 4, in accordance with the provisions of section 149 of the Industrial relations Act 1999.”; and

“4. The minimum increase awarded will be 4% and the maximum level of increase will be 5% per annum.”.

Section 149(1) (Arbitration if conciliation unsuccessful) states (*inter alia*):

“(1) This section applies if –

(c) all the negotiating parties consider conciliation has been unsuccessful and ask the commission to determine the matter by arbitration.”.

The parties, through the Commissioner conducting the conciliation, requested that the matter be dealt with at the Commission’s earliest convenience. Deputy President Bloomfield allocated the matter to the Commission as currently constituted with instructions for the matter to be “listed as expeditiously as possible”.

The Commission received the witness statements of the AMIEU the evening prior to the hearing and the statement of the witness for Inghams on the morning of the hearing.

It is fair to say that, had industrial realities permitted, the parties would have been better served by the setting of directions, which included discovery and the opportunity to respond in a considered way to claims in witness statements. In any event, the parties agreed to the process as it was and further accepted that the Commission sitting alone could determine the matter.

There was no evidence relating to the productivity levels in the past or at present nor was there any evidence regarding expected productivity levels.

In submissions, Mr Jones for Inghams, took the Commission to the proposed agreement and pointed out the changes to the previous Certified Agreement (2002) and in doing so submitted that none of the changes were beneficial to Inghams in terms of productivity gains or costs and that while some changes favoured employees, others had an equal impact on employees and Inghams.

There was no argument alleging an incapacity to pay by Inghams whilst the AMIEU submitted that the business of Inghams was extremely successful.

Mr Richardson gave evidence on behalf of the AMIEU.

Mr Cramond, a witness for Inghams, contested some of the contentions of the AMIEU on the basis of information provided to him by telephone from individuals employed by the competitors and with respect to Inghams from his direct knowledge.

Inghams referred the Commission to the cost increase associated with a 4% wage rise and pointed out the further cost should a 5% increase be awarded.

The unchallenged evidence of Glen Kraus and Amber Shelford (employees of Inghams subject to the current certified agreement) related to their financial circumstances which in both instances would be described as difficult.

Section 149(5) states:

“(5) In considering the matters at issue, the commission must consider at least the following—

- (a) the merits of the case;
- (b) the likely effects of the commission’s proposed determination, and any matters agreed before arbitration, on employees and employers who will be bound by the proposed determination;
- (c) the public interest, and to that end the commission must consider—
  - (i) the objects of this Act; and
  - (ii) the likely effects of the commission’s determination on the community, economy, industry generally and on the particular enterprise or industry concerned;
- (d) the extent to which the negotiating parties have negotiated in good faith.”.

With respect to the merits of the case/s, the case presented by the AMIEU in support of the claimed 5% per annum over 3 years was effectively that –

1. Inghams had the capacity to pay;
2. Inghams would benefit from the improved industrial relationship at the site should 5% be awarded; and
3. an increase in the order of 5% would not unduly affect the competitiveness of Inghams.

Inghams case was substantially that –

1. the level of increase offered (4%) was already generous in that it exceeded both their initial position of 3.75% and the Consumer Price Index outlook for 2003-04 of 2.5% for Queensland (referred to by the Full bench of the Australian Industrial Relations Commission in the most recent National Wage Case);
2. an increase of 4% amounted to a further \$695,000 per week on the wage bill and a further 1% would make the task of meeting this obligation much more difficult, in fact 25% more difficult;
3. the agreed terms in the proposed certified agreement do not offer any offset cost savings to Inghams;
4. the AMIEU has accepted 4% per annum for employees engaged in another undertaking owned and operated by Inghams; and
5. the Commission must be cognisant of the requirements of the Act including but not limited to the objects.

I do not view the case of the AMIEU supporting the claim of 5% increase over 3 years as compelling. Nor does there seem to be any particular science in Inghams defence of the AMIEU claim.

In short, both cases are not particularly meritorious, however, the Commission does recognise the difficulties faced by the parties because of the tight time frames set by agreement.

Regarding the likely impact on the parties, it is my view that the impact of a 4% per annum increase over 3 years on employees would be positive and 5% slightly more so.

Obviously, the contrary would be the case for Inghams. However, on the limited information available to the Commission, it seems that Inghams would cope adequately with either a 4% or 5% increase. Inghams did not advance any argument regarding an incapacity to pay.

Regarding the public interest, I do not foresee any noticeable adverse impact on the public generally that would arise should the employees concerned receive either 4% or 5% or some amount in between. In concluding so, I have considered the likely effects of such a determination on the community, economy, industry generally and on the enterprise and industry concerned.

I have also considered the objects of the Act required by s. 5(c)(i) and s. 320 and believe that neither an increase of 4% per annum nor an increase of 5% per annum would offend the objectives.

Section 320 places obligations on the Commission similar to those imposed by s. 149(5)(c) regarding public interest. It also states that the Commission is to be guided by equity, good conscience and the substantial merits of the case.

My view of the merits has been expressed and the parties agreed that the negotiations have been in good faith.

Regarding the question of equity, however, on 1 August 2003, prior to the State Wage increase, the certified agreement rate for a Level 3 employee (mid range) was \$557.02 per week, while the comparable award rate was \$517.00, a margin of 7.75%.

Following the September 2003 State Wage Case, the Level 3 award rate became \$536.00. In order to maintain the percentage relativity with the Award the certified agreement rate would need to remain 7.75% ahead of the Award. The result is \$577.54, an increase of \$20.52.

The existing certified agreement rate of \$557.02 improved by the 4% offer of Inghams delivers \$579.30, an improvement in real terms of \$2.28 per week.

The comparison for the remaining classifications using the same methodology is—

Level	Award Rate Pre State Wage Increase \$	CA Rate (Aug 2003) \$	% Difference
1	531.50	578.42	8.75
2	521.30	563.44	8.1
4	510.60	547.41	7.2
5	486.60	511.80	5.25

Level	Current Award \$	Award + relativity % loading \$	Current CA + 4% \$
1	550.50	598.66	601.55
2	540.30	584.06	585.97
4	529.60	567.73	569.30
5	505.60	532.14	532.27

In each instance an increase of 4% will either restore or slightly improve the relativity that existed between the Award and the Certified Agreement prior to the last State Wage Case.

The rates used for the calculations were drawn from Inghams exhibit 2, document 1 (the existing Certified Agreement) and document 2 (Poultry Processing Award – State 2003).

Significantly, in the evidence of Mr Cramond there was the brief comment claiming that there were no improvements contained in the proposed Certified Agreement that would directly lower production costs or increase productivity.

This was contested by Mr Richardson's claim that there were improvements for Inghams. He stated (ex 3, paragraph 36) that several productivity and cost advantages would be attained under the proposed Agreement. The attachment (ex 3, RMR 4) purports to list those advantages as compared to competitors.

Suffice to say that the content of RMR 4 was challenged. Mr Richardson's evidence was that he constructed this document on advice from officials both full-time and job-based and the challenge from Mr Cramond was mainly based on information gleaned by him via telephone conversations with competitors. However, one challenge was based on information directly within the knowledge of Mr Cramond.

Be that as it may, it appears that, in the main, the content of RMR 4 does not relate improvements to be gained through the implementation of this Agreement but situations that have existed historically. Classification levels, with few exceptions, are regulated by the Award.

The issue of equity has been examined as has the substantial merits of the case.

With respect to good conscience, I have considered that the assets of Inghams exceeded \$1 bn (ex 3 RMR 5) in 2002 an increase of approximately 90% over the position 10 years earlier.

Similarly, annual turnover (ex 3 RMR 5) had increased from \$666m in 1992 to \$1.127 bn in 2002.

Whilst acknowledging the considerable investment made by Inghams in the Murrarie plant and elsewhere, all of the evidence indicated that Inghams is competitive and financially viable and will remain so.

I accept that this is due, at least in part, to the efforts and co-operation of employees at Murrarie, the vast majority of whom will be bound by the proposed Certified Agreement.

In the Commission's view there is also value that can be attached to responsible industrial relations and evidence of that responsibility can be found in the choice exercised by employees in this instance. That choice, despite the temptation to take protected industrial action, was to place the matters before the umpire for determination. It is very much in the public interest for industrial relations to be conducted in this fashion and it is also in the public interest that employees maintain their confidence in the enterprise bargaining system.

As mentioned, the parties, because of the pressure at the time, subjected themselves to the tight time frames of this case. Within these time frames it was never going to be possible for the AMIEU to develop the sorts of work value, productivity or flexibility arguments that normally accompany claims for wage improvements.

Further, the parties themselves have set the parameters for consideration by the Commission and whilst the AMIEU had carriage of the case (by agreement) and would normally bear the burden of proof, I believe, in the circumstances, there was also an onus on Inghams to prove their case (that the increase should be 4% not 5%).

Also mentioned was the view of the Commission that neither party did a particularly convincing job.

The State Wage Case Principles guide a single Commissioner with respect to varying awards, not certified agreements.

Section 149(2)(a) confers on the Commission the arbitration powers of s. 230 as though s. 230 applied to certified agreement negotiations instead of disputes.

Section 149(8) enables but does not compel the Full Bench to establish principles about arbitration of certified agreements. No such principles have been established.

Previous s. 149 matters determined by arbitration in this jurisdiction have, with respect, shown that fixing wage levels in Certified Agreements is not an exact science. I have chosen not to rely upon them.

The following decision is based on the unique circumstances of the matter and should in no way be used as a precedent.

Having considered all of the circumstances, evidence and material, together with the provisions of the Act, I am comfortable with a position that delivers neither the maximum 5% nor the minimum 4% and does not unduly impact on the financial viability or competitiveness of Inghams whilst at the same time providing a marginal real improvement in the income of employees.

I award an increase of 4.5% per annum from the dates already agreed by the parties. Inghams are to provide a draft order to the Commission.

D. K. BROWN, Commissioner.

*Hearing Dates:*  
2004 20 October

Released: 28 October 2004

*Appearances:*  
Mr J. R. Jones of Jones Ross, with Mr J. Cramond, for Ingham Enterprises Pty Ltd.  
Mr L. Norris for the Australasian Meat Industry Union of Employees (Queensland Branch).

#####

#### INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 74 – application for extension of time*

#### **Bertram John Nicholson AND Cornett's Investments t/a Cornett's IGA, Gayndah (No. B1175 of 2004)**

COMMISSIONER BROWN

21 October 2004

#### REPORT ON DECISION (as edited)

In giving his decision from the Bench on 21 October 2004, Commissioner Brown stated:

“The applicant in this matter has failed to appear and the excuse provided to my associate via the telephone not too long ago is that he, the applicant, was unaware that the hearing was to be in Brisbane.

The hearing scheduled for 10:00 a.m. did not commence until 10:40 a.m. because of the absence of the applicant and at no time did the applicant seek to contact the Registry or the Commission for clarification should any be needed.

Pursuant to Rule 42 of the *Industrial Relations (Tribunals) Rules 2000*, the directions order issued in connection with this matter clearly stated the time, date and place for the hearing and moreover, the directions order clearly alerted the applicant to the fact that his application may be dismissed should he not comply with the directions.

Mr Price for the respondent indicated to the Commission that he had been in contact with the applicant on Saturday, 16 October, that is, the Saturday immediately past.

At the request of the Commission, Mr Price was sworn in and he gave evidence under oath. I accept the evidence of Mr Price that the applicant was aware of his obligations with respect to this hearing and had indicated an intention to attend in Brisbane with his witnesses.

Whilst Mr Price is a person with an exemplary record in this jurisdiction and his word is not doubted, it is remotely possible that the applicant was, in some way, confused about the directions.

The applicant was to be unrepresented, having elected to conduct his own case.

Therefore, whilst I am sorely tempted to dismiss the matter entirely, I have determined rather than dismiss the application to adjourn it to the Registry.

