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No. 17

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
CA9/04	PFD Foodservice Brisbane and Maroochydore & NUW & TWU – Certified Agreement 2003	6/2/04	
CA489/04	Lindsay Brothers Depots – Certified Agreement 2004	29/10/04	CA142/01
CA573/04	Foaming Fury Certified Agreement 2004	29/11/04	
CA572/04	Thomas Brown Shopfitters Pty Ltd Certified Agreement 2004	3/12/04	CA457/00
CA581/04	Schiavello Fitout (Qld) Pty Ltd Certified Agreement	3/12/04	
CA582/04	Webforge Australia Pty Ltd t/a Webforge Engineering & Construction Certified Agreement	3/12/04	
CA583/04	Hyun Kun Bae t/a A & J Interiors Certified Agreement	3/12/04	
CA584/04	Balmoral Building & Project Management Pty Ltd Certified Agreement	3/12/04	
CA585/04	Alliance Plastering Pty Ltd Certified Agreement	3/12/04	
CA588/04	Finecraft Furniture Pty Ltd Certified Agreement 2003	3/12/04	
CA586/04	Clerical Staff of the Queensland Union Movement – Certified Agreement 2004	7/12/04	
CA592/04	Transfield Services (Brisbane Ferries) Pty Ltd and Transdev Qld Pty Ltd trading as Metrolink Queensland Partnership – AWU Certified Agreement 2004	8/12/04	CA561/02
CA590/04	Bundaberg Sugar Ltd – Shared Services Bargaining Unit - Certified Agreement 2004	10/12/04	CA173/02
CA591/04	Greenacre Meatlockers – Certified Agreement 2004	10/12/04	
CA594/04	Ormiston College – Certified Agreement 2004	10/12/04	CA549/01
CA595/04	Jericho Shire Council Certified Agreement 2004	13/12/04	CA145/01

The following Agreement has been terminated by the Commission:

No/s	Title	Date terminated
CA188/04	Finecraft Furniture Pty Ltd – Certified Agreement 2004	3/12/04

G.D. SAVILL,  
Industrial Registrar.

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INDUSTRIAL COURT OF QUEENSLAND

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

**Queensland Independent Education Union of Employees AND Educang Limited t/a Forest Lake College  
(No. C64 of 2004)**

PRESIDENT HALL

13 December 2004

DECISION

This is an appeal against a decision of the Queensland Industrial Relations Commission now reported at 177 QGIG 89.

By that decision the Commission, which had been asked to consider a number of preliminary issues, dismissed an application for reinstatement initiated by the Queensland Independent Education Union of Employees for one of its members on the ground that the employment had terminated with the effluxion of time and not at the initiative of the employer. The contract was held to have terminated by the effluxion of time because it specified an outer limit beyond which it would not continue in the absence of a further offer of employment. On the appeal the Commissioner is said to have erred in law, not because of any finding or argument adopted in the reported decision, but because the Commission failed to deal with an argument put to the Commission by the Union's advocate (Mr Spriggs). That argument was that the engagement of Mr Collins was regulated by the *Teachers' Award – Non-Governmental Schools*, that the contract of employment was inconsistent with that Award and s. 135(2) of the *Industrial Relations Act 1999* requires that the contract has to be interpreted and has to take effect as it were amended to be extended necessary to make the area of inconsistency conform with the Award. It is contended that once the Award is read as directed by s. 135(2) the cessation date disappears and the engagement could not have come to an end with the effluxion of time.

It is necessary to rehearse the history of the *Teachers' Award – Non-Governmental Schools*. The *Teachers' Award – Non-Governmental Schools* was gazetted on 14 April 1983, see 112 QGIG 617. At that time the Award did not envisage the engagement of Teachers on fixed term contracts. By a decision of 18 June 1990, see 134 QGIG 862, clause 2 (definitions) of the Award was amended by deleting subclause 18 and inserting the following in lieu thereof:

“(18) ‘Fixed Term Appointee’ shall be defined as a teacher appointed by the school to accommodate an identifiable short term need. Without limiting the application of the foregoing, an identifiable short term need could include:-

- (a) Special projects
- (b) Proposed closure of a school
- (c) Special Government grants
- (d) Filling the position of a specified Teacher who is on nominated leave from the school
- (e) Filling the position of a Teacher arising from a resignation, where such position is declared vacant and no suitable permanent teacher is available:

Provided that fixed term appointees shall be employed for a period no greater than 12 months and shall not be regarded as probationary teachers: Provided further that if the identifiable short term need exists after the 12 month period, the fixed term appointment may be re-negotiated.

Any agreement reached between a school and an individual teacher as prescribed by this Clause shall be in writing, signed by both parties, and shall clearly identify the terms, conditions and specific duration of the appointment.”.

