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No. 15

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
CA524/04	Tornado Tilt N Crane – Certified Agreement 2004	3/11/04	
CA528/04	M & E Hydroponic Growers (Queensland) Pty Ltd – Certified Agreement	3/11/04	CA379/98
CA530/04	Wadja Wadja Aboriginal Corporation for Education – Certified Agreement	3/11/04	CA125/03
CA533/04	Shell Logistics Townsville Bitumen Plant – Certified Agreement 2004	3/11/04	CA541/02
CA538/04	Samdara – Certified Agreement 2003	12/11/04	
CA539/04	Avomac – Certified Agreement 2003	12/11/04	
CA540/04	Battistin Orchards Pty Ltd – Certified Agreement 2003	12/11/04	
CA541/04	EGR Extrusion Line – Certified Agreement	12/11/04	CA349/03
CA542/04	Sporting Wheelies and Disabled Sport and Recreation Association of Queensland Inc – Certified Agreement 2004	12/11/04	CA429/01
CA545/04	Pacific Coast Air Conditioning Pty Ltd On Site Sheetmetal Employees and AMWU Queensland Enterprise Certified Agreement 2003-2005	12/11/04	
CA543/04	Iplex Pipelines Australia Pty Ltd – Certified Agreement (Strathpine, Qld) 2004	15/11/04	CA484/02
CA552/04	Construction Painting Pty Ltd t/a Opat Certified Agreement	15/11/04	CA25/01
CA553/04	Stella Corp Pty Ltd t/a Stella Corporation Pty Ltd – Certified Agreement	15/11/04	
CA555/04	Hog Transport Pty Ltd – Certified Agreement 2004	23/11/04	
CA556/04	Chubb Security Services Limited Moorooka Cash and Coin Room – Certified Agreement 2004-2007	23/11/04	CA410/02
CA558/04	Hall Payne Lawyers (Support Staff) – Certified Agreement 2004	25/11/04	CA63/02

No/s	Title	Certified on and certificate issued	Cancelling
CA560/04	Compass Group (Australia) Pty Ltd Cannington – Certified Agreement 2004	25/11/04	CA209/01
CA567/04	Bungil Shire Council State Award Enterprise Bargaining – Certified Agreement 2004	25/11/04	CA318/03
CA568/04	Food Spectrum Pty Ltd Manufacturing and Warehousing Certified Agreement 2004	25/11/04	
CA557/04	Darling Downs Foods Engineering Services Department – Certified Agreement 2004	26/11/04	CA87/03
CA561/04	Lee Smith (ACN 605 587 253) – Certified Agreement 2002-2005	26/11/04	
CA562/04	Thomson Asset Inspections Pty Ltd (ACN 101 401 521) – Certified Agreement 2002-2005	26/11/04	
CA563/04	Fernloam Pty Ltd (ACN 104 463 238) – Certified Agreement 2002-2005	26/11/04	
CA564/04	Oakland Construction Pty Ltd – Certified Agreement 2003-2005	26/11/04	
CA565/04	Gold Coast Corporation Pty Ltd (ABN 30 099 013 064) & The Electrical Trades Union of Employees of Australia, Queensland Branch – Certified Agreement 2004/2006	26/11/04	

The following Agreement has been amended by the Commission:

CA919/03	Services Area – Mount Isa Mines Limited – Certified Agreement 2003	26/11/04
CA920/03	Metallurgical Plants Area Mount Isa Mines Limited – Certified Agreement – 2003	26/11/04

G.D. SAVILL,
Industrial Registrar.

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INDUSTRIAL COURT OF QUEENSLAND

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

John Benedict Finn AND Devan Management Pty Ltd (No. C63 of 2004)

PRESIDENT HALL

29 November 2004

DECISION

Formal parts omitted, the charge brought against Devan Management Pty Ltd was that being a person on whom a workplace health and safety obligation was imposed by s. 28(1) of the *Workplace Health and Safety Act 1995* it failed to discharge the obligation contrary to s. 24 of the Act. The following particulars were supplied:

“Worker: Mark Andrew Cockburn
Workplace: Price Farms, Bootooloo Road, Via Bowen

The risk is the risk of injury or death to Mark Andrew Cockburn.

The source of the risk emanates from the use of plant, namely a tractor and associated attachments.”.

A circumstance of aggravation was alleged, viz, the death of Mark Andrew Cockburn. The Industrial Magistrate found the essential facts to be as follows:

“On 13 th September, 2002 at Prices Farm, Bootooloo Road, two employees namely Mark Andrew Cockburn (the deceased) and Cameron Ingram were performing work in the same paddock. It was a windy day but the level of wind velocity was not unusual for the Bowen area. Mr. Cockburn was using an implement described as a ‘plastic picker upperer’ to roll up plastic that had been laid in rows in a paddock for farming purposes. He was operating the tractor and plastic picker upperer alone without any assistance. The plastic picker upperer consisted of two cylindrical cone drums situated behind and connected to the tractor which were rotated under hydraulic power in order to collect and roll up the plastic that had been laid in the paddock. The cones were operated off the power source of the tractor i.e. the speed of the revolving cones could be adjusted by increasing or decreasing the engine revs. For that purpose there was a hand throttle and a foot throttle on the tractor. The hand throttle could be manually set in a position to maintain the same engine revs even when the operator was not on the tractor.

When the plastic was being picked up by the implement it was quite common for the plastic to break. When that happened, operators had been instructed to stop the tractor, turn the motor off to stop the cones revolving, dismount from the tractor, tie the plastic onto the cones and then get back into the tractor, restart it and continue with picking up operation.

Mr. Ingram was operating a tractor in the same paddock collecting irrigation tubing. On a number of occasions he observed Mr. Cockburn to be behind the picker upperer manually feeding the plastic onto the cones whilst the cones were still in operation.

However, as he was involved in performing his own duties, he did not observe Mr. Cockburn for a twenty minute period. Mr Ingram then approached to where Mr. Cockburn was working and observed that the cones were operating at high revolutions but he could not see Mr. Cockburn. The tractor was stationary in a position at an angle to rows of plastic. He then made a closer inspection and observed that Mr. Cockburn was entrapped amongst the plastic that had been collected on the cones. He then stopped the tractor and sought assistance for Mr. Cockburn.

As a result of the injuries sustained Mr. Cockburn died at the scene of the accident.”.

By a carefully crafted and thoughtful decision of sixteen pages the Industrial Magistrate reached the conclusion that the complaint should be dismissed. Regrettably, the Industrial Magistrate fell into error.

Devon Management Pty Ltd was Mr Cockburn's employer. By s. 28(1) an employer has an obligation to ensure the workplace health and safety of each of the employer's workers at work. By s. 22(1) workplace health and safety is ensured when persons are free from, *inter alia*, death caused by any workplace or workplace activities. Proof of the death of Mr Cockburn proved the offence. Additionally, as it was entitled to do, the complainant relied upon s. 26 (3) to prove the offence in another way. The Workplace Health and Safety – Risk Management – Advisory Standard 2000 was put in evidence. It is the effect of s. 26(3) that the obligation cast upon Devon Management Pty Ltd by s. 28(1) might be discharged only by adopting and following the way stated by the Advisory Standard for managing exposure to risk, or by adopting and following another way that gave the same level of protection against the risk. If heed had been taken of clause 5.3 of the Advisory Standard before relying upon verbal instruction and a warning sign affixed to the tractor, Devon Management Pty Ltd would have turned its corporate mind to question whether physical devices were available to protect the driver from the hazard posed by the use of the "plastic picker upper" to roll up the plastic and protect the driver from the risk of being dragged into the picker upper by the plastic. There is no reason to doubt that if Mr Price, the director who gave evidence, had turned his mind to that question prior to the incident rather than after the incident, he would have made the same discovery which he made all too late. It is sufficient to reproduce the evidence which appears at PP 123 to 124 in the Transcript below:

"And – yes. Now, since the accident, so that we can be clear about the picker upper, has there been anything else done to your plant in order to – that affects the picker upper of affects implements that are being towed by tractors? Have you installed anything else?-- Yes, we have.

Can you describe what that is?-- It's a – I got the idea in my own mind about the – about this from the lawnmower story. There must be a way of stopping this bloody thing moving.

Right. Now, you're talking about the tractor here, are you?-- Yeah, that – that's where I got the idea from.

Yes?-- And from the lawnmower, laying in bed one night, and I went – went with my mechanic, Rusty Mayhew and his foreman and I said, 'look, there must be some way we can do something with this' and we sat down for a couple of hours and we worked out this electric over hydraulic gadget and to make the hydraulics work there's a pedal installed now, so as soon as the foot – driver's foot comes off the pedal, it stops all the hydraulics.

Okay. Now, when you're dealing with the picker upper, it's hydraulically driven?-- Yes.

So, for example, now if you pulled your foot off this pedal you've installed, the hydraulics to the picker upper would cease?-- Yes.

And it would cease operating? So in order to operate it, the foot has to be depressed on the pedal?-- That's right. But we haven't – we haven't operated it in the field.

All right. So it's something that's been devised-----?-- Yes.

-----and yet to be tested?-- -----it was fitted and – around Christmas time or thereabouts.

All right. And so it's yet to be field tested?-- Yeah, but I have full confidence in the thing."

Assuming that the company had adopted and followed "another way" of managing exposure to risk, and there is much to be said for the Appellant's submission that it had all been left "to the boys" to decide their work processes, that "other way" did not give the same level of protection against the risk as the Advisory Standard because it did not lead to identification and adoption of the physical barrier to injury. For much the same reasons, the defence at s. 37(1)(b) could not be made out. An employer who has not turned his mind to the question whether other controls are available before adopting administrative controls has neither exercised proper diligence to prevent the contravention nor taken reasonable precautions to prevent the contravention.

I allow the appeal and set aside the order of Mr Muirhead, Acting Industrial Magistrate, made on 30 August 2004. I order the Respondent Company be convicted of the offence as charged.

The parties, both of whom were represented by Senior Counsel, are agreed that rather than remit the function of sentencing to the Industrial Magistrate, this Court should address the issue for itself. My Associate will contact the parties to make the necessary arrangements. Appearance by telephone will suffice.

I reserve all questions of costs.

Dated 29 November 2004.

D. R. HALL, President.

Appearances:

Mr M. Byrne, QC and with him Ms J. Cameron instructed by the division of Workplace Health and Safety for the Appellant.

Mr S. Durward, SC Instructed by Ruddy Tomlins Baxter for the Respondent.

Released: 29 November 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 331(b)(ii) – Refrain from further hearing

Tradecorp International Pty Ltd AND Anthony Russell (No. B1658 of 2004)

VICE PRESIDENT LINNANE

24 November 2004

DECISION

[1] This is an application by Tradecorp International Pty Ltd (Applicant) seeking to have the Commission refrain from further hearing the matter of an application by Anthony Russell (Respondent) under s. 276 of the *Industrial Relations Act 1999* (Act). This application is made pursuant to s. 331(b)(ii) of the Act.

- [2] The Applicant relies upon a document forwarded to it by facsimile at 11.07 a.m. on Tuesday 12 October 2004. The document which was signed by the Respondent was forwarded to Livingstones (Australia), agent for the Applicant, under cover of correspondence from Solicitors then acting for the Respondent. Relevantly the covering letter also dated 12 October 2004, provided as follows:

“We enclose an amended Deed of Release signed by:

1. Anthony Russell;
2. A W Russell & Co;
3. The Ancath Corporation Limited.

You will note that we have amended the following paragraphs pursuant to our client’s requirements:

- Paragraph 1(d) – This has been amended to bring the payments in line with the usual custom and practice between the parties during the course of employment.
- Paragraph 6 – We have included a subparagraph (c) to include a pre-estimate of damages of liquidated debt for any breach of the clause.
- Paragraph 7(a) – This paragraph has been amended to simplify the paragraph.
- We have included a subparagraph (c) to take away any confusion as to the status of our client’s file referred to in the email of 27 September, 2004.

Our client requires your client to sign the Deed by close of business today.

If your client is not willing to sign the Deed we have instructions to contact the Commission and request a date for a hearing.”.

- [3] The Applicant did not sign the Deed of Release by close of business on 12 October 2004.
- [4] By correspondence dated 13 October 2004 Livingstones (Australia) replied to the Respondent’s Solicitors on behalf of the Applicant. That correspondence was faxed to the Respondent’s Solicitors at 5.12 p.m. on 13 October 2004. The opening paragraph of that correspondence would suggest that there was no agreement on the part of the Applicant to sign the Deed of Release. Relevantly that correspondence provided as follows:

“Just when we thought we were getting close to final agreement, your client chooses to completely change the landscape for everyone.

...

Accordingly we make the following comments in relation to the proposed and changed Deed.

- (1) We do not agree to the change to the paragraph 1(d) ...
- (2) The addition of Clause 6(c) ... we object to the claim of a liquidated debt as set out in the amended Deed...
- (3) The change to 7(a) is non-specific in that it does not specify that it relates to the business... Without this additional wording, clause 7(a) is relatively meaningless.
- (4) Sub-paragraph 7(c), this sub-clause is impossible for the Respondent to agree to as the Respondent has no knowledge of what is contained in the file. It is simply not possible for the Respondent to agree to sub-paragraph 7(c) in any manner without first viewing the file to make the determination that it is not his property.