On the issue of costs, I award the costs thrown away by the respondent in preparation for today's proceedings, including witness expenses. Should the matter be resurrected by the applicant, it will be a matter for the Commissioner hearing the matter to determine the overall issue of costs.

Obviously, there has been work performed by Mr Price's organisation in the preparation of witness statements and other material generally. Therefore, should the matter not be resurrected, within the time frame prescribed by the regulation, the respondent may make an application for costs generally.

The respondent is to submit to the Commission within 22 days of today (21 October 2004) an itemised account of the costs incurred in relation to today only, together with a draft order."

Dated 21 October 2004.

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

*Appearances:*

No appearance for the applicant.  
Mr J. Price for the Queensland Retail Traders and Shopkeepers Association  
(Industrial Organisation of Employers) on behalf of Cornett's Investments.

*Hearing Details:*  
2004 21 October

Released: 28 October 2004

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s.74 – application for reinstatement  
s.120 – application for compensation*

**David Kinsela AND Sunferries Magnetic Island Pty Ltd (Case No. B926 of 2004)**

**Merchant Service Guild of Australia, Queensland Branch, Union of Employees AND  
Sunferries Magnetic Island Pty Ltd (Case No. B927 of 2004)**

COMMISSIONER BLADES

29 October 2004

Application alleging unfair dismissal – Invalid reasons – Application alleging breach of Freedom of Association provisions of *Industrial Relations Act 1999* – Redundancy – Employee member of Union and Union Delegate involved in negotiations for agreement – Resistance from employer – Questions of fact – Inferences – Redundancy found to be a sham – Held dismissal breached unfair dismissal provisions and Freedom of Association provisions – Held harsh, unjust and unreasonable – Reinstatement not impracticable – Reinstatement ordered – Employer ordered to make up lost wages.

DECISION

These two applications, brought under the *Industrial Relations Act 1999* (the Act) concern the termination of the employment of David Kinsela (the applicant) who was employed by Sunferries Magnetic Island Pty Ltd (the respondent), latterly from March 2001 as a skipper on the Palm Island Ferry Service. The employment was initially as a casual, then as permanent part-time from May 2002 and finally as a permanent full-time skipper from 1 September 2003. His employment was terminated on Sunday 23 May 2004 after the completion of his Palm Island run at 11.30 p.m. His application is brought under the unfair dismissal provisions of the Act seeking reinstatement and/or compensation. The Merchant Service Guild of Australia, Queensland Branch, Union of Employees (the Union) also brings an application, relying upon the provisions of s. 120 of the Act applying to freedom of association and seeking the reinstatement of Mr Kinsela and compensation. There was no application for the imposition of a penalty in either case. Both applications have been heard together *by consent*. The primary remedy sought is reinstatement.

Evidence was given in the case for the applicants by Mr Kinsela; Michael Fleming the National Secretary and Director of the Port Services Division of the Australian Maritime Officers Union and the Officer of the Union of the Merchant Service Guild of Australia, Queensland Branch, Union of Employees; Glen Clements, a deck hand with the respondent and employed from 20 August 2001 to 28 May 2004; Paul Lampkin a casual Engineer with the respondent from 2002 until he was excluded from the roster on 24 August 2004; and Belinda O'Connor, initially Operations Manager with the respondent, then as a Master until her termination on a date which does not appear to have been disclosed. Evidence was given for the respondent by Michael Reilly the General Manager; Terrance Dodd the principal shareholder and Phillip Wilson the Fleet Manager.

The facts, evidence and inferences of course are common to both actions. In brief, the applicant was the Master of vessels operating between the Port of Townsville and Palm Island and other places. The respondent operates ferries and passenger services out of the Port of Townsville to Magnetic Island, Palm Island and the Great Barrier Reef. About May 2003, a workplace consultative committee was formed by Mr M. Reilly, the General Manager of Sunferries and Mr Kinsela was appointed to represent Masters on that committee. In early 2004, the respondent proposed to introduce a workplace agreement to regulate conditions of employment and Mr Kinsela and others disagreed with the proposed agreement and felt out of their depth. He joined the Union, encouraged others to join the Union and was appointed the Union's delegate. The Union attempted to negotiate a certified agreement with the respondent. On 7 May 2004, all staff were informed by the respondent of a review of operations as a result of a downturn in revenue. On 12 May 2004, staff were informed that there would be a reduction in some of the positions on the vessels operated by Sunferries. On 18 May 2004, Mr Kinsela organised and led a meeting of Sunferries' employees which resolved to ask the Union to represent all staff in negotiations with Sunferries and to obtain an agreement with Sunferries that contained, amongst other things, that there would be no crew reductions on any vessel or service and no reductions in current permanent employment. On 23 May 2004, the respondent advised Mr Kinsela that specifically in the previous 3 weeks, the Palm Island service had not been generating the passenger numbers and therefore the revenue to keep it financially viable. As a result of the restructuring and the retasking of the fleet, there was no longer sufficient work to retain Mr Kinsela's services and his employment was terminated from the end of his shift on 23 May 2004. He received 3 weeks' pay in lieu of notice and 4 weeks' severance pay together with other accrued entitlements. It is alleged that Mr Kinsela, unlike other employees of Sunferries whose positions had been affected by the operational changes implemented by Sunferries was not given the opportunity to apply for alternative positions and was not encouraged to apply for alternative positions.

This evidence leads to a reasonable inference that the termination of Mr Kinsela's services was directly related to his Union involvement and its involvement in the negotiations for a certified agreement.

The particular provisions of the Act which are relied upon by the Union to prove a prohibited reason are set out as follows:

**“Meaning of ‘engaging in’ conduct for a ‘prohibited reason’ for Ch 4.**

**104.(1)** For this chapter, a person engages in conduct for a **prohibited reason** if the person engages in, or threatens to engage in, the conduct because another person –

- (a) is, has been, proposes to cease being or become, or has proposed to cease being or become a member or representative of an industrial association; or
- (b) ...
- (c) ...
- (d) ...
- (e) ...
- (f) ...
- (g) ...
- (h) has the right to the benefit of an industrial instrument or an order of an industrial body; or
- (i) ...
- (j) ...
- (k) is a member of an industrial association that is seeking better industrial conditions; or
- (l) is dissatisfied with the person's industrial conditions; or
- ....".

In the respective applications, there is an onus on the applicant and the Union to prove the allegations on the balance of probabilities. In explaining the degree of cogency to discharge a burden of proof in a civil case, Denning J said in *Miller v Minister of Pensions* (1947) 2 All ER 372:

*"That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not."*

But the respondent has produced evidence which operates to counter the previously mentioned inference.

The respondent alleges that it had no issue with the involvement of the Union and that it was because the Palm Island service was losing money and running at a serious financial disadvantage for some time that a decision was made to curtail the service to Palm Island. When this was done it reduced the service from 24 hours per week to 12 hours per week and it was not viable to carry a skipper for a scheduled productive time of 12 hours per week. Thus it is asserted that the termination was as a result of a genuine redundancy.

That basic position was explained in the evidence of Mr Reilly. He told the Commission that the Palm Island service had been running at a serious financial disadvantage. He said that when Mr Kinsela was first employed as a permanent skipper in September 2003, he had been made full-time skipper on the Palm Island service. The respondent had been running 4 services involving 24 hours and up to 28 hours per week to and from Palm Island. The additional time required to make up the 38 hours per week was only about 12 hours and those hours were used to provide additional flexibilities within the company's operations on the Ferry and Reef services. In 2004, the traffic to and from Palm Island reduced substantially due to the fact that the senior football team did not participate in the Townsville AFL (or it may have been the Rugby League) competition. While the junior team did play in that competition, there were not enough passengers on the Saturday night run to make it viable. The respondent had reduced the service to 3 days per week and were facing the prospect of having to reduce it further.

Mr Reilly said he had a meeting in Townsville on 17 May 2004 with a representative from the Queensland Government and the CEO of the Palm Island Council which made it clear that it was not intending to get involved with private enterprise. On 19 May, at the Minister's request, Mr Reilly met with the Transport Minister in Brisbane. The Minister undertook to investigate further concessions with Palm Island so as to keep the service viable. No promises were made and no funding was made available. The Saturday night Palm Island service was cancelled as from the completion of the service scheduled for 22 May. It was decided that the dedicated Palm Island team would be dissolved.

Mr Reilly said that another employee, Mr Peter Kabay, was also dismissed from his position during the dismantling of the Palm Island service and an Engineer's hours were reduced. Mr Kabay was invited to make a written application for a place in the casual pool as had the hostess engaged on that service.

He said that the Palm Island service was not viable in its 3 trips per week and with no prospect of any immediate relief from either the State Government or the Palm Island Council, the respondent had to make a quick decision in the interests of its continuing operations and the jobs of the majority of its employees.

Other changes that were made were that deckhands and hostesses were combined into cruise attendants and there were a number of terminations. There were also redundancies on the Magnetic Island ferries and the Reef boat. Both the Fleet Manager and the Operations Manager had appropriate qualifications and had requested to go back to working on vessels as well. The whole organisation was downsized.

If Mr Reilly's evidence be true that the Palm Island service was suffering financial difficulties, it goes a long way in countering the inferences available from the evidence of the applicant and the Union, bearing in mind that the onus of proof rests upon the applicant and the Union.

In making my decision on the balance of probabilities, I have considered the whole of the evidence but it is the following matters which have borne some weight.

There is no doubt that Mr Kinsela was the Team Leader on the Palm Island service but it is equally as clear that the Palm Island service was only a part of his employment and a minor part at that. It was the reduction in the Palm Island service hours which was a significant cause of the redundancies. Mr Reilly described in his statement and later confirmed it on cross-examination that it was a misrepresentation of the facts for Mr Kinsela to claim that the hours by which the Palm Island service were reduced when the Saturday night Palm Island service was ceased from 22 May were only 6 hours. He claimed the true position was that the Palm Island service had been reduced by 12 hours per week because another 6 hours had been cut when the Palm Island football team had been kicked out of the Townville competition. The simple fact of the matter was that the football team had been kicked out of the competition during the 2003 season and had occurred before Mr Kinsela was employed full-time on 1 September 2003 so that the claim by Mr Reilly that the Palm Island service had been reduced by 12 hours per week was in itself a misrepresentation of the facts.

Mr Kinsela also produced to the Commission a document recording his hours from 5 January 2004 until his dismissal. His figures were not challenged. Of the total of 808.25 hours worked, only 303.75 were attributed to the Palm Island run. His other hours were worked on the night run (the Magnetic Island run) and the Reef run. It must also be appreciated that the Palm Island run was only to be reduced by one service per week, a service that occupied between 5 and 6 hours. While he might have held the designation as Team Leader, that work was only a minor part of his duties. Moreover, in his letter of appointment, there was no reference to any Team Leader position with the Palm Island service. The appointment was as a member of the Vessel Crew Team. This appointment was consistent with the duties he appeared to undertake as evidenced by the record of hours he produced.

While Mr Reilly claimed that there were three distinct services under the control of the respondent, namely the Palm Island service, the Magnetic Island service and the Reef service, it is clear that the employees were all interchangeable.

After the purported restructure took effect, the respondent was still running a Magnetic Island service, was still running trips to the Reef and was still running trips to Palm Island on two occasions per week. There was also the Orpheus Island trips which started up very soon after Mr Kinsela was made redundant. These commenced about mid June 2004 on one occasion per week and lasted about 10 – 11 hours per trip. Common sense dictates that planning had to be under way at the time of Mr Kinsela's dismissal if these services were to be commenced, yet no regard whatsoever (other than unconvincing evidence of discussions with "marketing people") was paid to the imminent commencement of this service when he was made redundant. The trip to Orpheus would more than cover the Palm Island shortfall. Furthermore, a Mick Dodd, the brother of the owner Terry Dodd was employed at about this time and although it was claimed he was appointed as Acting Operations Manager to replace the previous Operations Manager Ms O'Connor, he performed many of the duties previously performed by Mr Kinsela. Mr Wilson also performed some of the Palm Island run but according to Ms O'Connor, this arrangement did not last very long.

Much was made about admissions that Mr Reilly, when told at a meeting of the Consultative Committee about 19 January 2004 that employees, because they couldn't afford a lawyer, were considering getting a Union involved, responded with the words "That's fine". But other evidence does not indicate that it was fine and if that was the then opinion of Mr Reilly, subsequent events indicated that Mr Dodd did not. I accept as probable that at a meeting on 30 March 2004, after others had left, Mr Reilly (although he denied it) said words to Mr Kinsela that "I thought we had a deal that this was going to be between us with no union involvement". There were other parts to this conversation that Mr Reilly denied in his written statement but later admitted under cross-examination which led me to believe that Mr Kinsela was more reliable as a witness. I also accept the evidence by Mr Kinsela that Mr Dodd, the owner, told Kinsela that it was a bad move getting the Union involved and he shouldn't have done it and that no Union was going to tell him how to run his company. Mr Dodd admitted that he had expressed his disappointment that Kinsela and Reilly could not negotiate without bringing the Unions into it. Mr Dodd believed it to be unsatisfactory for negotiations to be made on behalf of a company and its employees by an employer association and a Union. Mr Dodd clearly wanted an agreement directly with the employees and preferred to negotiate directly with the employees. It was Mr Lampkin's evidence that Mr Dodd remarked to Mr Kinsela during part of a conversation he overheard, words to the effect "Now I will have to get a barrister". Ms O'Connor, who no longer works for the respondent, said she had heard Mr Dodd, Mr Reilly and Mr Wilson all say that they would not be re-negotiating with a Union. When Mr Dodd gave evidence, he was defensive, uncompromising and aggressive, making it very likely that the evidence of Mr Kinsela that Mr Dodd had said "No union is going to tell me how to run my company" was true.

The respondent has denied that it was aware that Kinsela was the Union Delegate and was driving the proceedings. However, there was a meeting held in the Australian Hotel on 18 February 2004 attended by all employees and organised by Kinsela to meet with Mr Fleming. Mr Kinsela, while he could not substantiate how the company had become aware of his involvement, was absolutely certain of its knowledge. There was no evidence what the phrase "all employees" meant as there were some 60-75 employees but the evidence of Mr Fleming is that there were a significant number in attendance. Admittedly, the respondent was never formally advised of Kinsela's position but I would expect rumour and gossip to have provided the necessary information to company personnel and I am quite sure that in the circumstances, the respondent did not need to have "direct evidence" of Kinsela's involvement with the Union and his organisation of that meeting before it could be said to have knowledge. The conversation I have previously accepted as having occurred, regarding "having a deal with no union involvement" occurred on 30 March. That conversation also included a discussion about the pros and cons of a Federal agreement or a State agreement and was a conversation which was accepted by Mr Reilly as having occurred. There was a meeting the day before on 29 March, attended by Mr Fleming and Mr Reilly when Mr Fleming presented to Mr Reilly a "without prejudice" proposed agreement with the Union as a party. It was between 29 and 31 March that a letter signed by 35 employees and seeking that the Union represent them and be a party to the agreement was sent to the respondent. I accept it as improbable that at that time, the respondent was not aware of Mr Kinsela's firm and deep involvement with the Union and the negotiations. Mr Wilson has given evidence that he was aware, although not formally, of Mr Kinsela's involvement with the Union about 19 or 20 April. Mr Fleming of the Union has given evidence which I accept that he told Mr Reilly that Kinsela was the Union's representative but that nothing formal was advised. I do not believe Mr Reilly's evidence that he was never informed that Kinsela was a Union representative. Even Mr Wilson said Reilly questioned Fleming at that meeting on what Kinsela's position was and Mr Dodd admitted he was told by Reilly after a letter dated 1 April from the Union advising of an employee request for the Union to act in the Enterprise Bargaining Agreement (EBA) that Kinsela was directly involved with that Union.

There was also evidence from Ms O'Connor, then one of the three senior Managers but who no longer works for the respondent, that shortly before she left on leave in March 2004, the owner, Mr Dodd, walked past her and told her not to look so stressed. She told him she was worried because the crews had joined the unions. She said he responded by saying "Bring it on, I like a fight and anyway, we need to get rid of half of these skippers". Ms O'Connor also gave evidence that Mr Reilly had said to her sometime after the dismissal of Mr Kinsela that there were not enough skippers.

It was claimed by Mr Reilly that Mr Kinsela was offered casual employment when the termination took effect. This was denied by Mr Kinsela. It is noted that the termination letter of 23 May to Mr Kinsela did not offer any alternative employment yet the termination letter to Mr Kabay of the same date did offer casual employment. I consider that this correspondence tends to confirm the evidence of Mr Kinsela and I accept his evidence on the probabilities. Mr Dodd gave evidence that he preferred re-deployment rather than termination. When asked whether there were any attempts to offer Kinsela other work, he replied yes but then when asked what were they, he gave an inappropriately long answer that said nothing and did not answer the question. Of those made redundant, Messrs Kabay and Clements were made an offer to re-apply for the combined new position of Cruise Attendant but didn't take up the offer. Messrs Spelta, Lee and Heap all applied for the new positions but were not successful although Mr Heap has since been employed on a casual basis. Adrian Coles was re-deployed. Hartman's contract was not renewed and Anne Lee resigned.

(It is noted that the names of Kabay, Clements, Spelta, Lee and Heap appear on the list of 35 names seeking Union representation).

Mr Kinsela was the only Master to have been made redundant. The respondent employed casual skippers at the time and still employs two casual skippers in addition to the permanent staff. No consideration was given to making Mr Kinsela a casual or part-time employee. Mr Wilson said it was not sensible to reduce the casual hours of others. I am not so sure that making Kinsela a casual would have had that effect and therefore I do not accept Mr Wilson's explanation.

Mr Reilly was asked what the present state of negotiations for the agreement were with the Union and responded that they were still on track, were pretty close with still some number crunching. That answer has to be compared to that given by Mr Fleming. He said that he had sought the assistance of the Queensland Industrial Relations Commission under the provisions of s. 148 of the Act because he believed that the respondent had ceased to bargain in good faith. The matter had been before Commissioner Edwards on two occasions and was to go before him again soon. I accept Mr Fleming's evidence and it reveals that Mr Reilly was not wholly truthful about the matter.

All of this evidence is consistent with an inference which I accept is a strong inference, that Mr Kinsela was dismissed because of his involvement with the Union and the negotiating process and that the purported redundancy, at least as it applied to Kinsela, was a sham. I am satisfied that the respondent wanted to rid itself of Mr Kinsela and has used the other purported redundancies as a smokescreen. The arrangements made to meet with the CEO of the Palm Island Council and the Minister for Transport were mere self-corroboration. The respondent produced no financial records to show that the business was "bleeding". This was information solely within the respondent's knowledge. Although there was a concession made by Mr Kinsela that the Palm Island numbers were down, there was no other credible evidence of a financial disaster as suggested by the respondent, not that a financial disaster is needed to justify a redundancy but that is the allegation made. Reasons advanced by the respondent, other than for the Palm Island downturn, were very generalised, did not condescend to any degree of particularity and the Palm Island downturn necessitated a reduction of only 6 hours per week. The Palm Island service was only ever a small part of Kinsela's employment.

There was no acceptable reason advanced why Kinsela was chosen for dismissal over and above other skippers or engineers.

This is not a case of the probabilities being equal. I am satisfied on the balance of probabilities on the whole of the evidence that the dismissal of Mr Kinsela was harsh unjust and unreasonable. I am satisfied it was for an invalid reason in that Mr Kinsela:

- 1. had acted and was acting in the capacity of an employees' representative;
- 2. was a member of an employee organisation; and
- 3. was discriminated against due to his trade union activity.

The application lodged by the Union does not seek the imposition of a penalty, nor does the applicant seek the imposition of a penalty because of a finding of a dismissal for an invalid reason. Therefore, there is little reason to go into any depth dealing with the Freedom of Association provisions of the Act because Mr Kinsela would receive the same remedy as available to him under the unfair dismissal provisions. However, in dealing briefly with that application, I am satisfied on the balance of probabilities that the dismissal breached the Freedom of Association provisions of Chapter 4 of the Act. I am satisfied that the dismissal (being the prohibited conduct) occurred because Mr Kinsela was:

- 1. a member or representative (as defined in s. 102 of the Act) of an industrial association (also as defined); and
- 2. a member of an industrial association that was seeking better industrial conditions.

I am satisfied on the probabilities that the owner resented the Union's direct involvement, Kinsela was the driving force behind the Union's direct involvement and the respondent knew of that fact and knew he was the Union Delegate sometime between the 18 February meeting of all employees at the Australian Hotel and at the very latest at the meeting on 19 April. There was then a notification to all staff dated 7 May which flagged "significant operational changes", to which the Union responded with a demand dated 14 May that there be consultation before any employees are terminated or their arrangements altered. There was a meeting held on 19 May where Mr Fleming, Mr Kinsela and Mr Clements met with Mr Wilson while Mr Reilly was away in Brisbane where Mr Wilson only referred to a position of a Master being changed to part-time, not termination. Kinsela was the only skipper terminated, in fact the only employee terminated, without any offer of re-deployment or opportunity to move to part-time or casual employment. Kinsela was a member of the Union and a Delegate and was therefore both a "member" and a "representative" of the Union. Furthermore, the Union and Mr Kinsela were seeking better industrial conditions in the form of an agreement. I am satisfied that there was both a temporal and causal connection between the dismissal and the factors which existed and which constituted a substantial and operative factor in the dismissal. I am satisfied that the respondent engaged in conduct for a prohibited reason. I do not believe that the financial circumstances of the respondent were a substantial and operative factor in the dismissal.

It is drawing a long bow to suggest that Mr Kinsela was dissatisfied with his industrial conditions or had the right to the benefit of an industrial instrument and was terminated for those reasons. His industrial conditions were set out in the Award and I heard no complaint from him, nor did the respondent about any dissatisfaction of that nature and the reason for the termination was not because he was covered by an Award. But in view of my previous findings, it is not necessary to further consider these matters.

The applicant seeks only reinstatement and consequently any loss suffered. I can find no reason in the evidence why reinstatement should not occur. Reinstatement should not be ordered if that remedy would be impracticable. There are no issues about lack of trust and confidence and no obstructive issues about performance or competence. Mr Kinsela is both a qualified Master and a qualified Engineer. I am satisfied that reinstatement would not be impracticable although impracticability is irrelevant for an order under the Freedom of Association provisions. There is evidence that there currently exists one vacancy among the Masters and there are two casual positions but in any event, that the applicant's former position has been filled by someone else is not necessarily a reason to find that it is impracticable to order reinstatement - *Johns v Gums Limited* (1995) 60 IR 258 at 271. As to loss suffered, he was paid 7 weeks upon termination and he found a new position on 23 July 2004. That meant he was out of pocket for 2 weeks. He was then employed until Friday 22 October 2004 when he resigned his latest employment.

I order that the respondent reinstate David Kinsela as from 22 November 2004 at the latest, to his former position on conditions at least as favourable on which he was employed immediately before dismissal and without loss of continuity of service. After taking into consideration the amount paid to him upon his dismissal and the wages received by him up to 22 October 2004, I order the respondent to pay to him the remuneration lost because of the dismissal, being 2 weeks' wages as at 22 October together with any wages lost after that date.

Should there be any difficulty experienced in assessing the amount lost by the applicant, this matter should be referred back to the Commission for assessment.

There appeared to be a non-consensus about the meaning of redundancy (because Mr Kinsela's job did not disappear) and whether the TCR Statement of Policy issued by the Commission (2003) 174 QGIG 908 changed the previously accepted position. In view of the findings the point does not need to be dealt with, but in any event, I am not so sure that the Statement of Policy seeks to define the limits of a "redundancy".

B.J. BLADES, Commissioner.