Our client has expressed a willingness to finalise this matter as expressed in our communications to you of 7 October 2004.

Would you kindly seek instructions from your client in relation to the finalisation of this matter.

Should there be no agreement, then we will be seeking that this matter be brought on for further conference before Commissioner Blades prior to any formal proceedings.

With respect, the ability to finalise this matter swiftly rests with your client.

We await your response.”.

- [5] On 14 October 2004 the Respondent’s Solicitors replied to that email by advising that their instructions were not to respond to the correspondence of 13 October 2004 and also advised that the Respondent would be acting for himself from that time onwards.
- [6] On the same day, 14 October 2004, Solicitors for the Respondent notified the Industrial Registry that the parties had not been able to settle the matter and requested a date of hearing. That correspondence was also copied to Livingstones (Australia).
- [7] On 22 October 2004 Livingstones (Australia) notified the Respondent personally that they believed his request for a hearing was unnecessary and stated that the Applicant would be signing the Deed of Release and forwarding it to him in the “very near future”.
- [8] On 25 October 2004 the Applicant emailed Livingstones (Australia) stating that “[y]our client was given a deadline within which the signed document was to be returned to my solicitor. Your client failed to meet that deadline and accordingly all discussions terminated ab initio.”. Livingstones (Australia) responded in correspondence dated the same day posing the question “[h]ave you reconciled your position given that you’ve already signed the Deed which we will plead as a bar to your continuing proceedings?”.
- [9] It should be stated that the Applicant did not originally provide the Commission with any evidence in support of its application. It provided written submissions and a bundle of documents. When the Applicant’s agent was contacted and advised that the Commission would require evidence to support the application, the Applicant’s agent provided an Affidavit to which he attached the Outline of Submissions by Tradecorp International Pty Ltd. In the Affidavit the agent purported to adopt those submissions as part of his evidence. In its Outline of Submissions the Applicant does a chronology of correspondence. In that bundle of correspondence (which is not identified) is a copy of an email from the Respondent to Livingstones (Australia) dated 29 October 2004. The Applicant seeks also to rely upon the contents of that email. It must be said that this is a rather inappropriate way of attempting to place evidence before this Commission. Some material contained in the Outline of Submissions was not evidence on which the Applicant could rely.

[10] In any event the email of 29 October 2004 provides as follows:

"In my mail this morning is a cheque from your client for \$304.06 made payable to 'AW Russell & Co'. There is a note attached to the cheque which reads '50% GST due on deed'.

Your client seems to now want to live under the fantasy that we struck an agreement, which we did not. My solicitors' e-mail to you dated 12/10/04 and sent at 11.07a.m. clearly set out the position under which my signature, and that of Ancath's, were affixed to the amended draft of the deed – your client did not accept the offer and as advised of our intention in that same e-mail we are now seeking a formal hearing of the case. Accordingly the cheque received from your client is not accepted and will be returned to them in today's mail.

I have this morning checked the NZ bank account of The Ancath Corporation Ltd and I note that on 27/10/04 there was a deposit of NZ\$3241.00 to the account. The only reference alongside the amount are the words 'Tradecorp International'. There is no mention as to what the sum is for or on what basis the money has been deposited and accordingly Ancath shall treat the amount as being a payment on account of invoice no 62. We now look forward to payment of the balance of invoice 62 as that will eliminate the necessity of going to a hearing."

[11] I am not briefed with any correspondence from either the Applicant or Livingstones (Australia) disputing the Respondent's analysis of the payment of \$3,241.00 to his bank account. The Applicant now seeks to rely upon the retention of those monies as a basis for a finding that the Respondent has compromised his s. 276 of the Act application. The Deed of Release, had it been accepted by the Applicant, required the Applicant to make a payment to Ancath of \$6,081.29 and a payment to Russell & Company of \$608.13. The payments were to be made in two equal instalments into the bank account that the payments were previously made to the Respondent.

[12] The payment of \$3,241.00 was paid in NZ currency and therefore was not necessarily easily identified as being half the \$6,081.29 which was required by the terms of the Deed of Release. I am however of the view that the Respondent probably knew that the payment was in respect of the terms of the Deed of Release given that he had received, on behalf of Russell & Company the \$304.06. The problem for the Applicant is that no one responded to the email of 29 October 2004. The Applicant did not set the record straight when the Respondent said that he would treat the amount of \$3,241.00 as being a payment on account of invoice no. 62. In those circumstances I am unable to treat the retention of those monies as an indication that the Respondent was accepting monies paid under the Deed of Release.

[13] Clearly there was no agreement on the terms of the Deed of Release as at 12 October 2004. The Respondent had made it clear in his Solicitors' correspondence of that date that the offer to settle was conditional on the Applicant signing the Deed of Release on that date.

[14] In the alternative, the Applicant contends that the sending of the original of the signed Deed of Release on 13 October 2004 was a further offer which was unconditional. That correspondence from the Respondent's Solicitors simply states as follows:

"We enclose:

1. fully executed Deed of Release;
2. 2000 Australian Master Tax Guide, being property of the Respondent surrendered by the Applicant pursuant to clause 7 of the Deed."

[15] That document was the original of the document faxed to the Applicant on 12 October 2004. On the material before me the Respondent's Solicitors could not have been aware of the Applicant's rejection of the offer made on 12 October 2004 until 5.12 p.m. on 13 October 2004. I do not accept the correspondence of 13 October 2004 which enclosed the original of the signed Deed of Release was a further offer by the Respondent to the Applicant.

[16] Even if one assumes that the Applicant saw the correspondence of 13 October 2004 as a further offer, then receipt of the facsimile of 14 October 2004 (i.e. the copy of the letter forwarded to the Industrial Registry) must have made the Applicant aware of the Respondent's true position i.e. there was no agreement at that time.

[17] The Deed of Release was ultimately signed by the Applicant on 26 October 2004. The Applicant was certainly disputing the terms of the Deed of Release in the correspondence dated 13 October 2004 i.e. at the time when the Applicant advised the Industrial Registry that it wanted the matter to go to a hearing as the parties had not been able to settle the matter.

[18] In those circumstances the Respondent is entitled to pursue his application under s. 276 of the Act. I will make no order remitting the matter to Callover until such time as the Industrial Registry receives an Affidavit from the Respondent to the effect that the monies paid into the bank account of The Ancath Corporation Ltd on 27 October have been repaid to the Applicant i.e. the \$3,241.00.

D.M. LINNANE, Vice President.

Appearances:

Mr L. Moloney of Livingstones (Australia), for the Applicant.

Mr A. Russell on his own behalf.

Hearing Details:

2004 23 November

Released: 24 November 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 278 – power to recover unpaid wages and superannuation contribution etc.

**Mark Lindsay Buglar of the Department of Industrial Relations (for Brendan Kahl) AND Geoffrey Baldwin
(No. W77 of 2004)**

VICE PRESIDENT LINNANE

24 November 2004

DECISION

[1] This is an application under s. 278 of the *Industrial Relations Act 1999* (Act) seeking payment of \$1,180.00 to Brendan Maurice Kahl (Applicant). The application is made by an Inspector of the Department of Industrial Relations on behalf of the Applicant. The application is made against Geoffrey Baldwin (Respondent) who trades as Zash Hair Design. The amount of \$1,180.00 is for two weeks' pay in lieu of notice.

- [2] The matter was originally listed for hearing on 27 October 2004 but was adjourned on 26 October 2004 when the Commission was advised that the Respondent was ill. A notice adjourning the hearing was forwarded to the parties on 26 October 2004. On 29 October 2004 a notice went to the parties which indicated that a conference was to be held in the matter on 22 November 2004. This was an error and the matter should have been listed for hearing. The Respondent did not appear on 22 November 2004 and the matter was adjourned to 24 November 2004. The Respondent again failed to appear today. I am satisfied that the Respondent was made aware of the listings for both 22 November 2004 and 24 November 2004.
- [3] In addition the notice of listing for 22 November 2004 was sent to The Hairdressing Federation of Queensland –Union of Employers. There was no appearance for that organisation on that date.
- [4] Exhibit 2 is an Affidavit of Service stipulating that the notice of listing for the hearing on 24 November 2004 was served on the Respondent on 23 November 2004. Additionally the Registrar spoke with the Respondent on two occasions today concerning the hearing of this matter. On the second occasion the Respondent indicated to the Registrar that he may send correspondence to the Registrar regarding the hearing today. A search of the Registry records was conducted prior to this hearing at 12.45 p.m. and that search revealed no communication from the Respondent.
- [5] I am satisfied that the Respondent was aware of today’s proceedings. In those circumstances I was prepared to hear the matter in the absence of the Respondent.
- [6] It was the evidence of the Applicant that he was employed by the Respondent during the period 9 October 2003 to 25 October 2003. The Applicant had, however, worked in the same business as and from 10 August 2001. He was originally employed by Wainfield Pty Ltd and then Frazbern Pty Ltd. When the liquidator of Frazbern Pty Ltd sold the business of Zash Hair Design to the Respondent all existing staff, including the Applicant, were offered positions with the Applicant. The Applicant was employed in the same position after 9 October 2003 as he was prior to that date. He was employed as a full-time hairdresser.
- [7] The Applicant’s hours of duty were 9.00 a.m. to 5.00 p.m. Monday and Wednesday, 10.00 a.m. to 7.00 p.m. Thursdays, 8.30 a.m. to 9.00 p.m. Friday and 8.00 a.m. to 2.00 p.m. on Saturdays. The hours of work were the same each week. The Applicant was paid wages at the base rate of \$590.00 gross per week. In addition the Applicant received commission of 15% of sales from \$1,001 to \$1,499 and then 30% of sales from \$1,500 onwards.
- [8] The evidence of the Applicant is that he resigned his employment with the Respondent by way of correspondence on 25 October 2003 giving the Respondent two weeks’ notice. The Applicant asked the Respondent whether he wanted him to work out his notice and the Respondent replied that he required the Applicant to work out his notice. According to the Applicant, later in that day the Respondent Manager, Lizzie Baldwin, spoke with the Applicant and advised him to finish work that day.
- [9] The Respondent did not pay the Applicant any payment in lieu of the period of notice given by the Applicant.
- [10] A Further Directions Order was sent to the parties on or about 25 August 2004. Direction number 6 required the Respondent to file in the Registry statements of evidence from all witnesses to be called and relied upon in the hearing by Monday 11 October 2004. The only material filed on behalf of the Respondent was an Affidavit from Brian Cox, the Manager/Director of The Hairdressing Federation of Queensland – Union of Employers which was filed on 11 October 2004. That Affidavit does not address the issues raised in the Applicant’s evidence. In any event there was no appearance by Mr Cox, the Respondent or any other person on behalf of the Respondent so I have not considered that material.
- [11] I also have the evidence of Harley David Matchett, an inspector appointed under the Act and employed by the Department of Industrial Relations. Mr Matchett gives evidence of a telephone conversation with the Respondent on 21 January 2004 wherein the Respondent is said to have stated that “he did not know anything about an employer inheriting responsibility for previous employees” and he asked Mr Matchett to forward him correspondence about such obligations. A letter was then sent on 23 January 2004.
- [12] Mr Matchett also gave evidence of a telephone conversation with the Respondent on 23 February 2004 wherein the Respondent is said to have stated that “he had dismissed the employee Brendan Kahl without giving him notice, but said that as the employee had not mentioned the two weeks’ payment in lieu of notice, he had interpreted that as being mutual agreement by the employee to finish on the spot without notice having to be paid.”.
- [13] I am satisfied that the Applicant was not paid for the two weeks’ notice that he gave the Respondent. I am further satisfied that the Applicant was entitled to payment of the two weeks’ wages. In the circumstances I order the Respondent to pay the Applicant an amount of \$1,180.00 within 22 days of the release of this decision.

Order Accordingly.

Appearances:

Mr D. Walker of Department of Industrial Relations, for the Applicant.

D.M. LINNANE, Vice President.

Hearing Details.

2004 24 November

Released: 24 November 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 331(b)(ii) – refrain from further hearing

**GTM Holdings Pty Ltd AND Transport Workers’ Union of Australia, Union of Employees
(Queensland Branch) (No. B745 of 2004)**

VICE PRESIDENT LINNANE
COMMISSIONER BLOOMFIELD
COMMISSIONER EDWARDS

25 November 2004

Application to refrain from further hearing a part of a s. 275 application – Applicant no longer engages persons of the class sought to be declared employees – Public interest considerations considered – Application granted – *Industrial Relations Act 1999 s. 331(b)(ii)*.