Hearing details:  
2004 25 and 26 October (Townsville)

Released: 29 October 2004

*Appearances:*

Mr J. Merrell, Counsel, instructed by Ms C. Hartigan, Hall Payne Lawyers, for the Applicants.  
Mr B. Shaw, Counsel, instructed by Mr B. Petley, Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers, for the Respondent.

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 - s. 74 - application for reinstatement*

**The Australian Workers' Union of Employees, Queensland (for Darryl Moate and Kenneth Allison) AND James Hardie Australia Pty Ltd (Nos. B1087 and B1088 of 2004)**

COMMISSIONER THOMPSON

29 October 2004

Application for reinstatement - Witness evidence - Sexual harassment complaint - Character of complainant - Company investigation - Witness credibility - Policies of the company - Dismissal of Moate harsh, unjust and unreasonable - Moate to be issued with a written warning - Reinstatement of Moate ordered with continuity of service and payment of remuneration lost - Dismissal of Allison harsh, unjust and unreasonable - Allison to be issued with a final warning - Reinstatement of Allison ordered in a level 3 position (a demotion) with continuity of service and payment of remuneration lost (at level 3 rate of pay) - Parties to confer on issue of annual and long service leave - Company to arrange for comprehensive briefing on policies in relation to sexual harassment for Moate and Allison - Applications granted.

## DECISION

**Background**

Applications (B1087 and B1088 of 2004) were filed with the Industrial Registry by The Australian Workers' Union of Employees, Queensland (AWU) (the Union) on 12 July 2004 seeking the reinstatement of members Darryl Moate (Moate) and Kenneth Allison (Allison), both of whose employment had been terminated on 5 July 2004 by James Hardie Australia Pty Ltd (the respondent).

The applications were not joined by the Commission, however there was agreement between the parties for the matters to be heard conjointly for reasons relating to the similar circumstances surrounding the terminations.

The Commission has chosen to release a composite decision encompassing both applications, with provision made for separate findings in respect of each application at the end of the decision.

**Applicant**

Evidence was given in support of both applications by Moate, Allison, Jack Pavlov, David Partridge, Reginald Ram, Darren Partridge, Thomas Harris, Adam Brind and Bruce Cockburn.

**Moate**

Moate had commenced employment with the respondent in June 1974 and at the time of his dismissal was employed as a machine operator level 3.

He worked under the direction of Allison, who was his Team Leader, and with other employees including Alan Ralph.

On 28 June 2004 during the course of his shift, he came into contact with Ralph on a number of occasions, with nothing of note occurring, with the exception of Ralph's departure at around 12.40 p.m.

On 1 July 2004, he was requested to attend a meeting in the office of Michael Booy, in the presence of Nikki Whaanga where he was advised that a complaint of sexual harassment had been made against Allison and himself by Ralph, and that a complaint had also been made to the Police.

He gave evidence of the shock he felt at the time and of denying ever sexually harassing Ralph.

At the conclusion of the meeting, he was suspended on full pay whilst an investigation was to be conducted.

Later that day, he was contacted by Ryan Bright from the company and requested to attend a meeting the next day.

At the meeting which was held with Booy and Megan Hillier in attendance, he was read excerpts from Ralph's statement, asked questions and gave responses.

Included in his responses was a denial that he forced his finger against Ralph's rectum.

A statement was generated at the conclusion of the meeting which he signed as an accurate reflection of the answers given by himself.

He was contacted later that day by Bright and was informed that he was to attend another meeting the following Monday.

At the meeting, he was advised that the investigation had been completed and that his employment had been terminated.

A letter of termination was handed to him and he then left the premises.

In evidence, he admitted that he had engaged in the past, in the practice of "bum slapping", but this had been done in a jovial way, not meant to hurt or demean a person.

Whilst he could not recall ever slapping Ralph on the bum, he did admit it may have happened.

In the 30 years of employment with the respondent, he had never been warned or counselled in respect of his behaviour or performance.

He could not recall having undergone training in relation to policies of the respondent as evidenced by Mr Whaanga.

Attached to his affidavit was the statement given to the respondent as part of the investigative process.

Included in that statement were matters including:

- his understanding that James Hardie had minimum behaviour standards that outlined standards of behaviour
- denied pressing his finger against Ralph's rectum at any time
- denied having witnessed Allison touching Ralph inappropriately in an office
- denied that he inappropriately and uninvitedly touched Ralph approximately three times per week over the course of a month.

Since his termination, he has remained unemployed, despite actively seeking employment.

***Cross-examination***

Under cross-examination, the witness acknowledged that a "pat on the bum" was not allowed.

He did not recall touching Ralph, but indicated that it was possible.

He denied that he rammed his fingers up Ralph's rectum.

**Allison**

The employment of Allison had commenced in August 1969 and continued unbroken until his termination on 5 July 2004.

At the time of the dismissal, he was a level 4 Team Leader and worked in the same team as both Moate and Ralph.

At paragraph 5 of his affidavit, he made reference to the practice of "bum slapping" in the workplace:

"I have in the past patted other employees on the bum, however this is common in the workplace, as most employees slap each other on the bum. This is not meant to hurt or demean anyone. It is simply a form of mucking around in a joking way."

On 28 June 2004 at sometime in the morning he had a disagreement with Ralph over how a job should be done, with Ralph being allowed to complete the task in his preferred way.

Later that day, Ralph became upset over some problems that he was having entering data into the computer with the witness explaining to him that it was not his fault.

Ralph approached him whilst he was driving a forklift advising that he was quitting as he could not work there any longer as "they're all a mob of dickheads".

He went to Mr Whaanga's office and asked if he knew why Ralph had left.

He was advised that Ralph was "bagging" everyone including him, but given no other information.

Nothing more happened until 1 July 2004 when he was requested to attend a meeting with Whaanga and Booy, where he was informed that a complaint of sexual harassment had been levelled against him.

He was handed a letter confirming the complaint and advised that he was being stood down on full pay whilst an investigation was undertaken.

Later that afternoon, he was contacted by Bright and asked to attend a meeting the following day.

At that meeting which was attended by Booy, Bright, Hillier and himself, he was required to respond to parts of a document read to him by Bright.

The questions and answers from the meeting were, according to Allison, accurately reflected in a statement prepared by the respondent and signed off by himself at the completion of the meeting.

He was contacted later that afternoon by Bright and requested to attend a meeting on the following Monday where he was told the complaint against him had been substantiated and that his employment was terminated.

On being handed a letter of termination, he left the premises.

He stated that he was aware that the respondent had a policy on harassment, however he was not familiar with the policy, nor had he received training on the policy.

In giving evidence in respect of the allegation made by an employee, Chris Hams, he stated at paragraph 18 of his affidavit:

"In relation to the allegations made by Chris Hams, I admit to making a suggestion towards a sexual nature when Chris Hams head was in the vicinity of my groin area on one occasion. However, this was only part of the mucking around that goes on [in] this workplace. Most of the employees at James Hardie engage in this sort of behaviour and no one has ever asked me to stop or not to do this sort of thing."

In his 36 years of employment with the respondent, he had witnessed similar behaviour without anyone from James Hardie taking issue with such behaviour.

The statement given by the witness to the respondent at the commencement of the investigation process was attached to the affidavit tendered by the witness in the proceedings.

In that statement, it stated the following:

- denied ever fondling Ralph's genitals
- never touched Ralph
- admitted to patting other employees on the bum
- admitted making a suggestion towards a sexual act when Hams' head was in the vicinity of his groin area on Monday 28 June 2004
- acknowledged that James Hardie had minimum behaviour standards that outlined appropriate standards of behaviour
- stated that patting on the bum is common and could be seen as harassment.

In his affidavit in reply, he gave evidence of being informed that Ralph had put "a DVD with porn involving animals" on his office computer. He gave instructions to have the pornography removed from the computer.

As was the case with Moate, he did not recall ever undertaking the training referred to in the affidavit of Whaanga.

Since his termination, he has sought employment but such applications have been hampered by a medical condition.

He had not received any income since his dismissal.

*Cross-examination*

Allison accepted suggestions put by Mr Ken Watson, of Counsel, on behalf of the respondent, that his role as Team Leader was a significant and important position which required him to ensure that the conduct of those under him was appropriate.

On the incident with Hams, at page 43, line 8, of transcript:

“Watson: Yes. And, in fact, what Mr Hams says there is quite correct, isn't it?”

Allison: Yes.

Watson: You pulled his head towards your - the area of your groin as if to imitate him performing oral sex on you; isn't that right?

Allison: Yes.

Watson: And that's completely inappropriate behaviour, isn't it?”

Allison: Yes.

Watson: Mr Allison, what sort of example do you think you were displaying to Mr Hams when you did that?

Allison: One that had been going on for quite a while.

Watson: What, pulling people's heads towards your groin?

Allison: Yes.

Watson: That had been going on for some time?

Allison: Yes.

Watson: And you would involve yourself in that?

Allison: That's the first time I done it to my knowledge, but similar things would be going on like that.”.

There was a denial in relation to “dry humping” Ralph, but acceptance that he had “dry humped” other employees.

According to the witness, approval had not been given by him for Ralph to load the pornographic DVD on the office computer.

Allegations of “grabbing the genitals” of other employees were denied.

**Pavlov**

The evidence from Pavlov was that he had been employed since 1988 and both the dismissed employees and Mr Ralph were known to him.

In respect of Mr Ralph, he gave evidence that he had heard him say on occasions:

- that he had heard him talking about “bum fucking” his partner with vegetable oil
- that he would like to “bum rape” David Partridge.

On the workplace culture, at paragraph 5 of his affidavit, he stated:

“In my experience at James Hardie Australia Pty Ltd at the Meandah plant, “bum slapping” and pinching has been accepted here for as long as I have been working there. Management have never said anything to any of the staff regarding this sort of behaviour being inappropriate or wrong.”.

Whilst giving his evidence-in-chief, Pavlov stated that on the Saturday gone (9 October 2004), Hams informed him that Ralph had offered him \$50,000 to be a witness for Ralph.

*Cross-examination*

Cross-examination of Pavlov went to issues involving Ralph's private life, and an incident involving Moate and John Worrell.

**David Partridge**

David Partridge, an employee with some 16 years service gave evidence of knowing both Moate and Allison as well as Ralph.

It was his evidence that Ralph had groped him on the backside on numerous occasions.

He gave evidence of Ralph telling details of his sex life with his girlfriend.

He went on to state that “bum slapping” occurred in the workplace and was common amongst most employees.

*Cross-examination*

Partridge confirmed the practice of “bum slapping” and that “dry humping” occurred in the workplace, although he had never witnessed Moate “dry hump” anyone.

In respect of Ralph's behaviour, at page 66, line 45 of transcript:

“Watson: A bit [of] difference between bum slapping and groping, isn't there?”

Partridge: Yes.

Watson: Are you saying groping went on all the time at the workplace?

Partridge: Well, by Alan Ralph, yes.

Watson: Alan Ralph. Was he the only one that did it?

Partridge: Groping, yes, bum slapping, no.

Watson: Did he do it to anyone else besides you?

Partridge: I don't know.

Watson: You didn't see him do it to anyone else besides you?

Partridge: Well, I never saw him do it to anyone else beside me.”.

### **Ram**

Ram, like the previous witnesses, knew Moate, Allison and Ralph.

He stated that Ralph was always talking about sex and of how he would like to rape some of his fellow workers.

On 28 June 2004, the day Ralph quit his employment, he had approached the witness and suggested that they should take nude photos of their wives and swap them.

Ram rejected the suggestion.

His evidence went to the workplace culture of employees engaging in “bum slapping” and management's practices of the past where they had never told employees to stop the behaviour because it was inappropriate or unacceptable.

### *Cross-examination*

Ram confirmed his participation in “bum slapping”, indicating it was a widespread practice at the workplace.

In respect of the admission from Allison about the incident involving Hams, at page 76, line 28 of transcript:

“Watson: Well, would you mind answering the question, Mr Ram? You would find that offensive, wouldn't you?”

Ram: I don't know. Depends on the --

Watson: You do know. You just don't want to say so?

Ram: I don't know. I don't know. Depends on the circumstances.

Watson: What, somebody grabbing your head and bringing it towards their crotch as if to simulate oral sex, you wouldn't find that offensive?

Ram: No.

Watson: You wouldn't find that offensive?”

Ram: No.”.

### **Darren Partridge**

Darren Partridge an employee of Trojan Workforce, a labour hire company commenced work at the respondent's plant in June 2004.

Having given a statement to the company, he was summoned by Booy and Bright and told that his statement contradicted other eye witness accounts.

At paragraphs 4 and 5 of his affidavit, his evidence went to that meeting:

“4. The following day I was summoned again by Michael and Ryan. I was told that my statement contradicted other eye witness statements. They both implied that my statement wasn't accurate. I was then told that my employment with James Hardie would be terminated if they found I wasn't telling the truth. I felt I was being threatened by Michael and Ryan and understood my employment with James Hardie would be terminated if I didn't tell them what they wanted to hear.

5. At no time was I informed of my right to have a witness present. As I had only been employed at James Hardie for approximately 4 weeks at that time and had no support or given no opportunity to find out what my rights were, I amended my statement because I felt my position was under threat if I didn't tell Ryan and Michael what they wanted to hear. The amended statement I supplied at the second meeting is attached to this statement. This is the statement that I supplied after I felt my job was being threatened.”.

In the time he had worked at the respondent's site, he witnessed employees slapping each other on the bum.

*Cross-examination*

Cross-examination of Darren Partridge covered similar issues to those of other witnesses, with the exception that he gave evidence on the Allison/Hams incident, at page 83, line 10 of transcript:

“Watson: What would you class it as?

Partridge: Just class it as two - two fellow workmates engaging in jokial behaviour.

Watson: What, Mr Allison grabbing Mr Hams’ head and bringing it towards his crotch, jovial behaviour; is that what you’re saying?

Partridge: Jokial - joke - joking around, sort of thing.

Watson: Just joking around?

Partridge: Yes, yes. Light-hearted fun. Nothing - I - I did not see anything in it.

Watson: You didn’t think that was offensive at all?

Partridge: No.

Watson: Did you ever see Mr Allison do that before?

Partridge: That incident?

Watson: No. Have you ever seen him do something like that before?

Partridge: No.”.

**Harris**

Harris, an employee of the respondent for more than 30 years, claimed that the “touching of employees” had been going on in that time, although it did not happen when an employee had stated that they did not want to be touched.

*Cross-examination*

The witness gave evidence of touching being part of the workplace culture for years, but qualified the position in respect of persons who did not approve of the practice.

At page 86, line 12, he stated:

“If someone said they didn’t want you to do that you didn’t do it, that’s all there was to it.”.

**Brind**

Brind, who was in the United States on business, gave his evidence by telephone.

The giving of telephone evidence had been agreed by the parties at a preliminary hearing and, in the view of the parties, was in compliance with *Practice Note 1 – Taking of Evidence by Telephone* (No. PN1 of 2000).

Brind commenced employment with the respondent in 1997 and, at the time of giving evidence, was employed in the capacity of a Team Leader.

His evidence went to his working relationship with both Moate and Allison, in that he found both men helpful and, in his view, they acted in a professional way toward employees, including himself.

He stated that there was a culture at James Hardie where most employees would slap each other on the bum and generally “muck around” with each other.

*Cross-examination*

The activity involving Allison and Hams was put to Brind at page 127, line 20 of transcript:

“Watson: All right. Well, the activity that Mr Allison has admitted to is taking the head of a fellow worker and pushing it into the vicinity of Mr Allison’s groin as to simulate having oral sex. Does that surprise you?

Brind: It does surprise me actually.”.

**Cockburn**

The witness had been employed by a labour hire company and had worked at the Meeandah plant for approximately 6 months.

During that time, he had never witnessed Moate or Allison touch anyone.

He recalled, at paragraph 4 of his affidavit, a conversation with Ralph on 28 June 2004:

“On Monday 28 June 2004, I was approached by Alan Ralph while I was having my smoko who was complaining about the area he works in. Alan Ralph said to me ‘I am sick of this shit, I am going to chuck my job in, if I go I am going to take the fuckers down with me, that Nikki better watch his back too, if you don’t get on with Kenny and that group, you don’t get anywhere around here’. Shortly after this exchange, Alan Ralph quit and left the workplace.”.

*Cross-examination*

In cross-examination, the witness confirmed the detail of his conversation with Ralph on 28 June 2003.

**Respondent**

The respondent relied upon six (6) witnesses in their opposing of the applications.

Those being Ryan Bright, Jamie Sims, Hams, Ralph, Whaanga, and Dr Leonidas Kondos.

**Bright**

Bright currently holds the position of Human Resources Manager for the respondent having commenced employment on 31 May 2004.

His involvement in this matter commenced with a telephone call he received from the Plant Manager that Ralph had made allegations of sexual harassment and possibly sexual assault (against co-workers).

He subsequently had a number of phone conversations with Ralph and was advised that a complaint was to be made to the Queensland Police Service.

His evidence was that on 30 June 2004, Ralph advised that he had withdrawn the Police complaint and gave the reason for his actions at paragraph 10 of his affidavit:

“Alan expressed his concern for the families of the employees he accused, and said that after talking with his partner decided he did not want to put them through a police investigation.”.

Ralph had further indicated (at a meeting held on 1 July 2004) “that he did not want to have the two accused workers ‘sacked’ that he just wanted to work without harassment”. Ralph went on to say that if the behaviour stopped, he would be willing to work with Allison and Moate.

Letters were drafted by himself which went to Moate and Allison under the hand of Booy advising of the complaint against them, and they were both suspended on full pay whilst an investigation was undertaken by the company.

A number of employees were interviewed in the course of the investigation, with all but one of them signing statements reflecting the content of the interview.

Meetings were then held with Moate and Allison (separately) and they too signed statements prepared by the company at the conclusion of the interview.

In their consideration of the allegations that had been levelled against Moate and Allison, the company took into account the severity of the complaint, the information gathered through the investigation process, James Hardie’s policy, definition of sexual harassment in the *Anti-Discrimination Act 1991*, the performance, length of service, and seriousness of the issue at hand.

On 5 July 2004, both Moate and Allison were taken through the findings of the investigation and then given notification of the decision to terminate their employment.

The termination letters were identical (in content) and read:

**“Termination of your employment at James Hardie**

Your conduct has been reviewed through a formal investigation. During this investigation your conduct was examined, and through your statement admitting inappropriate behaviour and statements obtained from various witnesses, the complaint of serious misconduct has been substantiated.

This letter is to advise that your employment with James Hardie will terminate effective immediately.

Your full payment entitlements will be detailed in writing under separate cover.”.

According to the witness, the decision to dismiss the employees adversely affected the workplace from both a morale and productivity perspective.

*Cross-examination*

Cross-examination of the witness was extensive, going to a range of issues including:

- his HR role at the company
- training in legal matters
- number of previous sexual harassment investigations conducted by himself
- impression of Ralph at the time the complaint was laid (page 101, line 37 of transcript):

“Broanda: Did you at some stage form an impression of Mr Ralph at this point in time? Did you find him to be credible?

Bright: I found him to be quite a fragile character.”.

- written complaint by Ralph against Moate and Allison (page 106, line 5 of transcript):

“Broanda: That reads, ‘We have a responsibility to investigate written complaints’. Do you have a written complaint from Mr Ralph?

Bright: The written complaint was taken to be his submission – or statement, I should say rather, from the Queensland Police Service.

Broanda: So he never actually provided you - the company - with a written complaint, he just gave you a copy of the police complaint?

Bright: That's correct.

Broanda: And asked you to act on the police complaint?

Bright: The information contained within that complaint.”.

- failure to provide Moate and Allison with Ralph's complaint in full (page 110, line 25 of transcript):

“Broanda: But you had been advised that he had withdrawn that complaint at that time?

Bright: Yes. Which point are we referring to, Mr Broanda?

Broanda: The 30th. The Commissioner has just taken you to point 10 of your affidavit where it talks about - you say that Mr Ralph had advised you at that stage that he had withdrawn his complaint?

Bright: That's correct.

Broanda: So, when you were interviewing both applicants as far as you knew Mr Ralph's complaint had been withdrawn? Is that correct?

Bright: Correct.

Broanda: So, in fact, there would have been nothing preventing you from - from providing either applicant with a copy of the complaint; would you agree with that?

Bright: No, I wouldn't agree with that.”.

- on the findings of the investigation against Moate and Allison as they related to Ralph's complaint (page 115, line 26 of transcript):

“Broanda: Well, let me summarise a couple of things for you. Mr Ralph says that Mr Moate forced his finger against his rectum. Did you find any evidence of that going on?

Bright: Mr Moate denied that allegation.

Broanda: Did you find any supporting evidence for Mr Ralph's allegation?

Bright: Not of that extent. It was more touching of the buttocks, not digital penetration.

Broanda: Mr Ralph says that Mr Allison approached him from behind in what's been referred to as the dry humping. Did you have any evidence at that stage that Mr Allison had ever done that to anyone?

Bright: At that stage, the evidence at hand was more along the lines of pulling another employee into his groin which I guess is consistent with that subject matter.

Broanda: No, Mr Bright, that's not my question. My question is, did you have any evidence that Mr Allison had engaged in the practice of dry humping with any other employees at that time?

Bright: In answer to your question, Mr Broanda, based on my recollection, I'd have to say no.”.

- company policies and training

- reasons for the dismissals of Moate and Allison (page 116, line 45 of transcript):

“Broanda: So, perhaps I can just back up a second. Can you confirm for me that both applicants were dismissed as a result of Mr Ralph's complaint?

Bright: And admissions of breaching the James Hardie Company policy.”.

- Page 136, line 8 of transcript:

“Broanda: Okay, so, the employees - is it your evidence, Mr Bright, that both employees were dismissed because they slapped other employees, in this case, Mr Ralph, on the bum?

Bright: Not entirely.

Broanda: Okay. You said a moment ago that they were dismissed because you found enough evidence to substantiate at least part of Mr Ralph's complaint?

Bright: Yes.

Broanda: Is that correct?

Bright: Yes.

Broanda: You've just said to me that the part you could substantiate was the slapping on the backsides, correct?

Bright: Yes.

Broanda: Was there any other part of Mr Ralph's complaint that you could substantiate?

Bright: No.

Broanda: So then, by conclusion, would you agree with me that the reason they were dismissed was because they slapped other employees, in this case, Mr Ralph, on the backside?

Bright: He took offence at that behaviour.

Broanda: Whether he took offence or not, the question is, is that the reason that the employees were dismissed?

Bright: Yes.

Broanda: And no other reason?

Bright: No.”.

- consideration of other remedy options
- witness reliance upon the *Anti-Discrimination Act 1991*

The Commission raised with the witness the situation relating to a complaint being laid by Hams (page 149, line 10 of transcript):

“Commissioner: Did Mr Hams ever make a formal complaint against Mr Allison?

Bright: Mr - through the investigative process it came out, Commissioner.

Commissioner: There you are, I know that?

Bright: He didn’t make a formal complaint, but he made it known to me that he felt disgusted by the behaviour.”.

### **Sims**

Sims, a former labour hire employee, had two stints at James Hardie in 2002 and 2003.

His evidence related to the witnessing of an incident in which he stated he observed Allison coming up behind Ralph and simulating the act of anal sex.

The incident lasted three to four seconds, and his first impression was that it was “really funny”.

Shortly thereafter, Ralph approached him and, according to the witness, was angry and upset.

He gave no thought to reporting the incident to human resources on the basis that he thought Allison was not serious and only playing a joke on him.

In the time spent at the company, he did not see anything of a similar nature and was not of the view that there was a culture of that type in the workplace.