DECISION

- [1] This is an application by the Tenth Respondent in B67 of 2002, GTM Holdings Pty Ltd, pursuant to s. 331(b)(ii) of the *Industrial Relations Act 1999* (Act) seeking to have this Full Bench refrain from further hearing B67 of 2002 in so far as it relates to GTM Holdings Pty Ltd. B67 of 2002 is an application by the Transport Workers' Union of Australia, Union of Employees (Queensland Branch) (TWU) to have certain persons engaged by various Respondents to that matter declared to be employees.
- [2] At the time B67 of 2002 commenced, GTM Holdings Pty Ltd traded as Black Thunder Express and engaged various persons as courier drivers or taxi truck drivers. The TWU thus included GTM Holdings Pty Ltd as a Respondent in B67 of 2002.
- [3] On or about 1 September 2003, GTM Holdings Pty Ltd sold its business to a number of named entities unrelated to GTM Holdings Pty Ltd. The assets of GTM Holdings Pty Ltd relevant to its operations as a taxi truck business were sold to Black Thunder Transport Pty Ltd (ACN 105 466 573) as trustee for the Black Thunder Transport Trust. Nicholas Black, a director of GTM Holdings Pty Ltd, gave evidence that neither he nor GTM Holdings Pty Ltd is in any way related to Black Thunder Transport Pty Ltd nor does he or GTM Holdings Pty Ltd have any interest in that company or the business of Black Thunder Express.
- [4] A company, Group Messengers Pty Ltd (ACN 084 916 478), was the entity that was introduced to the former courier drivers or taxi truck drivers engaged by GTM Holdings Pty Ltd and, according to Mr Black, it was Group Messengers Pty Ltd who ultimately engaged some of GTM Holdings Pty Ltd former courier drivers or taxi truck drivers.
- [5] Mr Black's uncontested evidence is that GTM Holdings Pty Ltd does not now operate in the taxi truck courier industry.
- [6] GTM Holdings Pty Ltd seeks to have the Commission refrain from further hearing B67 of 2002 as it relates to it as the Tenth Respondent on the basis that further proceedings by the Commission are not necessary or desirable in the public interest. The TWU opposes the application.
- [7] Essentially the TWU contends that:
- there has been a transmission or succession to the business or part of the business of GTM Holdings Pty Ltd by Group Messengers Pty Ltd;
 - the courier drivers formerly engaged by GTM Holdings Pty Ltd and now engaged by Group Messengers Pty Ltd comprise a part of the class of persons identified by the TWU's application in B67 of 2002; and
 - those persons remain potentially subject to any order that the Commission might make at the conclusion of B67 of 2002.
- [8] In its application the TWU does seek to have the successors of named Respondents bound by any order the Commission might make in B67 of 2002.
- [9] The difficulty for the TWU is that B67 of 2002 has not progressed beyond the application stage. The TWU has been given a number of opportunities to finalise its application but as yet no final application has been lodged. Pre-pleading discovery and inspection is still occurring in the matter.
- [10] The Application in its current form seeks "[a]n Order declaring a certain class of persons who are owner-drivers engaged in courier and taxi truck work to be employees ..." and a decision that "... the class of persons engaged as owner drivers in courier and taxi truck work described in ... working under contracts or arrangements, the nature and effect of which is described in ... with the entities in Schedule B C be declared to be employees". GTM Holdings Pty Ltd is listed in Schedule B C. GTM Holdings Pty Ltd now has no class of persons engaged as owner drivers in courier and taxi truck work. Further GTM Holdings Pty Ltd has no such persons under contracts or arrangements the nature and effect of which is described in the Application.
- [11] Further s. 275(1) of the Act provides as follows:
- “(1) The full bench may, on application by an organisation, a State peak council or the Minister, make an order declaring –
- (a) a class of persons who perform work in an industry under a contract for services to be employees; and
- (b) a person to be an employer of the employees.”.
- [12] There is now no class of persons described in the currently framed application who are performing work under a contract of services with GTM Holdings Pty Ltd.
- [13] In our view the weight of the competing public interest considerations favours the removal of GTM Holdings Pty Ltd as a Respondent in B67 of 2002. We will therefore refrain from further hearing that aspect of B67 of 2002 which relates to GTM Holdings Pty Ltd i.e. the Tenth Respondent in that matter.
- [14] We grant the application.

Order Accordingly.

D.M. LINNANE, Vice President.

A.L. BLOOMFIELD, Deputy President.

K.L. EDWARDS, Commissioner.

Appearances:

Mr A.A.J. Horneman-Wren directly instructed by The Queensland Road Transport Association Industrial Organisation of Employers for GTM Holdings Pty Ltd, with him Mr P. Knight.

Mr D. Quinn of Carne Reidy Herd Lawyers for the Transport Workers' Union of Australia, Union of Employees (Queensland Branch).

Released: 29 November 2004

Hearing Details:

2004 15 November

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**National Retail Association Limited, Union of Employers AND Queensland Retail Traders and Shopkeepers Association
(Industrial Organization of Employers) and Others (No. B1230 of 2004)
Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees AND National
Retail Association Limited, Union of Employers) and Others (No. B1320 of 2004)**

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

DEPUTY PRESIDENT BLOOMFIELD
COMMISSIONER BLADES
COMMISSIONER THOMPSON

26 November 2004

Applications to amend the *Trading Hours Order – Non-Exempt Shops Trading By Retail – State* – NRA application to allow non-exempt shops to open on 27, 28 December 2004 and 3 January 2005 – SDA application to require non-exempt shops to remain closed on 1 January 2005 – Case stated pursuant to s. 282 of the *Industrial Relations Act 1999* re 1 January 2005 – Witness evidence – Statutory requirements – Weighing of competing arguments and considerations – NRA application granted – SDA application substantially granted.

DECISION

This decision relates to applications lodged by the National Retail Association Limited, Union of Employers (**NRA**) (Matter No. B1230 of 2004) and the Shop, Distributive and Allied Employees Association (Queensland Branch) Union of Employees (**SDA**) (Matter No. B1320 of 2004) to amend the *Trading Hours Order – Non-Exempt Shops Trading by Retail – State* (the Order) pursuant to s. 21 of the *Trading (Allowable Hours) Act 1990* (the Act). The applications arise because of the effect of the gazettal of substituted public holidays for Christmas Day and Boxing Day in 2004 and New Year's Day in 2005. The Christmas Day public holiday will be observed on Tuesday, 28 December 2004, the Boxing Day holiday on Monday, 27 December 2004 and the New Year's Day holiday on Monday, 3 January 2005. By agreement the applications were heard concurrently.

NRA's application seeks to amend clause 3.2(1) of the Order by including a new provision after the current provision in the following terms:

“Provided that notwithstanding the provisions of clause 3.1, the following trading hours shall apply on Monday December 27, 2004, Tuesday December 28, 2004, and Monday January 3, 2005.

	<u>Opening Time</u>	<u>Closing Time</u>
<i>Monday December 27, 2004</i>	<i>8.00am</i>	<i>5.00pm</i>
<i>Tuesday December 28, 2004</i>	<i>8.00am</i>	<i>5.00pm</i>
<i>Monday January 3, 2005</i>	<i>8.00am</i>	<i>5.00pm.”</i>

NRA's application, if granted, would allow non-exempt shops in regional areas of Queensland to open on the days in question.

SDA's application seeks to add a new provision after clause 3.2 of the Order in the following terms:

“3.2A Notwithstanding the provision of Clause 3.1 and Clause 3.2, all non-exempt shops shall be kept closed on the following days:

*Sunday, 26 December, 2004, and
Saturday, 1 January, 2005.”*

SDA's application, if granted, would have the effect of requiring all non-exempt shops throughout the whole of Queensland to remain closed on 1 January 2005, which would otherwise be a normal trading day because of the substitution of the observance of the New Year's Day public holiday to 3 January 2005.

Following the decision of Parliament on 9 November 2004 to amend the Act to require shops, other than in tourist areas, to remain closed on Sunday, 26 December 2004, SDA amended its application to remove any reference to 26 December 2004 from its claim. Consequently, it only pressed the Commission to order that non-exempt shops be closed on 1 January 2005.

NRA's application (Matter No. B1230 of 2004) was opposed by the Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employers) (**QRTSA**), National Meat Association of Australia (Queensland Division) Industrial Organisation of Employers (**NMAA**), The Australian Workers' Union of Employees, Queensland (**AWU**) and by the SDA. The Hardware Association of Queensland, Union of Employers (**HAQ**) wrote to the Commission on 1 November 2004 and indicated it had no objection to the Order being amended as proposed by NRA.

SDA's application (Matter No. B1320 of 2004) was supported by QRTSA, NMAA and AWU. HAQ also informed the Commission it had no objection to the Order being amended in terms of SDA's application. The application was opposed by NRA.

Correspondence was also received from the Brisbane City Council, on 4 November 2004 in relation to Matter No. B1320 of 2004, to the effect that Council *“neither supports nor opposes the (SDA) Application.”*

To clarify the Commission's jurisdiction to deal with the SDA application – i.e. whether it could order shops remain closed on 1 January 2005 – we stated a case to the President of the Commission pursuant to s. 282 of the *Industrial Relations Act 1999*. In a decision released on 17 November 2004 (Matter No. C84 of 2004) the President determined:

“An order deciding that the trading hours of the non exempt shops do not include hours on 1 January 2005 discharges that function (under s. 21(1) of the Act) and is squarely within the power.”

The respective cases

NRA – In opening the case on behalf of NRA, Mr Black said his organisation's application sought to address the situation where, under the current Order, non-exempt shops in regional Queensland would be required to be closed for 4 consecutive days from Saturday, 25 December 2004 until Tuesday, 28 December 2004, inclusive and then subsequently for a further 2 days on 2 and 3 January 2005. Further, Mr Black said, if SDA's application succeeded, non-exempt shops in regional Queensland would be closed for 3 days straight between 1 January 2005 and 3 January 2005, inclusive.

Consequently, NRA sought an amendment to the Order such that non-exempt shops could trade on Monday, 27 December 2004, Tuesday, 28 December 2004 and Monday, 3 January 2005, respectively. Mr Black also indicated NRA was vehemently opposed to SDA's application.

In support of NRA's case, Mr Black called the following witnesses:

- Mr Scott Wallace, Regional Retail Support Manager in Queensland for Woolworths Limited.
- Mr Brian West, Regional Manager in Queensland for Coles-Bi Lo Supermarkets.
- Ms Pat Cooper, Manager of the Myer Queen Street Store and Acting State Manager for Myer Grace Bros.
- Mr Gerard Winzenberg, District Manager for Target Australia Pty Ltd in Queensland.
- Mr Milton Cockburn, Executive Director of the Shopping Centre Council of Australia.

NRA also called the following persons in support of its case in opposition to SDA's application:

- Mr John Green, employed by Gandel Retail Management Ltd as the Centre Manager for the Myer Centre, Queen Street, Brisbane.
- Mr Scott Wallace, Regional Retail Support Manager for Woolworths Limited in Queensland.
- Mr Brian West, Regional Manager in Queensland for Coles-Bi Lo Supermarkets.
- Mr Ricky Hough, Regional Operations Manager for Kmart.
- Mr Milton Cockburn, Executive Director of the Shopping Centre Council of Australia.

The general tenor of the evidence of all these witnesses was to the effect that a 4 day closure, followed by a 3 day closure (if SDA's application was granted), would generate unacceptable levels of inconvenience to customers, place unreasonable stresses on the operation of most stores and cause significant problems in service delivery. It was suggested that contemporary shopping trends disclosed that consumers favoured more frequent and smaller food shops, with the emphasis on the purchase of fresh products. Consumers had demonstrated they wanted flexible shopping hours that allowed them to shop at convenient times.

It was also suggested that rejection of NRA's application would lead to *extremely* congested conditions in stores – particularly supermarkets – on 24 December 2004. The witnesses said 24 December was already one of the busiest trading days of the year, and the traditional day for pre-Christmas fresh food purchases. If 24 December 2004 also preceded a 4 day closure of stores in regional areas, store conditions were expected to be highly congested. A 4 day closure would also lead to many logistical problems with distribution centres, and suppliers, being stretched to adequately supply stores with sufficient quantities of product to cope with the expected demands prior to Christmas. There would also be difficulties in the following week as stores attempted to re-stock their shelves with less available time to accomplish that task.

It was claimed that a similar situation, although not as severe, would be encountered on the following weekend if SDA's application was granted and NRA's application, in respect of 3 January 2005, was rejected.

A number of the witnesses also commented that if regional stores were required to remain closed on 27 and 28 December 2004 there would be a loss of potential sales within their retail stores, and other stores in the same towns, as consumers elected to travel to tourist regions in order to access the Boxing Day and traditional end-of-year sales.

In particular, Ms Cooper gave detailed evidence about the loss of potential sales at Myer's Toowoomba store in recent years when that store was only required to close on 26 December. She said if Myer's Toowoomba store was forced to close on 27 and 28 December 2004 she expected there would be significant negative effects for the store. Sales staff would lose the opportunity for employment over those days, and thus income. Consumers would travel to Brisbane to participate in the Boxing Day and end-of-year sales and the sales lost in Toowoomba would never be recovered. Such events could ultimately affect the viability of the store.

Finally, all of the witnesses said it was simply unacceptable that regional Queenslanders would be deprived of shopping opportunities if NRA's application was not granted. Stores would be closed for 6 days out of the 10 days between 25 December 2004 and 3 January 2005. Further, if SDA's application was granted, non-exempt stores would only be open for 3 days during that 10 day period. It was argued that this was a totally unacceptable position, not only to retailers but also to consumers.

SDA – SDA called the following witnesses in support of its case in opposition to NRA's application:

- Mr Allan Siegle, a shop assistant employed by Kmart, Toowoomba.
- Ms Trisha Moras, a shop assistant employed by Woolworths Limited, Bundaberg.
- Mr Steven Andrew, a storeman in the dry goods area of Woolworths Supermarket, Bundaberg.
- Mr Colin Uern, a service assistant employed by Bi-Lo, Goondiwindi.

These witnesses said they would decline to work on 27/28 December 2004 and 3 January 2005 if NRA's application was granted. Several of them said they would be away for the bulk, or all, of those days either visiting relatives or on holidays. Each of them also expressed the attitude that the existing trading hours around Christmas and New Year were adequate.

SDA called the following persons in support of its own application:

- Mr Joseph Chan, a service assistant employed at Coles Supermarket, Greenslopes.
- Ms Michele Georgopoulos, a shop assistant employed at David Jones, Robina.
- Mr Wayne Johnson, a shop assistant employed at Myer, Queen Street, Brisbane.
- Ms Diane Downey, a shop assistant employed at Myer, Queen Street, Brisbane.
- Ms Sapphira Standerwick, a shop assistant employed at Myer, Queen Street, Brisbane.
- Ms Natalie Halpin, a shop assistant employed at Action Supermarket, Carindale.
- Ms Donna Campbell, a service assistant employed at Target Australia Pty Ltd, Springwood.
- Ms Cassie Sulzenbacher, a service assistant employed at Coles Supermarket, Mount Gravatt.
- Ms Elizabeth Banks, a shop assistant employed at Big W, Strathpine.
- Ms Deborah Danton, a shop assistant employed at Myer Stores Limited, Maroochydore.
- Ms Carole Murray, a shop assistant employed at Myer Stores Limited, Maroochydore.
- Mr Christopher Stanford, a service assistant employed at Coles Supermarket, Nerang.
- Ms Alison Zorn, a service assistant employed at Bi-Lo, Kallangur.
- Ms Karen Berg, a shop assistant employed at Woolworths Supermarket, Ashgrove.
- Ms Mellisa Boulter, a shop assistant employed at David Jones Limited, Toombul.

The majority of these witnesses said they would decline to work on 1 January 2005 if SDA's application was rejected. Several of them said they would work, but only if they were directed to. Many of the witnesses said they did not believe that retail employees should be required to work on 1 January 2005 because retail was not like an emergency service. It was not essential that retailers be open for trade on 1 January 2005.

Many of the witnesses also expressed comments to the effect that New Year's Day was one of the few days that people could get together and it was also a day when most people were off work, except retail workers. Further, retail workers were not able to enjoy New Year's Eve, as were other workers, because many of them would be required to be in a fit state to work on the following day.

A number of witnesses who had worked on 1 January previously said that the day was extremely quiet and that they were bored. Several of them also said that the stores that they worked for had not traded on 1 January 2004, because of previous experience, but they were not sure what their employers' intentions were this coming New Year's Day.

QRTSA – QRTSA called the following witnesses in support of its case in opposition to NRA's application:

- Mr Howard Carpenter, Co-owner, "Mans World", Mount Isa, "Totally Workwear", Mount Isa and "Donahues", Townsville.
- Mr Geoffrey Becker, Owner, Becker Furniture Limited, Toowoomba.
- Ms Gwendoline Shields, Store Manager, Glenmore AUR Foodstore, Rockhampton.
- Mr Stephen Erbacher, Senior Business Manager, Independent Grocers of Australia (IGA) Distribution.
- Mr Neil Rogers, Owner, IGA Westridge, Toowoomba.
- Mr Ken Murphy, Chief Executive Direction, Queensland Newsagents Federation Ltd.
- Ms Rossana Winters, Owner, Frenchville Foodstore, North Rockhampton.

There were substantial similarities in the evidence of most of QRTSA's witnesses because of the "template" nature of the statements that had been prepared with the assistance of Mr Price, of QRTSA. Nonetheless, the essential argument coming from these witnesses – in both their written statements and under cross-examination – was to the effect that if NRA's application was rejected they would experience an increase in their own trade because their primary competition, the major supermarkets, would be closed. In that sense, it was seen as a significant opportunity for small to medium size retailers to capitalise on the fact that the "majors" would be closed. One witness agreed it would be a "windfall" opportunity to increase sales.

Many of those who gave evidence also said that the period between Christmas and New Year, and into early January, was traditionally slow. This was partially because many people from regional regions took the opportunity to take a holiday or to visit family. As a consequence, sales in regional areas fell. Having the major stores closed on 27 and 28 December 2004 and 3 January 2005 would help to generate additional income during this traditionally slow time of the year.

A number of witnesses also said they stocked virtually everything the major stores offered and would be able to service their local area if the major stores – such as Coles, Woolworths, Bi-Lo and Action – were required to be closed.

NMAA – NMAA called evidence in support of its case in opposition to NRA's application from the following witnesses:

- Mr Peter Boodle, Owner, Rocky Super Meats, North Rockhampton.
- Mr Gregory Davis, Owner, Sarina Fine Foods (a retail butchering business), Sarina.
- Mr John McLean, Owner/Manager, Magees IGA, Bowen.
- Mr Mark Nolan, Owner and Manager, Gray's Modern Meat Mart, Toowoomba.
- Mr Hartmut Scharf, Owner, Pecco Wholesale and Retail Management Pty Ltd trading as AUR Supermarket Warrina, Townsville

Excluding the evidence of Mr McLean, whose evidence was similar to that of QRTSA witnesses, the other witnesses called by NMAA gave quite different, and at times, conflicting evidence. Several of them said, under cross-examination, that their stores would not be open on 27 and 28 December 2004 irrespective of whether NRA's application was granted or refused. Another witness said he might trade for limited hours on each of those 2 days if the major supermarkets were closed. Nonetheless, all of the witnesses claimed they would lose business to the major stores if those stores were allowed to open. However, they could point to no particular reason why this would be so, given that NRA's application would, in effect, result in a trading hours regime similar to that of recent years.

Submissions of the parties

NRA – Mr Black essentially highlighted the evidence from his witnesses, which we have already referred to (above). However, he also particularly highlighted the view of his organisation, and several of his witnesses, to the effect that retail is part of the leisure and entertainment sector and that retailers compete for consumers' disposable income together with other businesses in that same sector. He suggested it was unfair that enterprises such as clubs, hotels and movie theatres were allowed to trade virtually 365 days a year when retailers faced a number of restrictions on their activities.

Mr Black also said retail employees had nothing to complain about *vis-a-vis* other employees engaged in the leisure and entertainment sector. All of those other employees could be called upon to work virtually any hour of the day or night on virtually any day of the year. This contrasted to the position of retail employees who were afforded certain protections not only by the Order, but also by enterprise certified agreements and Awards.

Mr Black suggested SDA's claim was motivated solely because work on 1 January 2005 would not attract public holiday rates. He suggested SDA's response to this situation was to make an application to require all shops to be closed. This was unsatisfactory.

Finally, Mr Black said the issue before the Commission was essentially about whether one group of retailers should be able to enjoy an advantage over others. He said it was for the Commission to decide what was fair in all of the circumstances.

SDA – Mr Gillespie, on behalf of SDA, said the evidence disclosed there was no community pressure for non-exempt stores to be open on 27 and 28 December 2004, nor on 3 January 2005. He said the single most common concern of NRA's witnesses was an apprehended loss of business if non-exempt stores were required to be closed on those days.

Mr Gillespie also said that many retail employees would have made plans to take extended leave over the Christmas and New Year's break because of the number of scheduled public holidays. The holidays had been gazetted well beforehand and employees were entitled to take their scheduled leave, even if the Commission found favour with NRA's application.

Mr Gillespie also said that SDA had been overwhelmed at the number of persons who were prepared to give evidence in opposition to NRA's application (more than 260 people volunteered) and in support of his own organisation's application (around 400 people). He said this demonstrated overwhelming endorsement for the position SDA had adopted in these proceedings. Further, he said that his members were not motivated by the penalty rates which would be on offer if NRA's application was granted. SDA's witnesses had indicated they prioritised family life ahead of additional income.

QRTSA – Mr Price said NRA had failed to establish sufficient grounds for its application to succeed. Any losses suffered by non-exempt stores on 27 and 28 December 2004 would be negligible. They would be made up during sales over the following few days.

Further, the needs of consumers in regional centres could be catered for by his members. Most of them offered a similar product range to the major stores and there was simply no need for any order to allow the majors to open.

Mr Price also highlighted that there was no support whatsoever from local Government (see s. 26(h) of the Act) which was a telling negative for NRA's application.

NMAA – Mr Wotherspoon said it was apparent from NRA's witnesses that they saw 27 and 28 December 2004 (in particular) as an opportunity to generate extra sales. However, the major stores already traded very well throughout the year, as demonstrated by their annual reports, and the minimal amount of sales lost on the few days in question could be generated once non-exempt stores re-opened.

Mr Wotherspoon also criticised the timing of NRA's application. He said the Queensland Government had gazetted the forthcoming Christmas Day, Boxing Day and New Year's Day holidays as far back as 25 July 2003 (75 QGG 1099). He said many country people, in particular, took the opportunity to take holidays around Christmas/New Year and many of them had made plans – well in advance – based upon the way that public holidays fell this coming Christmas/New Year. He said it was unfair that some stores might now have to open, in order to compete with the majors, if the Commission granted NRA's application. In that sense, he suggested that the lateness of NRA's application should be held against it when the Commission came to consider the competing arguments.

Mr Wotherspoon also said that at least one of the NRA's witnesses, Mr Winzenberg, agreed that being able to trade on 5 days out of 10, over the Christmas/New Year period, would be acceptable. Mr Wotherspoon suggested that this could occur if non-exempt stores were allowed to open on 28 December 2004.

Finally, Mr Wotherspoon said that consistent with his organisation's views that there should be no extra trading hours, NMAA was not advocating a net reduction in trading hours over the New Year's Day weekend. He said that if the Commission was minded to grant SDA's application, in respect of 1 January 2005, NMAA would accept that a consequence of that decision was that stores would be allowed to open 3 January 2005. He said such a decision would not involve a reduction in trading hours, and nor would it lead to an increase.

We commend Mr Wotherspoon, and his organisation, for that submission. It shows a pragmatic attitude which, sadly, was otherwise absent in these proceedings. The repeated push by NRA for extended trading hours has attracted equally vehement opposition from those traditionally opposed to any such extension. Mr Wotherspoon's (and NMAA's) position was a rare example of someone prepared to deal with an issue on its merits, rather than idealistically.

AWU – Mr Martin essentially supported the submissions of Mr Gillespie for SDA.

Conclusion

Christmas Day and New Year's Day, respectively, fall on a Saturday once each 5 or 6 years, depending upon the number of leap years between each occurrence. The respective days last fell on a Saturday in 1999. Previously they had fallen on a Saturday in 1993.

In a decision published at (1993) 144 QGIG 671 a Full Bench of this Commission decided to allow non-exempt shops to trade on Tuesday, 28 December 1993 and also decided that non-exempt shops remain closed on Saturday, 1 January 1994.

In 1999, through the *Trading (Allowable Hours) Amendment Act 1999*, Parliament legislated to provide that non-exempt shops could open on Tuesday, 28 December 1999 and that non-exempt shops throughout Queensland should be closed on Saturday, 1 January 2000. The closure of shops on the latter date was related to the Y2K phenomenon and the desire of retailers to limit, or avoid, any problems linked to that issue.

In each instance, excluding certain tourist areas, non-exempt shops were required to be closed for 3 consecutive days over each of the successive weekends which incorporated 25, 26 and 27 December and 1, 2 and 3 January, respectively.

NRA's application seeks that regional non-exempt shops be closed in 2004 for only 2 days over Christmas (25 and 26 December 2004) and for one day (2 January 2005) over what is traditionally known as the New Year's long weekend. NRA claims that its application should be granted because "*the trading hours landscape has changed substantially since (the 1993 and 1999) arrangements were introduced, and the applicant believes that the resolution of this application requires a different outcome to that deemed suitable in 1999.*"

The Commission has previously observed that the fixing of trading hours, especially for Christmas and New Year trading, "*should involve a year by year examination of all of the circumstances involved in what would be a fair and equitable outcome with respect to employers, employees and the community generally.*" (144 QGIG 671 at 671).

Section 26 of the Act sets out the matters the Commission is required to consider in its determination of an application made pursuant to s. 21 of the same Act. After considering the statutory requirements, and all that has been submitted to us, both in evidence and submissions, we have decided to grant NRA's application and to also substantially grant SDA's application.