### *Cross-examination*

The cross-examination established that Sims was a former neighbour of Ralph and that Ralph was instrumental in getting him a start at James Hardie.

He denied that he was giving evidence in this matter as a favour to Ralph.

### **Hams**

Hams, a current employee, had worked at James Hardie for about 5 years.

He did not witness Allison or Moate poke their fingers up Ralph’s backside, or grab his genitals.

In the past, Allison had touched his genitals, bottom, and on occasions, had “dry humped” him.

He stated that he was not homosexual, and whilst that conduct was not invited, he had not taken offence and generally had a “quick laugh”.

There had never been a specific request by him to Allison to desist from those practices.

In the statement he gave the company during the investigation of the Ralph complaint, at paragraphs 8, 22 and 23 he stated:

“8. Kenny pulled my head to his groin on Monday 29 June 2004 when I was bending down to get my cigarettes, I did not consider this to be sexual harassment, although it was uninvited. . .

22. It really did no bother me, I wouldn’t have said anything if Alan didn’t raise this.

23. I have to laugh when I am touched inappropriately to make it feel like I am part of the group.”.

He had never witnessed Moate act inappropriately.

On 28 June 2004, he recalled talking to Ralph about the incident involving Allison and himself which resulted in Ralph getting worked up.

Whilst his evidence was that he would never have made a formal complaint, upon reflection, he did feel uncomfortable with the situation.

He denied having a conversation with Pavlov on the previous Saturday in respect of these proceedings.

*Cross-examination*

Hams was questioned in relation to an alleged offer made by Ralph "to stand up for him". In evidence, he was guessing that the offer was \$50,000. The offer had, in his view, been a joke, yet he saw fit to raise it with Bright and Whaanga, but not with Pavlov.

When questioned on training received in respect of James Hardie's policies, his evidence was that the training did not go to sexual harassment.

**Ralph**

Ralph commenced employment on the Meeandah site in late 2000, gaining a full-time position in October or November 2002.

It was his evidence that over a period of time he was subjected to repeated sexual harassment and abuse from Allison and Moate which included poking of fingers up his bottom, grabbing and fondling his genitals, and pretending to have anal sex with him.

Despite having requested the behaviour stop, the abuse was on going.

A fellow employee (Sims) had witnessed Allison simulating anal sex with him.

Even though it got progressively worse, he did not raise it with management prior to 28 June 2004.

Hams, in a discussion with him on 28 June 2004, told him about Allison's behaviour that day which, according to the witness, made him "snap" and he decided to quit.

He went to Whaanga's office and told him he was quitting.

Later he phoned the Plant Manager and told him what was happening in the workplace.

He also spoke to a representative from the AWU and visited his doctor.

On 29 June 2004, he attended Hendra Police Station and made a complaint against Moate and Allison.

He met with Bright and a woman from James Hardie, and went through the police statement with them.

A return to work was effected on 13 July 2004, however, according to his evidence, the sexual harassment and assault by Moate and Allison had affected his health to the extent that he could no longer work.

Evidence was given that he was aware of James Hardie's policies and training he had received.

*Cross-examination*

Ralph was subjected to extensive cross-examination, occupying some 45 pages of transcript.

Matters dealt with included:

- previous "walk off" the job by the witness
- on his behaviour at work in respect of making comments of a sexual nature. He agreed that his verbal evidence on this issue contradicted his written affidavit
- he denied possessing "bestiality" DVD's at work, and then admitted that he did have such a DVD in his possession at work (for a limited time)
- he claimed to have spoken to Sims 2 to 3 weeks ago and on other occasions in the past months. When questioned on Sims' evidence that no such calls occurred, the witness stated that Sims was mistaken
- on his relationship with Pavlov, he stated that he idolised him but denied ever telling him that he "bum fucked his partner with vegetable oil"
- he denied wanting to swap naked photo's of his partner with Ram and visa versa
- witness claimed that Cockburn was mistaken in his evidence about a conversation on 28 June 2004
- on discussions with Bright about Moate and Allison's responses to his complaint (at page 206, line 35 of transcript):

"Broanda: Just on that - just before I go off that subject, Mr Ralph, just finally, Mr Bright has told this Commission that he contacted you around about - at - one day around about this time and told you that - that Mr Moate and Mr Allison denied what had happened, and put their denials to you; did that not happen?"

Ralph: No, not that I can remember, no. To the impression I got on that phone call was that - that they had admitted to some things and denied others -

Broanda: And they'd - ?

Ralph: - but he wouldn't tell me what they admitted to.

Broanda: Okay. He wouldn't tell you - okay. He wouldn't tell you what they'd admitted to, but did he tell you what they had denied?

Ralph: No.

Broanda: Okay?

Ralph: Wouldn't tell me nothing."

- omissions from his police statement
- on the alleged offer of \$50,000 to Hams (page 227, line 1 of transcript):

“Broanda: Have you ever offered Mr Hams any sort of enticement to give specific evidence before this Commission?”

Ralph: No. I’ve got nothing to give him.

Broanda: Mr Hams says that you approached him and offered him \$50,000 to support your statement before these proceedings?

Ralph: Yeah.

Broanda: What do you say to that?

Ralph: That he’s lying.

Broanda: So Mr Hams is lying now as well?

Ralph: Yeah, I reckon he’s been - he’s getting pressure put on him by them and all the other employees that still work there. He is lying.”.

### **Whaanga**

The witness has been in the employ of the respondent for around 9 years.

Former employees, Moate and Allison, reported directly to him.

Prior to the investigation of the complaint against Moate and Allison, he was not aware of any sexual harassment or assaults taking place and he had never witnessed such practices as poking fingers up the backside, imitating anal sex, or the grabbing or fondling of co-workers genitals.

He had, whilst Team Leader, witnessed a couple of workers smacking each other on the backside.

That behaviour had now been “stamped out” at the plant.

On 28 June 2004, Ralph came into his office, “pretty fired up”, and told him that he was quitting. He did not recall Ralph saying anything about being sexually harassed or assaulted.

On the issue of training on workplace harassment issues, he, along with Booy, would provide such training once or twice a year, with the most recent session being held in late 2003 or early 2004.

All production staff, including Moate and Allison, would attend the training.

Since the departure of Allison, it has been necessary to fill his position whilst Moate’s position has not permanently been filled.

### *Cross-examination*

On the reason advanced by Ralph for quitting, at page 232, line 6 of transcript, in response to questioning, he gave the reason as: “Working with dickheads and they think that I am stupid”. Ralph also stated that the production superintendent (Booy) was also a “dickhead”.

In respect of the Hams’ allegation that Ralph had offered (Hams) \$50,000 to provide certain evidence, the witness stated that he had first been informed of this by Hams in the week following the dismissals of Moate and Allison.

He stated that he had not informed any person of the allegation as Hams had told him in “pure confidence”.

### **Kondos**

The final witness for the respondent was Dr Kondos, a qualified medical practitioner that had seen Ralph as a patient.

Clinical notes relating to medical treatment provided to Ralph were attached at LCK 2 of his affidavit.

Ralph had reported to him on 28 June 2004 that he had been subjected to sexual harassment and assault whilst at work.

In his evidence, he stated that he continued to treat Ralph for depression and anxiety arising from the sexual harassment and assault.

### *Cross-examination*

Mr Broanda questioned the witness on details relating to the medical condition of Ralph and, at page 246, line 25 of transcript, raised the possibility of other causes for Ralph’s depression:

“Broanda: So, after being removed from the workplace, Mr Ralph’s depression continued?”

Kondos: Mr Ralph developed symptoms when I - saw him on the 28th of the 6th. He seemed worse when I saw him on the 27th of 7th, and was still suffering depression on the 5th of the 8th. When I saw him on the 30th of the 8th, I thought his moods had improved, but was still suffering from depression.

Broanda: Okay. And - okay, Doctor, just bear with me one second. So, back to your point 12 again, Doctor. You’ve told the Commission that Mr Ralph didn’t offer up any other information that may be affecting his moods; correct?

Kondos: That’s correct.

Broanda: And you didn’t probe - I guess you could say - Mr Ralph for what else was going in his life - ?

Kondos: No –

Broanda: – at that time?

Kondos: – I didn't.”.

In re-examination, Dr Kondos gave evidence that it was possible that whilst having suffered depression for over a year, it was possible that an acute event such as the events of 28 June 2004 could see the depression manifest.

### Submissions

#### **Applicant**

Mr Broanda, on behalf of the applicants, gave extensive submissions covering a range of issues.

The dismissals of Moate and Allison were harsh, unjust and unreasonable and it was submitted that they be reinstated and awarded all wages that would have been payable for the period between their dismissal and reinstatement.

Both had been summarily terminated following a complaint from Ralph which came to the respondent via a statement made to Police.

The allegations contained within the statement were denied by both Moate and Allison.

In determining the applications, it was necessary for the Commission to understand the background of the complainant (Ralph) and the general work environment.

In the case of Ralph:

- he accepted that he had a bestiality DVD in his possession at work
- there was evidence from Pavlov and David Partridge that he wanted to “bum rape”/fuck Partridge
- Ram’s evidence which went to wanting to swap nude photo’s of their respective partners
- the character of Ralph is in question with the allegations in respect of his behaviour or worse than levelled at Moate and Allison
- the company had evidence that the complainant was a deviant, perhaps with a troubled home life and an axe to grind but ignored it
- Ralph had offered \$50,000 to Hams for giving evidence to support his allegations. Offer supported by evidence from Hams and Whaanga. Pavlov from his evidence was also aware of the offer
- Support from Sims should be discarded on the basis of Sims misleading the Commission, he was a neighbour and friend of Ralph, and had been assisted by Ralph in obtaining employment at James Hardie.

The Commission should reject the complaint by Ralph as untruthful.

In terms of the general work environment, it was conceded by Moate, Allison, and a majority of witnesses that “bum slapping” in a jovial way was common practice at Meeandah.

Whaanga, at point 7 of his affidavit, said:

“The only thing remotely of that nature I have seen was back when I was a team leader on the lathe lines. On occasion a couple of these workers smacked each other on the backside. It was mucking around. Nothing ever went further than that that I was aware of.”.

The Union, according to Mr Broanda, does not approve of this type of behaviour, however the evidence is clear that it had been going on for many years without the company taking any steps to curtail the behaviour before the dismissal of Moate and Allison.

At page 262 of transcript, Mr Broanda stated:

“Commissioner, the AWU submits that this Commission cannot find anything other than this behaviour goes on in the workplace. Having made that finding, the AWU submits Mr Allison and Mr Moate should not have been dismissed for engaging behaviour that is not only common culture in the workplace but is condoned by management through their lack of action on the issue.”.

The actions of Allison in respect of Hams, at worst, was an extension of the behaviour engaged in by most of the employees.

Hams himself had never complained and, in reference to previous incidents, stated:

“But I did not take particular offence to these things when they happened. I generally had a quick laugh to be part of the group and fit in. At no time did I specifically ask Allison to stop. I never made a complaint to management.”.

The complaint by Ralph was left unsubstantiated at the conclusion of the company investigation and, in reality, Moate was dismissed for admitting to “bum slapping” fellow employees.

Allison’s termination was also due to “bum slapping” and his admission to the incident involving Hams.

The evidence of Ralph lacked credibility.

Procedural errors occurred in that the company predetermined Moate and Allison’s guilt and failed to put the responses of Moate and Allison to the complainant.

It was procedurally unfair to the extent that the company failed to hear from Moate and Allison as to why they should not be dismissed prior to terminating their employment.

A number of authorities were relied upon by the applicant including:

- *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362-3 – Dixon J
- *Ms B v Store X* (No. B321 of 1994) – Swan C
- *Donchi v Broadhead and AMP Shopping Centres Pty Ltd* (2001) QADT 22 (18 December 2001) – Sofronoff QC (President of Anti-Discrimination Tribunal Queensland)
- *Andrew and TWU v Linfox Transport (Australia) Pty Ltd* IRCA (No. VI 4576 of 1995) 4/12/95 – Murphy JR
- *Bostik (Australia) Pty Ltd v Gorgevski (No 1)* (1992) 36 FCR 20
- *Barsha v Motor Finance Wizard (Sales) Pty Ltd* (2002) 171 QGIG 139 – Asbury C
- *Maher v Quick Cat Cruises* (No. B2209 of 2001) – Blades C
- *Quality Bakers of Australia Limited v Golding & Anor, Wickham & Anor v Quality Bakers of Australia* 60 IR 327 – Beazley J.

In finalising his submission, Mr Broanda again stated that the primary relief granted should be reinstatement with the payment of lost wages and a further order to maintain continuity of service.

Both Moate and Allison were long-term employees of 30 and 36 years service with unblemished records.

If the Commission was not disposed to reinstate them, then the Commission should consider compensation at the maximum level and the matter of *Serratore v Doyles Construction Lawyers* (2001) 168 QGIG 9 at 11 – Blades C, was put forward for consideration.

#### **Respondent**

Mr Watson provided oral submissions on behalf of the respondent.

His submission commenced with a challenge to the argument advanced by Mr Broanda in the matter of *Ms B v Store X* where, which according to Mr Watson, the *Industrial Relations Act* 1999 (the Act) is cast in a way where the onus is upon the applicants to establish that their dismissal was harsh, unjust and unreasonable as opposed to the legislation relied upon in that matter.

In responding to what he deemed to be repetitive comments made in respect of Ralph's character, he stated that the Commission was not a Court of morals, it is not here to judge the character of Ralph, his character is irrelevant to these proceedings, save for two areas.

It was put that the Commission may take into account the character of a witness when assessing their credibility, however the Commission may accept some evidence of a witness and reject other parts of the evidence.

Due to the nature of the conduct of other applicants, it was expected that a "great big bucket" would be tipped on Ralph and the respondent was not "disappointed".

At page 284 of transcript, Mr Watson said:

"But can I remind the Commissioner of this: even prostitutes can be raped, even paedophiles can be robbed and even drug addicts can be murdered. The character of a person doesn't determine the circumstances that befall them. Their attitude to it or what they do as a consequence may depend upon their attitude - or, sorry, their character."

Mr Watson went to the formal investigation carried out by the company and the admissions freely made by both Moate and Allison in statements given to the company in the course of that process.

Both Moate and Allison have acknowledged that "bum slapping" was inappropriate behaviour.

The complaint of serious misconduct had been substantiated.

If the Commission was to accept the evidence of Ralph, the behaviour of Moate and Allison, whether James Hardie had a policy or not, was inappropriate behaviour, incorrect behaviour, and serious misconduct.

On the specific allegations of Ralph, there is sufficient evidence before the Commission, including corroboration from Pavlov and Sims to substantiate the claims.

Mr Watson acknowledged that an issue existed in relation to the \$50,000 coming from Ralph, but summed up the situation by saying that there was "a sort of three-way conflict" on that evidence.

The evidence from Hams took a lot of courage in that he was a fellow employee of Moate and Allison and still employed by the respondent.

The attempts of Mr Broanda to devalue the evidence of Hams had not detracted from Hams' evidence.

In going to ss.119 and 120 of the *Anti-Discrimination Act 1991*, it was submitted that when a person says "stop" it means stop and when a person says "no" it means no.

The submission challenged the credibility of both Moate and Allison indicating that neither could be accepted as witnesses of credit.

In going to the question of what is sexual harassment, Mr Watson went to a recent publication "Discrimination Law and Practice" by Chris Ronalds and Rachael Pepper, quoting (at page 291 of transcript):

“A single act of harassment is sufficient to give rise to a complaint. There does not need to be a continuous or repeated course of conduct. This means that if a person makes a lewd suggestion or inappropriately touches a person on one occasion only then a breach of the harassment law may have occurred. A single incident may result in lower damages than if there's been on going conduct over a lengthy period. However, an employer is required to respond to a single incident in the same way as if a long series of events are the subject of complaint and to take the matter as seriously and respond as promptly as with other complaints. Alternatively the conduct can occur over a lengthy period and on occasions can involve more than one perpetrator.”.

He went on to rely upon a finding from the New South Wales Tribunal in respect of a person who stands in a position of power to a complainant.

This, he said, was particularly relevant to Allison's position of Team Leader where, according to Mr Watson, Allison had failed abysmally in setting the correct example.

Mr Watson provided further commentary on the “Discrimination and Law Practice” publication and findings from the New South Wales Tribunal.

At page 293 of transcript, Mr Watson stated:

“And finally can I take you to the last page, Commissioner, where under the heading ‘Homosexual Harassment’ on the left-hand page. The following is said, ‘The Tribunal made’ - down towards the bottom of the page:

‘The Tribunal made a general statement of the operative principles where it held the legislation is designed to make stereo typed assumptions about people unlawful where conduct falls within one of the prescribed grounds of discrimination. To a certain extent the legislation is revolutionary in that it attempts to mould human conduct for the better. An offender cannot hide behind the shield of a rough workplace environment. An individual's sensibilities are just as likely to be offended in that environment as they are in the more pristine environment of an office. Where the behaviours is found to be accidental’ -

And I stress accidental because there's suggestion of accidental - of any accidental nature in the evidence before you:

‘touching by a male co-worker's groin area then it may not be sexual harassment as it would not be considered offensive by a reasonable person given the work environment where there are jokes and some physical playful actions between co-workers.’”.

The evidence of Bright confirmed that the investigation and the process relied upon to terminate the employment was *bona fide* and in fact an exemplary investigation.

It was submitted that, on the question of impracticability of reinstatement, the position of Allison was different than Moate for reasons relating to Allison's admissions in respect of the Hams incident.

The employer could not have the necessary faith and confidence in Allison discharging the responsibilities of a Team Leader position.

The submission relied upon a number of authorities, including some previously submitted on behalf of the applicant. Others mentioned were:

- *Telstra Corporation Limited v Edwards* (1998) 84 IR 178 – Giudice P, Polites SDP, Cribb C
- *Byrne and Frew v Australian Airlines Limited* (1994) 120 ALR 274
- *Roma Town Council v Latimore* (2001) 167 QGIG 176.

In response to a question from the Commission on the issue of the awarding of compensation as a remedy, Mr Watson acknowledged the principles that would be subject to the considerations of the Commission.

## **Conclusion**

### **Preamble**

In this matter, the Commission heard evidence from a significant number of witnesses fifteen in all, which covered, not only the allegations levelled against Moate and Allison, but also other questionable behaviour relied upon to cause the termination of both employees.

The evidence went to an instemic culture of questionable behaviour that was practised over the course of many years and left unchecked by the respondent.

In the considerations of the Commission, it was not necessary to make a finding as to whether the type of behaviour practiced was inappropriate or otherwise as admissions from any number of the witnesses acknowledged that the patting of bums and “dry humping” was, in effect, a form of inappropriate behaviour.

This type of behaviour would not necessarily be viewed in a stereotypical way across the wider community, and more than likely would be subject to different levels of judgement dependent upon a person's background and a particular work environment.

The fact that such behaviour went unabated for so long at this workplace would draw one to conclude that the level of inappropriateness attached to what was happening would have been at the lower end of the scale at least the Meeandah factory.

The Commission was indeed charged with the task to determine whether firstly the allegations of Ralph were substantiated and secondly that the subsequent investigation which delivered a finding of serious misconduct against Moate and Allison and their termination was reasonable and just in the circumstances.

### **The Complaint**

The complaint upon which the company relied was in the form of a police statement given by Ralph on 29 June 2004 and withdrawn on the following day 30 June 2004.

*Note: In evidence Ralph informed the Commission that quite some weeks after the dismissal of Moate and Allison that the complaint had been reactivated.*

The company, through Bright, sought out Ralph after he had “walked off” the job and initiated dialogue around the contents of the police statement.

The Commission accepts the evidence of Whaanga that when Ralph “walked out” he made no reference at all in respect of concerns about being either sexually harassed or assaulted.

The complaint alleged that Moate and Allison had subjected Ralph to forms of sexual harassment which included a finger in the rectum, simulated oral sex, and grabbing of genitals.

There was evidence that prior to the making of the complaint to police, Ralph had offered Hams the sum of \$50,000 to back up his allegations.

The evidence of Hams and Whaanga confirm both the offer and timing of the offer, despite the denials of Ralph that such an offer was made.

Pavlov also gave evidence of the exact amount of the alleged offer.

In questioning why such an offer would have been made, the Commission accepts the evidence of Ralph that he was not a person of means and that he did not have access to such a sum.

It is certainly not out of the realms of possibility that Ralph may, have thought that his complaint may have led to a significant “payout”, although there was no such evidence before the Commission.

Ralph’s departure from the Workplace was, on the evidence, unplanned and taken as a result of him “snapping” over an incident which did not involve himself.

The immediate withdrawal of the police statement the day after making of the said complaint has, in the opinion of the Commission, led to a “clouding of the waters” as to all of the circumstances surrounding the complaint.

#### **Character of the Complainant**

The necessity for the Commission to go here is as a result of a range of allegations delivered through the evidence of the applicant’s witness.

The allegations went to alleged disclosures by Ralph in respect of most intimate aspects of his and his partner’s sex life, some of which was confirmed by Ralph.

His possession (at work) of a DVD depicting bestiality was, in the course of cross-examination, acknowledged by Ralph.

As Mr Watson put to the Commission, the character of a person does not necessarily prohibit that person making a complaint and the matters raised about Ralph’s character have not had a meaningful bearing on the Commission’s deliberations.

#### **Company Investigation**

The company, through Bright, was very proactive in pursuing the allegations levelled by Ralph.

In fact, those investigations commenced with the company having full knowledge that Ralph had withdrawn the police complaint.

Moate and Allison were suspended on pay on 1 July 2004.

Statements were taken from the (then) suspended employees, along with similar statements from numerous other employees.

There were admissions made by Moate and Allison to “bum slapping” and, in the case of Allison, to the incident involving Hams.

Both Moate and Allison denied what might be regarded as the most serious of the complaints.

The investigation did, in the view of the Commission, fail to substantiate the bulk of Ralph’s allegations.

On 5 July 2004, Moate and Allison were handed letters of termination.

In cross-examination, Bright, the chief investigator, admitted that there was no corroboration of the finger in the rectum allegation against Moate.

In the case of Allison, there was admission that he had been involved in an incident with Hams, but acknowledgment that Hams had never lodged a formal complaint with the company.

Further, in cross-examination, he agreed that the reason for the dismissal had been that Moate and Alison had slapped other employees, including Ralph on the backside.

#### **Witness Credibility**

More often than not in cases where there are conflicting views, the credibility of the witnesses are very much relied upon by the Commission to determine an outcome.

This matter is no exception.

In accessing the evidence provided by the witnesses on behalf of the applicants, in general terms, they presented well and, in the main, deviated little from their evidence-in-chief when cross-examined.

The principle witnesses, being Moate and Allison, presented as persons genuinely embarrassed by the behaviour that had resulted in their appearance before the Commission.

As was the case with the company's investigative process, they acknowledged the behaviour was inappropriate but were clear that it was not meant to demean or humiliate a person and would not have occurred if the recipient of their actions had objected.

The Commission does not accept the argument advanced by Mr Watson that they were not witnesses of credit.

The evidence of Pavlov, in respect of the alleged offer of \$50,000 was interesting as both Hams and Whaanga had been clear that they had not spoken to him about the offer.

Pavlov's evidence that Hams had told him of the offer on the Saturday prior to the hearing would seem to be the more likely position accepted which then brings into question the credibility of Hams.

The main witnesses on behalf of the respondent were Bright and Ralph.

The witness Bright presented as a truthful and open person who, in cross-examination, answered questions candidly, and sometimes to the detriment of the respondent's position.

That should not be taken as a criticism, but more as an acknowledgement of his undertaking to the oath under which he gave his evidence.