In making our decision, we note that Parliament has not deemed it appropriate to totally deregulate trading hours but, instead, has placed certain responsibilities on this Commission to decide applications having regard to the statutory requirements. In that respect, the Commission is required to consider not just the interests of major retailers, on whose behalf the substantive application is pressed, but also the public interests, consumers interests and business interests (whether small, medium or large). In deciding to grant NRA's application, and substantially grant SDA's application, we have attempted, as best we can, to take into account the interests of all such parties.

The evidence suggests there would be significant difficulties if regional non-exempt shops were required to remain closed for 4 successive days between 25 and 28 December 2004, inclusive. There would be significant logistical problems associated with distribution centres, and suppliers, attempting to supply stores with sufficient product to enable them to cope with the pre-Christmas buying surge that would be expected to result if stores were closed for such a lengthy period. There would also be significant extra congestion in stores on 24 December 2004 if such an outcome was forced on the community.

In our considered view, such a situation is not desirable and benefits no one.

In making our decision to grant the whole of NRA's application in respect of 27 and 28 December 2004 (Matter No. B1230 of 2004), rather than only granting it in respect of 28 December 2004, we have also considered the particular circumstances which will apply this year. Pursuant to the *Workers Compensation and Rehabilitation and Other Acts Amendment Bill 2004*, Parliament has seen fit to require all stores throughout Queensland, other than in certain tourist areas, to remain closed on 26 December 2004. This will mean that many of the traditional Boxing Day sales in major centres will now not commence until Monday, 27 December 2004. Similarly, a great many stores, in shopping centres and the like, will also open for normal business on that day, and the succeeding day.

We believe that consumers in regional areas should not be deprived of the opportunity to shop on 27 December 2004 in circumstances where their "city cousins", and people in tourist regions, can shop on that day and seek out end-of-year bargains. The same can be said for 28 December 2004.

We also believe that there must be some balance between work and family life and that retail employees should, along with the great bulk of the rest of the community, be entitled to enjoy New Year's Eve and New Year's Day without feeling obligated to work on a day when there is, on the evidence available to us, only a modicum of trade. In our considered view, there is no need for non-exempt stores, other than in tourist areas (see below), to be open New Year's Day. By New Year's Day, many retail workers are exhausted after having worked considerable hours in the week leading up to Christmas and in the post-Christmas sales which follow. In our view, they are entitled to relax on New Year's Eve and on the following day to re-charge their batteries and to experience, and enjoy, the occasion with friends and relatives.

Further, whereas larger retailers are able to staff their stores on 1 January, many smaller exempt and independent stores are not similarly blessed. The amount of trade historically generated on that day, and the penalty rates involved, simply result in them trading at a loss. Whilst the major retailers might be prepared to trade at a loss – in support of some wider agenda about the relaxation of trading hours generally and the pursuit of market share – there is little demonstrated support for, or demonstrated need for, retail trading opportunities on that day.

In that respect, whilst several of NRA's witnesses claimed that retailers were in competition for consumers' discretionary spending dollars that is no justification, in our view, for increasing trading hours. It is not one of the elements the Commission is required to consider under s. 26 of the Act. Further, Parliament has not deregulated trading hours deciding, instead, (with one or 2 exceptions) to assign the responsibility for deciding trading hours to this Commission.

SDA's application (Matter No. B1320 of 2004) requests the Commission to require that all non-exempt stores throughout the State be closed on 1 January 2005. Whilst SDA has *generally* made out the case in support of its application, we do not believe that its arguments, and evidence, have the same relevance to tourist areas as they do for metropolitan and regional areas. Consequently, we propose to limit our approval of SDA's application to those areas which are non-tourist areas.

Deciding what is, and what is not, a "tourist area" causes us significant concern. Whereas the Commission has previously decided, for example, that the area of City Heart of Inner City of Brisbane is such an area, we are also conscious of the need for consistency on the issue of trading hours so as to lessen public confusion about whether a particular area will be open or closed. In that regard, we note the recent decision of the Parliament – when enacting the 2004 amendment to the Act – to limit the areas within which non-exempt shops may open on 26 December 2004 in the area of South-East Queensland (SEQ) to the Gold Coast and Sunshine Coast only, with the existing Order regulating trading hours outside that area.

After carefully considering this matter, and weighing the competing issues, we have decided the need for consistency of trading hours on this occasion dictates that we mirror the decision of Parliament and determine that only those non-exempt shops allowed to remain open on 26 December 2004 by the combined effect of the 2004 amendment to the Act and the existing Order will be allowed to open on 1 January 2005.

This will mean that non-exempt shops allowed to open on 26 December 2004 will also be allowed to open on 1 January 2005. Shops required to be closed on 26 December 2004 will also be required to be closed on 1 January 2005.

We have also decided to allow non-exempt shops to trade on 3 January 2005, as requested by NRA. Not only is there insufficient evidence which would justify any decision to require shops to be closed for 3 successive days between 1 and 3 January 2005 we are not about granting anyone a windfall opportunity to generate additional sales simply because of the way the calendar falls. We also note that for the majority of Queensland (parts of SEQ excepted) the number of trading days will generally be the same, *albeit* on different days than might otherwise have been the case, had neither application been granted.

Whilst our decision will also increase the number of days that most non-exempt shops may trade *vis-a-vis* 1993 and 1999, we nonetheless accept that the general trading hours regime has moved since those respective decisions were made. Whereas a 3 day "shutdown" may have been seen as acceptable in 1993, and even in 1999, we believe consumer expectations have altered to the stage where a 2 day shutdown is now the maximum most people normally expect to see.

Although we have granted NRA's application in respect of 27 and 28 December 2004 and 3 January 2005 we note that such days are, nonetheless, public holidays by virtue of the provisions of the *Holidays Act 1983*, as gazetted by the Honourable Minister for Industrial Relations on 25 July 2003 (75 QGG 1099).

In such circumstances, it is reasonable to assume that many retail employees, and their employers, have planned their forthcoming Christmas and New Year vacations based upon their expectation that those days would be holidays. In that sense, many employees would have made plans, and commitments, based upon their expectations. Accordingly, we believe that in circumstances where NRA is *extremely* late in its application (having only lodged it on 12 August 2004) no retail employee engaged by a non-exempt shop should be required to work on 27 or 28 December 2004 or on 3 January 2005. Any work on those 3 days should be strictly voluntary. There should be no coercion whatsoever – whether direct or indirect – applied to any employee to get them to "volunteer" to work on any of those days.

In deciding the above trading hours, we note that the Order "*merely sets the hours within which non-exempt shops may trade and that the occupiers of shops will be capable of making their own decisions as to whether they trade on the permitted day(s) to the extent allowed, or not.*" (144 QGIG 671 at 672).

The respective applicants are directed to prepare an amendment to the existing Order within 7 days to give effect to this decision. The decision will not be effective until, and unless, an amendment to the Order is issued by this Full Bench.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Deputy President.

B.J. BLADES, Commissioner.

J.M. THOMPSON, Commissioner.

Hearing Details:

2004 10 September (B1230 of 2004 only)
17 September
10, 11, 23 November

Released: 26 November 2004

Appearances:

Mr G. Black, of National Retail Association Limited, Union of Employees.

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

Mr J. Price, of Queensland Retail Traders and Shopkeepers Association (Industrial Organization of Employees).

Mr R. Wotherspoon, of National Meat Association of Australia (Queensland Division) Industrial Organisation of Employees.

Mr K. Law, of Hardware Association of Queensland, Union of Employees.

Mr J. Martin, of The Australian Workers' Union of Employees, Queensland.

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Vocational Education, Training and Employment Act 2000 – s. 230 – application to appeal**Julie Mae Baker AND Owen Phillip Gould t/as Owen Gould Real Estate Agent (No. AT8 of 2004)**

COMMISSIONER FISHER

24 November 2004

Application to appeal – *Vocational Education, Training and Employment Act 2000* s. 230 – Cancellation of training contract – Amended Show Cause Notice – Information Notice – Employment Relationship – Performance issues – Financial issues – Financial hardship relied on to cancel training contract – Appellant argues financial hardship cannot be sustained – Commission finds grounds of financial hardship can be sustained – Office of Fair Trading contacted to confirm sale of business – Application denied – *Industrial Relations Act 1999* s. 139 – Appellant seeks wages between termination and contract cancellation date – *Vocational Education, Training and Employment Act 2000* s. 235 – Compensation awarded equivalent to outstanding wages to be paid within 22 days of decision release.

DECISION

This is an appeal by Julie Baker against the decision of the Training and Employment Recognition Council (TERC) to cancel the training contract made between her and Owen Phillip Gould trading as Owen Gould Real Estate Agent. The training contract was entered into on 2 December 2003 and cancelled on 11 August 2004. Notice of the decision to cancel the training contract was issued by Thomas Hagan, Training Consultant, Department of Employment and Training (DET), acting under delegation from the TERC. Mr Hagan made the decision in consultation with Peter Langbein, Assistant Regional Director and Tracey Holt, District Manager of DET, Wide Bay. The decision followed the issuing of a Show Cause Notice on 9 July 2004, later replaced by an Amended Show Cause Notice on 12 July 2004, and consideration of submissions by Ms Baker objecting to the cancellation of the training contract as well as consideration of other information about the state of Mr Gould's business collected as a result of the investigation conducted by Ms Holt.

Mr Gould submitted an application on 30 June 2004 requesting cancellation of the training contract on the grounds that the employer was facing financial hardship. On receipt of the application DET considered the relevant sections of the *Vocational Education, Training and Employment Act 2000* (the VETE Act) dealing with the cancellation of a training contract and concluded that the application was made pursuant to s. 63(1)(a)(ii), viz:

“63(1) If a party to a training contract can not perform the party's obligations under the contract on any of the following grounds, the party may apply in writing to cancel the contract –

- (a) if the party is an employer
 - (i) ...
 - (ii) there has been a substantial change in the employer's circumstances and the change has affected the employer's capacity to perform the employer's obligations under the contract;”.

In the Information Notice provided to the parties to the training contract the key reasons for the decision to cancel the contract were as follows:

“ ...

- Mr Lynton Lewis CPA, Accountant to Owen Gould Real Estate Agent, in his professional opinion advised that Owen Gould Real Estate has extensive outstanding debts and is facing financial hardship and possible bankruptcy. Mr Lewis further provided that Owen Gould Real Estate could not support the trainees wages through to completion.
- Senior Inspector Nikolaus Berceanu of the Office of Fair Trading confirmed that Owen Gould Real Estate had sold the business at 426 Charlton Esplanade Torquay on 22/7/04. Furthermore, a client service officer, Hazel Wroe of the Office of Fair Trading notified DET on 27 July 2004 that 3 members of the sales staff from Owen Gould Real Estate Hervey Bay had notified the Office of Fair Trading that they were no longer employed.”.

Ms Baker advances six grounds for the appeal. For brevity I do not repeat them here, however in essence, Ms Baker rejects the claim of financial hardship on the part of Mr Gould, suggests that Mr Gould was in a financial position to continue the training contract and submits that Mr Gould had other motivations for trying to cancel the training contract.

Nature of the Appeal

Section 232(1) of the VETE Act provides that an appeal to the Industrial Commission is by way of rehearing on the record. Subsection (2) provides however that the Commission may hear evidence afresh, or hear additional evidence, if the Commission considers it appropriate to effectively dispose of the appeal. In this matter the Commission decided to hear evidence afresh as this was considered appropriate in the circumstances. The Commission and all parties were provided with a copy of the record in accordance with Rule 109 of the *Industrial Relations (Tribunals) Rules 2000*.

In *Murrays v Training Recognition Council* (2002) 171 QGIG 93 Hall P considered the function of the Commission under s. 232 of the then *Training and Employment Act 2000* (now the *Vocational Education, Training and Employment Act 2000*). Relevantly, the President decided that the function of the Commission under that section was “to decide for itself whether the training agreement should be cancelled.”.

The President held that the responsibility of the Commission in that case was to give the appellant “a full and fair hearing of the case and a decision quite independent of any view formed by any other adjudicators.”.

Thus, in an appeal under s. 232(2) of the VETE Act, it is the function of the Commission to decide, whether on the material before it, grounds exist for the cancellation of the training contract and in this case, that grounds exist pursuant to s. 63 of the VETE Act.

The Employment Relationship

Fundamental to any training contract is the development of a training plan, the provision of on-the-job training and the engagement of a Registered Training Organisation (RTO) to ensure the Training Plan is complied with and to assess the trainee's competencies. It is common ground that the training plan was not developed and other training obligations were not fulfilled. In particular, while an RTO had been engaged, Mr Gould decided not to proceed with its services and as a result, delays and possible contravention of the VETE Act occurred. The many difficulties experienced with the training fundamentals whilst impacting on the relationship, were not ultimately matters that the Commission could take into account in this appeal. Those deficiencies and any remedies are addressed by other means elsewhere in the VETE Act.

Ms Baker commenced employment with Owen Gould Real Estate Agent in Hervey Bay on 1 December 2003. The relationship between Ms Baker and the second respondent began to sour in April 2004 when Ms Baker became concerned about the lack of provision of training modules to complete. Ms Baker raised her concerns on 19 April 2004 with Mr Gould who responded by asking her whether she would consider working in his Maryborough office. Ms Baker indicated her reluctance at the time but agreed to advise him of her position after the staff meeting the next day. At that time Ms Baker declined to work from Maryborough given her small weekly wage and the travel costs associated with working from that office. The matter was deferred until Mr Gould's return from New Zealand in early May 2004.

On 15 May 2004 Mr Gould advised Ms Baker in writing that he required her to work in his Maryborough office on a fortnightly rotation with the Hervey Bay office. Although Ms Baker objected to this requirement also in writing, she nonetheless complied with it. The fortnightly rotation commenced on 31 May 2004.

The requirement to work on a fortnightly rotation coincided with Mr Gould raising performance issues in relation to Ms Baker, the detail of which is unnecessary to outline here.

It is apparent again from the notes taken by Training Consultant Hagan, that Mr Gould first notified his intention to cancel the training contract on 15 June 2004 on performance grounds. The notes were taken contemporaneously and were not challenged by Mr Gould. Mr Hagan's notes further reveal that at that time Mr Gould was unable to establish grounds that would warrant cancellation under ss. 63, 66 **Cancelling registration of the training contract** or 71 **Discipline** of the VETE Act. Mr Gould is then recorded as saying, "I don't want to reveal my financial position to anyone but if that is what it takes to get rid of her I will get a statement from my accountant.". Mr Hagan then explained the provisions of s. 63 of the VETE Act.

It was not until 28 June 2004 that Mr Gould advised he had obtained a letter from his accountant indicating financial hardship. Mr Gould did not want at that time to submit a request for cancellation of the training contract signed by him alone. He advised Mr Hagan that he wished to discuss the matter with Ms Baker to see whether the parties could mutually agree on cancellation.

The meeting between Mr Gould and Ms Baker was held on 30 June 2004. It was a disaster. Ms Baker believed that she was being pressured into agreeing to a cancellation and walked out of the office with the intention of lodging a Workcover claim.

Later that day Mr Gould advised DET that he wished to apply for a one party cancellation of the training contract. He completed a form requesting cancellation on the grounds of financial hardship.

It is apparent again from Mr Hagan's notes that Mr Gould was angry at and frustrated with Ms Baker. Mr Gould made it clear to Mr Hagan that he (Gould) wished to get rid of Ms Baker. It is equally clear from Mr Hagan's notes that Ms Baker was distressed by Mr Gould's treatment of her. The employment relationship was brief and for at least half of it, unhappy for both parties.

On 9 July 2004 Mr Gould wrote to Ms Baker advising of his decision to terminate her employment effective 23 July 2004. He further advised that she was not required to attend for work and that she would be paid up to 23 July 2004.

Mr Gould sold his Hervey Bay office on 22 July 2004.

Financial Issues

Mr Hagan relied on the following financial information to help establish the requirements of s. 63 of the VETE Act:

- Written advice from Mr Gould's accountant, Mr Lynton Lewis, CPA, providing four urgent recommendations including the "immediate retrenchment of unproductive staff – i.e. traineeship."
- Further written advice from Mr Lewis advising Mr Gould to adhere to his recommendations else he faced "immediate financial hardship with the possibility of bankruptcy."
- Written advice from the Australian Taxation Office (ATO) setting out the extent of Mr Gould's tax debt.
- Two interviews of Mr Lewis by Ms Holt on 30 July 2004 and on 6 August 2004. In those interviews Mr Lewis advised that the sale of the Hervey Bay office would increase Mr Gould's cash flow in the short term, however, Mr Gould still had several financial issues to face. Mr Lewis was also unable to say whether Mr Gould's financial situation could support the trainee's employment through to completion.

These, together with the sale of the Hervey Bay office of Owen Gould Real Estate Agent, were the substantial factors that led to the conclusion that the requirements of s. 63(1)(a)(ii) of the VETE Act had been satisfied.

The appellant's case against the issue of financial hardship relied on the following:

- (1) That the situation of the ATO tax debt must have existed at the time of commencement of her traineeship. In that regard nothing had changed to warrant a claim of financial hardship.
- (2) That Ms Baker had seen Mr Gould uplift a couple of cheques from the Hervey Bay office of his business. She contended that these cheques had not been banked into the business bank accounts and hence Mr Gould was hiding income from his accountant (and it follows, the ATO).
- (3) That Mr Gould had lodged a development application with the Maryborough City Council to develop farm stay dwelling houses on land owned by him.
- (4) The DET had not sufficiently interviewed Mr Lewis or taken a formal statement from him about the financial position of Mr Gould.

In the submissions of the appellant, these factors showed that an argument of financial hardship could not be sustained.

In this matter, the Commission has had the benefit of direct evidence of the key participants in this sorry chain of events. In particular, the Commission heard extensive evidence from Mr Gould about his financial affairs. As this evidence was suppressed under an order pursuant to s. 679 of the *Industrial Relations Act 1999* I do not intend to refer to it in depth. However, in that evidence Mr Gould gave a detailed account of the financial issues affecting him personally and his business. The appellant had the opportunity to view documentary material and to cross-examine Mr Gould on that material and other issues raised in his evidence in chief. In laying himself bare on these financial issues, Mr Gould suffered great distress which was clearly evident to the parties and the Commission.

Based on the evidence given by Mr Gould I am satisfied that he owed a substantial tax debt to the ATO at the time of entering into the training contract with Ms Baker. He had been carrying that debt for some time and believed (mistakenly) that the employment of a trainee would assist the productivity of his business. In February 2004, more than a month after the completion of the one month probationary period of the traineeship, the ATO notified Mr Baker of its intention to seek the recovery of the debt. This forced Mr Gould to examine ways of reducing his expenditure to meet his tax obligation otherwise he faced possible bankruptcy. This included deciding to sell his Hervey Bay office, the result of which was to reduce but not eradicate his debt to the ATO.

I accept therefore that the notification from the ATO in respect to its intention to recover the debt was a circumstance in Mr Gould's financial situation that did not exist when the traineeship commenced.

The allegation relating to Mr Gould uplifting cheques was true to the extent that Mr Gould acknowledged attending the Hervey Bay office of his business and taking with him commission cheques. Mr Gould is a sole trader. It was his evidence that he banked cheques made out to Owen Gould Real Estate Agent into his business accounts. A record of all cheques was kept in the office and his accountant and office administrator of the Maryborough office would work out where the monies came from. He denied absolutely hiding cheques from his accountant or the ATO.

There was simply no evidence produced by the appellant to support her allegation that Mr Gould was hiding cheques from his accountant and the ATO. In the absence of any supporting evidence, it is a scurrilous accusation.

Mr Gould acknowledged the truth of the third contention that he had lodged a development application relating to his residential property. His evidence was that it was his partner, Ms King, who had paid for the development application as he had insufficient funds of his own to do so. The purpose of the development application was to allow, when funds permitted, the diversification of his business interests. Such a strategy was recommended by his accountant as a means to protect and enhance his assets.

It is perfectly understandable that the applicant would be suspicious of a development application made to a Council shortly after an application to cancel her traineeship on financial hardship grounds was made. The lodgement of the development application at such a time would inevitably raise questions about the truth and sincerity about claims of financial hardship. I am satisfied in this instance, again based on the openness of Mr Gould's evidence on this matter, that he did not expend his own funds in making the application. In that regard it is not a matter that derogated from his claims of financial hardship.

The fourth concern raised by the appellant related to the interviews of Mr Lewis by Ms Holt and the subsequent reliance on this information to substantiate Mr Gould's application for cancellation of the training contract.

Ms Holt conceded that her interviews with Mr Lewis were brief –about ten minutes in total. However, she claimed that in that time the information necessary to the consideration of the application was given. Moreover, she stressed that the financial hardship contention was only one part of the matter. It was Ms Holt's evidence that the sale of the Hervey Bay office was the key factor in proving a change in circumstances under s. 63 of the VETE Act.

Ms Holt said that a formal statement was not taken from Mr Lewis as one was not required under the VETE Act.

I am satisfied that a formal statement was unnecessary in the circumstances. Ms Holt's interviews of Mr Lewis could however only be described as cursory. It would have been preferable had Ms Holt sought to gain more detail from Mr Lewis especially about such matters as when he had first given advice to Mr Gould about the restructuring of his business; what steps Mr Gould was taking to reduce his ATO debt (other than the sale of the Hervey Bay office) and what proportion of the wages bill was a trainee's wage. The information about the business restructuring would have been useful given that the pressure from the ATO was said to have been placed in February 2004 yet the first written advice from Mr Lewis to Mr Gould was dated 21 June 2004.

In any event I am satisfied that any deficiencies in Ms Holt's interviews of Mr Lewis have been cured by the taking of evidence in these proceedings.

In summary I reject the appellant's contentions regarding financial hardship and find that such grounds can be sustained.

Other Motivations

The appellant contended that the second respondent was motivated by reasons, other than financial ones, to cancel her training contract. In this regard the appellant referred to Mr Gould's dissatisfaction with her performance, the delay in arranging the provision of training modules because of a desire to change training providers for reasons associated with cost, and Mr Gould's dislike of her querying her conditions, the provision of training etc. The appellant submitted that Mr Hagan's notes only confirmed these concerns. The effect of this was said to be that Mr Gould hid behind the grounds of financial hardship rather than pursuing the cancellation of the training contract for reasons that he believed existed, *viz*, performance, but were less likely to be established.

Based on the unchallenged notes of Mr Hagan I consider that evidence shows that Mr Gould wanted to cancel the training contract for whatever reason could be sustained. Mr Gould said in evidence that he initially sought to cancel the training contract on grounds other than financial hardship because he did not wish to reveal his parlous financial position. Given his reaction in the witness box in outlining his financial affairs, I accept that evidence to some extent. However, I believe Mr Hagan's notes to be the most revealing evidence. Mr Gould was looking for a reason to cancel the appellant's training contract. He was clearly unhappy with Ms Baker's performance and did not want her in his employ. The employment relationship had deteriorated to a point of no return, at least from Mr Gould's perspective. If the only sustainable ground for the cancellation of the training contract was financial hardship, then those would be the grounds submitted. At least he would be able to prove those grounds.

In the circumstances, the appellant's contentions about the motivation of Mr Gould are substantially correct. The difficulty for the appellant is that Mr Gould was able to prove to DET's, and ultimately the Commission's satisfaction, that financial hardship did exist.

Decision pursuant to s. 63 of the VETE Act

Earlier in this decision I set out the provisions of s. 63(1)(a)(ii) of the VETE Act that were relied on by Mr Hagan, under delegation from the TERC to cancel the training contract. In essence what needs to be established is that there has been a substantial change in the employer's circumstances and that change has affected the employer's capacity to perform the employer's obligations under the contract.

The first respondent has submitted that there were two elements to the substantial change in the employer's circumstances. One was the financial hardship that Mr Gould was enduring and the second was the sale of his Hervey Bay office. Both of these elements, and particularly the latter, had been found to have affected the employer's capacity to perform the employer's obligations under the contract.

In the course of his consideration of this matter, Mr Hagan made enquiries of the Office of Fair Trading in Hervey Bay. Senior Inspector Nikolaus Berceanu of that Office confirmed that Owen Gould Real Estate had sold the business at 426 Charlton Esplanade Torquay (the Hervey Bay office) on 22 July 2004. Further, a client service officer of the Office of Fair Trading notified DET on 27 July 2004 that three members of the sales staff from Owen Gould Real Estate Hervey Bay had notified that Office that they were no longer employed. Mr Hagan concluded that this was a substantial change in the employer's circumstances as required by s. 63 of the VETE Act particularly as the appellant was employed out of the Hervey Bay office.

In the grounds of her appeal the appellant strongly disputed that three staff from the Hervey Bay office were no longer employed by Owen Gould Real Estate Agent. The appellant further contended in the appeal grounds that this information should not have been relied on to decide the case.

In the amended Show Cause Notice dated 12 July 2004 matters relating to the closure of the Hervey Bay office were added. These matters had not been referred to in the original Show Cause Notice. In the amended Show Cause Notice one of the "Facts and Circumstances" relating to the action to cancel the training contract was:

"Employer Owen Gould advised DET on 7 July 2004 that he has given notice to his staff that he will close the Hervey Bay office effective 23 July 2004."

The appellant did not specifically address this matter in her submission to Mr Hagan objecting to the cancellation of the training contract.

In my view DET was correct in checking the veracity of Mr Gould's advice with the Office of Fair Trading. Such matters relating to real estate business are required by law to be registered with that Office. In my view DET was entitled to rely on the information provided by another Government body, especially when it was not challenged by Ms Baker.

Finally I would note that the appellant did not produce any evidence to the Commission disputing the advice given by the Office of Fair Trading.

There is however one matter which arose out of the evidence of the appellant. Ms Baker said in her evidence that as from 30 June 2004 she had been permanently transferred to the Maryborough office of Owen Gould Real Estate Agent. This contention was rejected by Mr Gould in his evidence and Mr Hagan's evidence was that no such permanent transfer had been mentioned to him. The import of the appellant's evidence, if accepted, is, of course, that the closure of the Hervey Bay office, while a substantial change to the employer's circumstances, is not one that affects the employer's capacity to perform his obligations under the contract.