In the case of Ralph, the Commission would be most reluctant to place too much of an emphasis on the honesty of his testimony.

When faced with evidence contrary to his, he simply branded the person giving the evidence as lying.

Such was the case in respect of Pavlov, who he stated he idolised but he too ended up with the "liar" tag.

It was the Commission's position that Ralph was "caught out" on enough occasions for him to be regarded as an unreliable witness.

Other witnesses, including Sims and Whaanga, gave, in the view of the Commission, honest and truthful evidence.

I accept the submission of Mr Watson that it was most difficult for Hams to come forward and give his evidence and, except for the alleged discussion with Pavlov, the Commission generally accepts his evidence.

#### **Policies**

The Commission accepts the evidence in respect of the existence of the Workplace Harassment Policy as tendered by the respondent, however there remains a question over the implementation procedures, certainly at the time leading up to the terminations of Moate and Allison.

#### **Findings**

In determining whether the terminations of Moate and Allison were harsh, unjust or unreasonable, the Commission, having considered all of the evidence, material, authorities and submissions before the proceedings finds that the respondent acted with both good intentions and speed to investigate a complaint that potentially was of a most serious nature.

The statements obtained from all persons were, most likely genuinely considered by the company and acted upon accordingly.

The company did not, however, have the same processes that were available to the Commission in the hearing of these applications and, in particular, the cross-examination and submission aspects.

The Commission finds that substantial parts of the allegations contained in the complaint of Ralph on the balance of probability were untrue and, in the company's investigation, were also not substantiated.

This left the termination of Moate being effected for inappropriate behaviour not worse than that of any number of other employees, that being the "bum slapping" incidents.

Allison had the further incident relating to Hams to contend with in addition to the "bum slapping" admissions, although there were no formal complaint from Hams.

In dealing with each of the applications separately, the following findings are recorded.

#### **Moate**

A mature aged man of some 30 years employment with the respondent he, at times, behaved quite stupidly and for that has, to date, paid a significant price.

He has had his employment terminated summarily for reasons that carry a fair degree of stigma and has since 5 July 2004, been unable to find employment.

The decision by the respondent to terminate his employment was, in my observation, harsh in that they failed to consider other remedies available to them at the time.

I am of the view that the company failed to establish that his actions were of what could reasonably be considered, sexual harassment, and the decision to terminate for participating in a seemingly accepted and established practice was unjust and unreasonable.

There was no evidence advanced by the respondent that Moate had ever been warned about his conduct and the fact that there was no reliance placed upon the "failed" serious allegations, then in the case of Moate, a written warning would have sufficed from his "bum slapping" activities.

I find that the dismissal of Moate was harsh, unjust and unreasonable.

Under s. 78 of the Act, when the Commission is satisfied that an employee has been unfairly dismissed, it may:

“(2) The commission may order the employer to reinstate the employee to the employee’s former position on conditions at least as favourable as the conditions on which the employee was employed immediately before dismissal.

(3) If the commission considers reinstatement would be impracticable, the commission may order the employer to re-employ the employee in another position that the employer has available and that the commission considers suitable.

(4) The commission may also –

(a) make an order it considers necessary to maintain the continuity of the employee’s employment or service; and

(b) order the employee to repay any amount paid to the employee by, or for, the employer on the dismissal; and

(c) order the employer to pay the employee the remuneration lost, or likely to have been lost, by the employee because of the dismissal, after taking into account any employment benefits or wages received by the employee since the dismissal.

(5) This section does not limit the commission’s power to make an interim or interlocutory order.”.

Thirty years of exemplary conduct and service does warrant what might be regarded as positive considerations and the Commission is of the view that reinstatement, in Moate’s case, would not be impracticable and, as such, will be ordered.

As mentioned earlier, an appropriate punishment for Moate’s indiscretion would have been the issuing of a written warning and this should occur with the company arranging for Moate to receive a comprehensive briefing of their policies in relation to sexual harassment.

The respondent is ordered to reinstate Moate within fourteen (14) days of the release of this decision to his former position on conditions at least favourable as the conditions on which he was employed immediately before his dismissal.

I further order, in accordance with s. 78(a) and (c) that Moate’s continuity of service be maintained and that the respondent is to pay Moate the remuneration lost, or likely to have been lost, because of the dismissal of taking into account any monies or benefit received by him since his dismissal.

The Commission is aware that Moate received annual and long service leave payments on dismissal and, as such, the parties should confer on how to address this issue prior to employment recommencing.

#### **Allison**

The position of Allison is different from that of Moate for reasons relating to his role as Team Leader and his admission of the incident involving Hams.

Mr Watson, at times, drew to the attention of the Commission, the failure of Allison to set standards that would be expected from a person in authority.

Whilst not disputing the point raised by Mr Watson, one should remain conscious of the level of remuneration paid to Allison for performing that role.

At the time of his termination, Allison’s gross pay was \$752.80 per week, compared to that of Moate, who worked under his direction, and received \$733.70 per week.

The difference in remuneration does not reflect Allison being “way up” in the management chain and would support in “past terms” that he was paid as a working leading hand.

The Hams incident occurred and came to the attention of the company through the investigation of the Ralph complaint.

Hams never made a formal complaint whilst stating in his statement to the company that it was uninvited but not considered sexual harassment.

Hams went on to say in that statement that “it really did not bother me, I wouldn’t have said anything if Alan [Ralph] didn’t raise this”.

Allison, like Moate, is a mature aged person, with 36 years of service.

The only blemish on his record, from his own evidence, goes to “staying at the pub” one lunch hour some twenty years ago.

His participation in “bum slapping” was as foolish as Moate’s, was stupid, and was inappropriate behaviour.

The question for the Commission is whether the decision to dismiss Allison was harsh, unjust and unreasonable.

The considerations for Allison by the company were the same as those that applied to Moate, albeit there was the Hams incident.

When it came to the issuing of letters of termination, Allison’s was exactly the same as the one handed to Moate and contained no reference to Hams.

In respect of Allison’s application, the Commission makes a similar finding to that of Moate in respect of the harshness, unjustness and unreasonableness of his termination.

The Commission relies upon the same grounds as relied upon when determining the Moate application.

There is, however, a difference in what the Commission believes should be the appropriate penalty for Allison’s indiscretion.

In the case of Allison, he should be issued with a written “final warning” with the understanding that any future transgression will lead to his termination.

Allison has also an extensive period of exemplary conduct and service, however in considering reinstatement, there arises some difficulties in that his position as Team Leader has been filled.

The Commission accepts that there was nothing untoward in the decision of the company in so filling the position.

Relying upon the same sections of the Act as applied to Moate, the Commissions orders that Allison is to be reinstated to a position of a level 3 employee within fourteen (14) days of the release of this decision on conditions relevant to that classification.

In determining that Allison be, in effect, demoted, the Commission has accepted the reasoning advanced by the respondent that they no longer have the trust and confidence in Allison to suitably perform the role of Team Leader and, therefore, such an order reinstating him to his previous position would not be appropriate in those circumstances.

As was the case with Moate, orders are also issued in respect of continuity of service and the requirement of the respondent to make a payment of remuneration lost or likely to have been lost because of the dismissal taking into account any monies or benefit received by him since his dismissal.

These monies should be paid at the level 3 rate of pay.

Allison should also confer with the company in respect of his annual and long service leave received prior to recommencing his employment.

The company should also arrange for Allison to receive a comprehensive briefing of the policies in relation to sexual harassment.

**Summary**

The findings of the Commission should, in no way, be seen as an acceptance, in any form, of the behaviour identified in these proceedings.

The Commission is heartened that the company has taken steps to “clean up” the workplace so that inappropriate behaviour will no longer be accepted whether invited or otherwise.

I order accordingly.

J.M. THOMPSON, Commissioner.

*Appearances:*

Mr D. Broanda, of The Australian Workers’ Union of Employees, Queensland, Applicant.  
Mr K. Watson, of Counsel, instructed by Ms E. Hoy of Carter Newell, for James Hardie Australia Pty Ltd, Respondent.

*Hearing Details:*

2004 5, 11 to 13 October

Released: 29 October 2004

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 125 – making, amending and repealing awards*

**Australian Liquor, Hospitality and Miscellaneous Workers Union, Queensland Branch, Union of Employees AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No.3) (No. B1033 of 2003)**

**SECURITY INDUSTRY (CONTRACTORS) AWARD – STATE 2004**

AMENDMENT

PRESIDENT HALL  
COMMISSIONER ASBURY  
COMMISSIONER THOMPSON

23 April 2004

This matter coming on for hearing before the Full Bench of the Commission at Brisbane on 23 April 2004, this Commission orders that the said Award be amended as follows as from 24 June 2003:

- 1. By deleting clause 5.1.6 and inserting the following in lieu thereof:

“5.1.6 *All employees* – The minimum weekly wage payable to employees in the Southern Division (Eastern District) will be as follows:

<u>Classification Level</u>	<u>Wages Per Week</u> <u>From 01/09/2002</u>
	\$
Security Officer Level 1 .....	470.80
Security Officer Level 2 .....	488.80
Security Officer Level 3 .....	501.40
Security Officer Level 4 .....	514.00
Security Officer Level 5 .....	538.70

<u>Classification Level</u>	<u>Wages Per Week</u> <u>From 24/06/2003</u>
	\$
Traffic Controller Level 1 (first 12 months in the industry)	\$473.20
Traffic Controller Level 2 (after 12 months in the industry)	\$481.60
Traffic Controller Level 3 (after 16 months in the industry)	\$491.50

<u>Classification Level</u>	<u>Wages Per Week</u> <u>From 01/09/2003</u>
	\$
Security Officer Level 1 .....	489.65
Security Officer Level 2 .....	508.35
Security Officer Level 3 .....	521.45
Security Officer Level 4 .....	534.55
Security Officer Level 5 .....	560.25

<u>Classification Level</u>	<u>Wages Per Week From 01/09/2003</u>
	\$
Traffic Controller Level 1 (first 12 months in the industry)	\$492.15
Traffic Controller Level 2 (after 12 months in the industry)	\$500.90
Traffic Controller Level 3 (after 16 months in the industry)	\$511.20

<u>Classification Level</u>	<u>Wages Per Week From 01/09/2004</u>
	\$
Security Officer Level 1 .....	509.25
Security Officer Level 2 .....	528.70
Security Officer Level 3 .....	542.30
Security Officer Level 4 .....	555.95
Security Officer Level 5 .....	582.65

<u>Classification Level</u>	<u>Wages Per Week From 01/09/2004</u>
Traffic Controller Level 1 (first 12 months in the industry)	\$511.85
Traffic Controller Level 2 (after 12 months in the industry)	\$520.95
Traffic Controller Level 3 (after 16 months in the industry)	\$531.65

Note: The above rates include safety net adjustments of \$8.00 per week and \$10.00 per week. They also include increases of 5% (effective 19 January, 1998), 4.5% (effective 19 January, 1999), 3% (effective 20 March, 2000), 3% (effective 20 March, 2001), 4% (effective 1 September 2002), 4% (effective 1 September 2003) and 4% (effective 1 September 2004).

The above rates are not to be adjusted for State Wage Case increases which have been, or may be, awarded by the Queensland Industrial Relations Commission in 2002, 2003 or 2004. The percentage based increases are as a result of special cases B1521 of 1994, B1658 of 1999 and B771 of 2002.”.

2. By inserting a new clause 5.3.13 as follows:

“5.3.13 *Travel Allowance – (Traffic Controller)* – Employees travelling directly between their home and a traffic control workplace at which the employee is rostered to work using transport not supplied by the Employer will be paid the following allowance:

Per shift from 10/09/2003	Per shift from 01/09/2004
\$12.60	\$13.10

This allowance does not apply where the Employer offers to provide transport.”.

Dated 23 April 2004.

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

Operative Date: 24 June 2003  
Amendment – Classification of wages and travel allowances  
Released: 1 November 2004