The difficulty with the appellant's contention is that it was raised for the first time in her oral evidence. Nowhere is it mentioned in her written statement of evidence, and from the reaction of the first and second respondent at the bar table, the evidence certainly came as a surprise. (While Mr Gould and Ms Holt were at the bar table at the time, Mr Hagan was not). Further, no correspondence exists to substantiate the appellant's claim. This is an important point, because as Mr Gould said in his evidence, by this time major issues between him and Ms Baker were reduced to writing. The last piece of correspondence relating to the matter was in May 2004 where the fortnightly rotation between Maryborough and Hervey Bay was established. Ms Baker said the variation to her place of employment had been advised orally by Mr Gould to her in a meeting on 30 June 2004.

However, I note that in Mr Hagan's notes of 30 June 2004, when discussing with Mr Gould the setting up of a mediation session between Ms Baker, Mr Gould and himself over the issue of cancellation of the training contract, the matter of location is mentioned. Mr Hagan proposed that the mediation be conducted at Hervey Bay as Ms Baker had requested that it occur there. In response Mr Gould is recorded as saying "no she works in Maryborough now, she can come to Maryborough.". This statement lends weight to Ms Baker's evidence. Mr Hagan's record of this statement was not put to him or to Mr Gould while giving their evidence.

Ms Baker's employment was terminated by Mr Gould as from 23 July 2004, however, her last day of attendance at work was 30 June 2004.

On balance I reject Ms Baker's oral evidence that she was permanently transferred to Maryborough. In addition to there being an absence of documentation to support this evidence, nowhere does she make mention of it. It is not recorded in Mr Hagan's notes of conversations with Ms Baker, it is not mentioned in her submission objecting to the cancellation of the contract nor is it raised in any other correspondence that Ms Baker sent to DET. For all of these reasons I find that the rotational arrangement would have continued in operation had Ms Baker been fit to attend work and her employment not been subsequently terminated.

Appeal re Decision to Cancel Training Contract

The decision by Mr Hagan was made pursuant to s. 63(1)(a)(ii) of the VETE Act. The only issues raised by the appellant about the process followed by DET in deciding the appeal were those relating to the interview of Mr Lewis and the consideration of advice provided by the Office of Fair Trading. I have already dealt with those matters.

No issue was taken about whether procedural fairness was afforded to the appellant. In case it be necessary I record that I consider the appellant was properly informed in the amended Show Cause Notice of the grounds for the proposal to cancel the training contract and the facts and circumstances supporting the proposed cancellation. The appellant was given the opportunity to object to the proposed cancellation and did so. The record and evidence shows that matters raised by the appellant were considered by DET.

After considering the submissions of the appellant, the advice from Mr Lewis and the information supplied by the Office of Fair Trading, Mr Hagan considered that the elements of s. 63(1)(a)(ii) of the VETE Act had been satisfied. The financial hardship being experienced by Mr Gould and the sale of his Hervey Bay office were the factors relied on by Mr Hagan to be satisfied that there had been a substantial change in the employer's circumstances and that change affected the employer's capacity to perform his obligations under the contract.

I am satisfied that grounds existed for the cancellation of the training contract pursuant to s. 63(1)(a)(ii) of the VETE Act. Those grounds are those relied on by Mr Hagan to cancel the training contract. The appeal as it relates to those grounds is dismissed.

Appeal re Breach of s. 139 of the Industrial Relations Act 1999

The appeal raises one further ground. The appellant alleges that the second respondent terminated her employment in writing on 9 July 2004 with the effective date of termination being 23 July 2004. The appellant submits that this is a breach of s. 139(2) of the *Industrial Relations Act 1999* (Industrial Act) in that the training contract was not cancelled until 11 August 2004. The appellant seeks the payment of wages between 23 July and 11 August 2004 together with the payment of all superannuation payments required by law. It is contended no superannuation payments have been made since the commencement of employment.

The grounds of appeal refer to s. 139(2) of the Industrial Act. This section provides that:

"The apprentice's or trainee's employment with an employer cannot be terminated unless the apprenticeship or traineeship is completed or cancelled under the *Vocational Education, Training and Employment Act 2000*."

In my view any complaint by the appellant under the Industrial Act should be raised in an application made pursuant to that Act. Appeals to the Industrial Commission against decisions of the TERC or other decisions pursuant to the VETE Act are permitted only in respect of the decisions listed in s. 230 of that Act.

The appellant has confused the powers of the Commission under the Industrial Act and the VETE Act. Being essentially self represented this is understandable.

Section 235 of the VETE Act does however give power to the Commission to do certain things where there is an appeal to the Commission about the cancellation of a registered training contract and the Commission decides that the employer has purported to cancel the contract other than in a way allowed under the VETE Act. In effect the appellant contends that this is what occurred. Further, that the relief sought by the appellant is not that provided by the Industrial Act but the VETE Act. For a breach of the Industrial Act as claimed by the appellant, the penalty is the imposition of up to 40 penalty units with each penalty unit valued at \$75.

As both the appellant and the respondent were representing themselves and I think want the matters between them to conclude, I propose to deal with the issue raised by the appellant.

There is merit in the appellant’s contention. Her employment was in fact terminated before the training contract was cancelled. This is not permitted by the VETE Act. Mr Hagan’s notes show that he advised Mr Gould that the training contract remained active until such time as training is completed or the contract is cancelled. In addition, he advised that terminating Ms Baker’s employment before a decision had been made on whether the training contract would be cancelled would be in breach of the VETE Act. Mr Hagan’s advice to Mr Gould was later confirmed by Ms Holt.

Mr Gould, however, relied on the provisions of the training contract that state that both parties to the contract agree that the training contract expires when the employer ceases to conduct its business in the normal course or disposes of the whole or any part of its business other than in the normal course of business. He said this is what happened with the sale of his Hervey Bay office on 22 July 2004. Further, he dismissed the other staff employed out of that office as a consequence of the sale. As Ms Baker was also employed out of that office then it followed that she too had to be dismissed. He concluded that the provisions of the training contract obligated the parties to mutually agree to the termination of the contract in these circumstances.

The provisions of the training contract cannot override legislation. The relevant legislation provides that the trainee’s employment cannot be terminated unless the traineeship is cancelled. Mr Gould ignored the advice of Mr Hagan and later by Ms Holt to his detriment.

I accept it is difficult to continue the employment of a trainee when a business has been sold. In this case however Mr Gould continued to operate the Maryborough office of his business after the Hervey Bay office was sold. As Ms Baker was working out of that office on a fortnightly rotational basis it was possible for the training contract to remain on foot by having her continue to work out of that office until the application to cancel the training contract was resolved. In my view the sale of the Hervey Bay office was used by Mr Gould as a smokescreen for the real reason for the termination of Ms Baker’s employment. Based on the many unsavoury remarks made by Mr Gould to Mr Hagan about Ms Baker, it is clear that Mr Gould simply wished to bring the employment relationship to an end as quickly as possible and that was to be achieved by terminating Ms Baker’s employment. I am satisfied that Mr Gould was attempting to avoid his obligations as an employer of a trainee. Moreover, his actions were in breach of s. 139(2) of the Industrial Act.

Accordingly, I find that Mr Gould purported to cancel the contract other than in a way allowed by the VETE Act. The VETE Act provides alternative remedies in such a case. The primary remedy provided is the resumption of training. The alternative remedy is that where that is found to be inappropriate then compensation can be awarded. I am satisfied that the resumption of training is inappropriate for two reasons. Firstly, there has now been an irretrievable breakdown in the relationship between the parties to the training contract. Secondly, while it would have been feasible to have Ms Baker continue to work out of the Maryborough office of Owen Gould Real Estate Agent until the investigation into the application to cancel the training contract was completed, it was not feasible to have that continue on an ongoing basis. The Hervey Bay office was Ms Baker’s principal place of employment and there clearly are cost imposts on her if she was to work out the balance of her traineeship from the Maryborough office.

I therefore order that Owen Phillip Gould trading as Owen Gould Real Estate Agent pay to Julie Mae Baker compensation in an amount equivalent to the wages that would have otherwise been payable from 23 July 2004 (the date of termination of employment) until 11 August 2004 (the date the training contract was cancelled). Such amount to be paid within 22 days of the date of release of this decision.

The matter of superannuation contributions, if they have remained unpaid, should be pursued by way of separate application or with the ATO.

Order accordingly.

G.K. FISHER, Commissioner.

Appearances:
Mr N. A. Baker for the appellant.
Mr R. McColm and with him Ms T. Holt for the Training and Employment Recognition Council.
Mr O. P. Gould and with him Ms P. King on behalf of the second respondent.

Hearing Details:
2004 5 & 6 October

Released: 24 November 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Warren David Shay AND Jacko’s Plumbing Pty Ltd (No. B672 of 2004)

COMMISSIONER EDWARDS

1 December 2004

Application for Reinstatement – Termination – Dismissal – Evidence – Dismissal Harsh, Unjust and Unreasonable – Reinstatement Impractical – Compensation to be determined – Parties to make submissions.

DECISION

Application by Warren David Shay (the applicant) for reinstatement to his former position with Jacko’s Plumbing Pty Ltd (the respondent).

The applicant was employed by the respondent from 1 April 2003 to 14 April 2004.

The respondent operates a plumbing business providing services such as roofing, guttering, drainage, earthworks and associated plumbing work in the domestic, commercial and mining fields.

The evidence of the applicant included:

- had known Ian Jackson, Director of the respondent Company for a period of four years;
- March 2003 Ian Jackson requested help with a roofing job at Gladstone;
- the work of three days' duration was not done under the name of the respondent Company;
- while in Gladstone it was indicated there may be work available as the respondent had tendered to install water meters in Rockhampton;
- the respondent did not win the tender for the water meters but did secure work with Fieldforce, the Company who won the tender;
- initially only the applicant and Ian Jackson worked on excavating holes for the meters to be installed;
- the applicant was paid \$16 per hour;
- during stages between 10-12 people were engaged on the water meters' contract;
- whenever Ian Jackson was off the job site another person was in charge;
- during the 5 months of the water meter work, Ian Jackson decided what hours were to be worked;
- at the start, Ian Jackson and the applicant were working from 6.30 a.m. until 6.30 p.m.;
- a company vehicle was supplied to travel to and from work together with a fuel card, tools, equipment and work shirts;
- various other jobs were completed during April 2003 – September 2003;
- the water meter work finished late August;
- proceeded to Blackwater to work on various jobs for the respondent;
- during the period September 2003 until April 2004 was authorised to purchase materials in the name of the respondent;
- Friday 26 March 2004 was advised that wages could not be paid until the Monday but was given \$100 to get through the week-end;
- checked with Wageline to what the ruling was on late payment of wages and was advised that as an employee of the respondent the State Award applied;
- on Tuesday 13 April 2004 told to finish jobs;
- based on the information contained in the Award prepared a list and presented a claim to Ian Jackson and Kirsten Litz on behalf of the respondent;
- on Tuesday 13 April 2004 was directed by Ian Jackson to finish the current job and return to Rockhampton;
- at 6.30 p.m. that day Ian Jackson advised the applicant he was not dismissed but was stood down until the wages matter was resolved; and
- Wednesday 14 April 2004 Kirsten Litz phoned and advised of the dismissal.

The other witness for the applicant was Lance Avenell who worked for the respondent for a period from June 2001 until September 2001 except for a period when he was employed by another Company. He was employed by the respondent as a labourer until 25 July 2003 when he became an indentured apprentice. During the period of his employment with the respondent he worked with the applicant on many projects at Blackwater and Rockhampton. On Wednesday 14 April 2004 he received a call from Kirsten Litz to advise him that she had cancelled his apprenticeship. In evidence, Lance Avenell indicated that he had been advised by Kirsten that he was not an apprentice but he was a contractor. As a result he had to present his papers to Centrelink to confirm that he was an indentured apprentice.

Ian Jackson, Director was not called to present evidence.

Kirsten Litz, a Director of the respondent since the business began in 1988 outlined in evidence that Ian Jackson announced on 18 June 2004 his resignation as a Director. In response to questions she confirmed that such resignation has not been processed and records would indicate that he continues to be a Director of the respondent. As she was not present on site she was unable to give evidence by hands-on working arrangements. It was her evidence that the applicant was engaged as an independent contractor and the records indicate:

- (a) Warren was being paid PPS payments and had an ABN;
- (b) Warren had his own ABN prior to performing work for the Company but had requested that I attend to issuing him with a separate ABN when he commenced performing work for the Company;
- (c) Warren was paying voluntary PPS payments. I had previously asked him to complete a Voluntary Tax Withholding form but he never did. However, he did request that I withheld 20% of his payment for tax so she wasn't lumped with a big tax bill at the end of the year. I withheld 20% tax off every gross payment each week. I would declare that in the Company's BAS statements every 3 months and the payments of the withheld tax were made some 2 weeks after the filing of the BAS statements.
- (d) Warren received no entitlement to annual leave, sick leave, long service leave etc. If he did perform any work during any particular week he received no payments from the Company.
- (e) Warren was liable for any defects in his work. On occasions work that Warren had performed was found to be defective. If that was the case then Ian would go out and fix the job and the number of hours spent fixing the job would be deducted from Warren's payments for that week.
- (f) Warren's workload depended upon the needs of the Company and when he was not required he performed no work for the Company."

She also elaborated on information provided to her by Ian Jackson on 13 April 2004 and of concern for her safety. As a result of a lack of work he was dismissed. She reiterated that he was not dismissed because of claims for payments owing. By Exhibit 10 the Commission was provided with a piece of paper suggesting that such was a costing prepared by the applicant for a number of jobs. The Commission is of the view that such document does not provide appropriate documentation to support an argument of a contractual arrangement but is merely rough working notes prepared by the applicant.

The Commission is satisfied that the respondent:

- controlled the manner in which the work was performed, the hours of work as well as lunch breaks;
- provided tools of trade and a motor vehicle;
- authorised the applicant to use a company fuel card and purchase goods on company account; and
- did not authorise the applicant to delegate work to contractors.

The Commission acknowledges that the applicant was paid by means of an ABN number. Such was a private arrangement between the applicant and the respondent and was not the significant factor in determining how the wages were earned but a means by which payment was achieved. Furthermore, even though the applicant was permitted to perform other duties on an ad hoc arrangement, his principal income was arrived by employment with the respondent.

Based on all the evidence, exhibits and submissions the Commission is satisfied that the applicant was an employee of the respondent.

Section 72(1)(a) of the *Industrial Relations Act 1999* states:

“an employee during the first 3 months of employment with an employer (the “**probationary period**”), if the dismissal is for a reason other than an invalid reason, unless the employee and employer agree in writing that the employee serve –

- (i) a period of probation that is shorter than the probationary period; or
- (ii) no period of probation; or”.

The applicant was employed for periods in 2003 and 2004. Section 72(1)(a) of the Act refers to the first three months of employment and provides for a specified period unless there is a written agreement between the employer and the employee. The Commission was not provided with any agreement in writing. Furthermore, the nature of the engagement is not the significant factor but the initial three months of employment. Accordingly, the Commission rejects the submission of the respondent that the applicant’s probation period commenced at the end of January 2004.

In relation to the dismissal Kirsten Litz gave evidence that a decision between herself and Ian Jackson had been made some two weeks prior to 14 April 2004 to cease using the services of the applicant. She outlined that they could not bring the decision into effect due to the fact that the applicant was the only person available at that time to perform services for the respondent in Blackwater. The decision to terminate was delayed until such time as the respondent could adequately manage its operational requirements.

The Commission accepts the evidence of Kirsten Litz that the decision to terminate was made prior to the applicant questioning delays in the payment of wages. In view of this evidence it was not possible for any procedural fairness to be extended to the applicant.

The dismissal was harsh, unjust and unreasonable.

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

An examination of the evidence of the applicant and Kirsten Litz indicates that a number of important industrial issues have arisen between the respondent and the applicant. These include allegations relating to:

- damage to company property;
- abusive behaviour to a director of the company;
- complaints about work from customers;
- theft of company property; and
- the use of marijuana which may have jeopardized the company’s mining site contracts.

The Commission is satisfied in terms of s. 78(2) and (3) of the *Industrial Relations Act 1999* reinstatement and re-employment would be impractical.

The Commission has made the above determinations and understands that the applicant has lodged a claim with the Department of Industrial Relations. The Commission has not been provided with an accurate assessment of the wages the applicant was eligible for as an employee of the respondent.

The material before the Commission is not at a level which would enable the Commission to make a determination in relation to compensation under s. 79 of the *Industrial Relations Act 1999*. The parties are required to make further submissions to be filed with the Industrial Registrar by 10 January 2005 on this aspect.

Depending on the contents of those submissions the matter may be relisted by the Commission.

The Commission orders accordingly.

K.L. EDWARDS, Commissioner.

Appearances:

Mr W.D. Shay on his own behalf.

Hearing Details:

2004 7 & 8 October

Mr C. Mossman of McCullough, Robertson Hancock and with him Ms K Litz on behalf of the respondent.

Released: 1 December 2004

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QUEENSLAND INDUSTRIAL REGISTRAR

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

The Registered and Licensed Clubs Association of Queensland, Union of Employers (No. Q33 of 2004)

REGISTRAR SAVILL

29 November 2004

Conduct of Election – Prescribed Information – Method of Election – Electoral Commission to Conduct Election.

DECISION

On 26 November 2004 The Registered and Licensed Clubs Association of Queensland, Union of Employers lodged in the Registry under the *Industrial Relations Act 1999* the information as prescribed in section 36(1) of the *Industrial Relations Regulation 2000* in relation to its request for the conduct of an election by the Electoral Commission of Queensland for the following Offices:

<i>Office</i>	<i>Number of Positions</i>
<u>Zone Representative</u>	

Gold Coast Zone	1
Brisbane South East Zone	1
Darling Downs and South-Western Zone	1
Wide Bay Zone	1
Far Northern Zone	1
Western Zone	1

Reason for Elections

The Industrial Organisation advises that the term of office for each of the above positions will expire at the Annual General Meeting which has been set for the weekend of 16/17 April 2005.

Method of Elections

I am satisfied the method of election for Zone Representatives is by a direct vote by secret postal ballot of the members of the particular zones.

Conduct of Elections

I have considered the request, the Act and Rules, and I am satisfied that an election is required to be held under the rules for the positions of office set out above.

Therefore, under section 482 of the *Industrial Relations Act 1999*, I am making arrangements for the conduct of the election for the above Zone Representatives of The Registered and Licensed Clubs Association of Queensland, Union of Employers by the Electoral Commission of Queensland.

Dated 29 November 2004.

G. SAVILL,
Industrial Registrar.

Released: 29 November 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited,
Industrial Organisation of Employers (No. B1471 of 2004)**

DISABILITY SUPPORT WORKERS AWARD – STATE 2003

COMMISSIONER BECHLY

23 November 2004

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 23 November 2004, this Commission orders that the said Award be amended as follows as from 1 December 2004:

1. By deleting Part 5 of clause 1.2 and inserting the following in lieu thereof:

“PART 5 – WAGES AND WAGE RELATED MATTERS

Definition of classifications.....	5.1
Progression within and between levels	5.2
Wage rates.....	5.3
Allowances.....	5.4
Payment of wages	5.5
Superannuation	5.6”.

2. By deleting clause 1.4.2 and inserting the following in lieu thereof:

“1.4.2 Employees and employers shall be exempt from Part 5 and Part 6 of this Award, and clause 7.6 of this Award, for all time whilst employees are performing work that falls within the definition of “live in arrangement” as defined in clause 1.5.”.

3. By renumbering the existing clauses 1.4.3 and 1.4.4 as clauses 1.4.4 and 1.4.5.

4. By inserting a new clause 1.4.3 as follows:

“1.4.3 This Award shall not cover employees of the Crown.”.

5. By renumbering existing clauses 1.5.2 and 1.5.3 as clauses 1.5.3 and 1.5.4, respectively.

6. By inserting a new clause 1.5.2 as follows:

“1.5.2 ‘Australian Qualifications Framework (AQF)’ refers to the national system of recognition for the issue of vocational credentials.”.

7. By renumbering existing clauses 1.5.4 and 1.5.5. as clauses 1.5.6 and 1.5.7 respectively.

8. By inserting a new clause 1.5.5 as follows:

“1.5.5 ‘Live in arrangement’ means an arrangement where an employee is required to live in the same premises as a client for a period in excess of 68 consecutive hours, and is responsible for, or provides one or a combination of home-aide, handyperson, personal care duties, and support for the client in their home life. An employee must be provided with full board and lodging whilst required to live in the same premises as the client in order to fall within this definition of ‘live in arrangement’.

No employee shall suffer a reduction in their terms and conditions of employment as a result of the introduction of clause 1.5.5 in the Award. This definition of ‘live in arrangement’ shall operate on a trial basis for a period of 12 months, and the parties to the Award will jointly report back to the Queensland Industrial Relations Commission during this period if necessary, but no later than 12 months.”.

9. By deleting from clause 5.1.1(a) the words in the first sentence “This position requires work” and inserting the words “An employee at Level 1 works” in lieu thereof.

10. By inserting a new clause 5.1.1(e) as follows:

“(e) An employee at this level possesses no qualifications or has not demonstrated the competency standards requirements of Wage Level 2.”.

11. By deleting from clause 5.1.2(a) the words in the first sentence “This position” and inserting the words “An employee at Level 2” in lieu thereof.

12. By inserting a new clause 5.1.2(e) as follows:

“(e) Level 2 shall include employees who possess and are required to utilise the competencies achieved either through formal or informal assessment or who possess and are required to utilise the appropriate certification for a qualification with an AQF Level 2 outcome relevant to the industry.”.

13. By deleting from clause 5.1.3(a) the words in the first sentence “This position” and inserting the words “An employee at Level 3” in lieu thereof.

14. By inserting a new clause 5.1.3 (f) as follows:

“(f) Level 3 shall include employees who possess and are required to utilise the competencies achieved either through formal or informal assessment or who possess and are required to utilise the appropriate certification for a qualification with an AQF Level 3 outcome relevant to the industry.”.

15. By deleting from clause 5.1.4(a) the words in the first sentence “This position requires” and inserting the words “An employee at Level 4 is required to demonstrate” in lieu thereof.

16. By inserting a new clause 5.1.4 (e) as follows:

“(e) Level 4 shall include employees who possess and are required to utilise the competencies achieved either through formal or informal assessment or who possess and are required to utilise the appropriate certification for a qualification with an AQF Level 4 outcome relevant to the industry.”.

17. By deleting the title to clause 5.2 and inserting the following in lieu thereof:

“**5.2 Progression within and between levels”.**

18. By deleting clause 5.2.2 and inserting the following in lieu thereof:

“5.2.2 Subject to clauses 5.2.3 and 5.2.4 an employee shall not move from one paypoint to the next paypoint within the classification level until:

- (a) In the case of a weekly employee such employee has received such salary/wage for a period of 1976 hours;
- (b) In the case of a part-time and casual employee, when such employee has received such salary/wage for a period of 12 months and has worked for the equivalent of 800 hours;
- (c) Notwithstanding anything contained in clauses 5.2.2(a) and 5.2.2(b) no employee shall be entitled to receive salary payment/wage level movements by virtue of this Award if after undergoing a formal counselling process in accordance with this Award, it was deemed that their performance was not satisfactory.”.

19. By inserting new clauses 5.2.3 and 5.2.4 as follows:

“5.2.3 A Disability Support Worker who holds a Certificate III in Disability Work or the equivalent, and who has less than 1976 hours experience in the case of a weekly employee, or less than a period of 12 months and the equivalent of 800 hours in the case of a part-time or casual employee shall be appointed to Level 3.1.

5.2.4 A Disability Support Worker who holds a Certificate III in Disability Work or equivalent, on completion of 1976 hours experience in the case of a weekly employee, or a period of 12 months and the equivalent of 800 hours in the case of a part-time or casual employee shall be appointed to Level 3.2. Such employees shall progress to Level 3.3 in accordance with clause 5.2.2.”.

20. By deleting clause 5.3.1 and inserting the following in lieu thereof:

“5.3.1 *Disability support worker*

	Current Rate \$	Rate as at 17/1/2005 \$	Rate as at 4/7/2005 \$
Level 1			
Up to 3 months	496.40	496.40	496.40
Level 2			
Paypoint 1	507.10	507.10	507.10
Paypoint 2	517.50	517.50	517.50
Paypoint 3	527.90	527.90	527.90
Level 3			
Paypoint 1	538.30	542.90	547.50
Paypoint 2	548.80	555.00	561.20
Paypoint 3	561.20	568.20	575.20
Level 4			
Paypoint 1	582.10	585.70	589.30
Paypoint 2	592.50	597.90	603.30
Paypoint 3	602.90	610.20	617.40

NOTE: The rates of pay in this Award are intended to include the arbitrated wage adjustment payable under the 1 September 2004 Declaration of General Ruling and earlier safety net adjustments and arbitrated wage adjustments. (Disputed cases are to be referred to the Vice President.) This arbitrated wage adjustment may be offset against any equivalent amount in rates of pay received by employees whose wages and conditions of employment are regulated by this Award which are above the wage rates prescribed in the Award. Such payments include wages payable pursuant to certified agreements, currently operating enterprise flexibility agreements, Queensland workplace agreements, award entitlements to give effect to enterprise agreements and overaward arrangements. Absorption which is contrary to the terms of an agreement is not required.

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

21. By deleting clause 5.4.2(a) “Early or late work allowance” and inserting the following in lieu thereof:

“(a) An amount of 15% per hour in addition to their ordinary rates shall be paid to employees for all hours worked after 6.00 p.m. and before 6.00 a.m.”.

Dated 23 November 2004.

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

Operative Date: 1 December 2004
Amendment – Live in arrangements, classifications
Released: 25 November 2004