An Award is to be given the interpretation which will best advance its purpose, *Queensland Nurses Union of Employees v Longreach and District Age Peoples Inc t/a Pioneers Hostel/Nursing Home (No.2)* (2002) 170 QGIG 212 at 212. It is clear from the case number that the decision of 18 June 1990 dealt with a restructuring application. Plainly enough, the Union conceded the introduction of fixed-term appointments (in some circumstances) as a cost off-set to facilitate the flow on of a state wage case increase under the centralised wage fixing system. The inclusion of the provision in the “definitions” clause is unfortunate but does not disguise that the so called “proviso” is in truth a substantive provision. I note that in the course of the Award Review process the provisions about “fixed term appointment” were shifted of the definition section and into the substantive provisions of the Award, see (2004) 175 QGIG 749 at 754. I should add that though the formatting changed the substance of the provisions remain the same. I add that comment deliberately because although the post award review version of the Award applied at the time of termination of Mr Collins' employment, the pre award review version of the Award applied at the time of his engagement. There is potential difficulty in s. 135(2) where a contract is inconsistent with an Award when made, but ceases to be inconsistent upon a subsequent amended of the Award.

The critical issue whether the *Teachers' Award – Non-Governmental Schools Award* applied to Mr Collins' engagement is not without difficulty. (It is common ground that the Educang Certified Agreement 2002 has no application.) There was but limited evidence before the Commission. The Commission was invited to deal with the matter on the basis of an agreed statement of facts:

“AGREED STATEMENT OF FACTS

1. The applicant commenced employment on 13 January 2003.
2. An offer of employment dated 25 December 2002 setting out terms and conditions of employment was provided to the Applicant by the Respondent. (see attachment “A”).
3. The offer of employment was accepted by the Applicant on 31 December 2002.
4. The Applicant was formally advised in a letter dated 10 December, 2003 that his employment with the Respondent would cease on 31 December 2003. A copy of this correspondence is attached. (Attachment ‘B’).”.

A perusal of the Transcript reveals that elements of a witness statement by Mr Collins and some testimonial evidence by him also crept into evidence. Materially paragraph 149 of the witness statement declared:

“14. My key duties are set out in the Educang Head of Middle Schooling Position Description. I am aware that a copy of this document has already been filed with the Commission. Some contact teaching duties were also allocated to me. This was in the form of a year 8 spiritual development class. I commenced teaching this class on the first day of the school year for students. I taught that class for two lessons per week over a period of four weeks before being replaced by a new staff member; Reverend Greg Jenks. In addition I was rostered onto playground duty at The Springfield College each Monday.”.

It has been settled for forty years that one determines whether a worker is a builder's labourer by looking at the work which the employee performs, compare *Hennessy v Ray and Sue Boundy Pty Ltd* (2001) 166 QGIG 420 at 421. In the same way it seems to me that one should determine whether an employee is a teacher by looking at the work which the employee performs. However, on the invitation of counsel I am prepared to assume that Mr Collins performed the work described in the duty statement which was annexed to the offer of employment referred to in the agreed statement of facts.

Counsel are *ad idem* that the question whether the *Teachers' Award – Non-Governmental Schools* applied to the engagement of Mr Collins is to be answered by enquiring whether Mr Collins was employed as a Teacher. Counsel also accept that to answer that question one must enquire whether the principal purpose of Mr Collins' engagement was to teach. Compare *Carpenter v Corona Manufacturing Pty Ltd* PR 925 731, 17 December 2002. The enquiry is entirely analogous to that performed in determining whether a particular employee falls within a union's coverage or constitution rule, compare *Joyce and Ors v Christofferson and Ors* (1990) 33 IR 390 at 397 to 399 per Gray J. For myself, I should add that, at least in the case of a common rule award, a noun such as “Teacher” in a coverage clause should be treated as ambulatory, compare *The Queen v Isaac; ex parte Transport Workers' Union* (1985) 159 CLR 323 at 331 per Gibbs CJ (a union coverage case), and that in the same way as in determining whether an engagement is “industrial” one must assess the activity of the employee in the setting in which it is performed, compare *The Queen v The President and Certain Other Members of the Commonwealth Conciliation Arbitration Commission; ex parte The Association of Professional Engineers, Australia* (1959) 107 CLR 208 at 271 per Windeyer J.

Acknowledging the principles is one thing. Applying the principles to the circumstances of the case is another. The fundamental issue is whether Mr Collins, who was not a classroom teacher, is to be treated as providing instruction and support to the students at the schools which he serviced or as providing instruction and support to the classroom teachers at those schools. The critical provision seems to me to be clause 3 of the Position Description which is headed “Duties and Responsibilities”.

Before going to the Position Description I should perhaps note that Mr Collins was employed as “head of middle schooling”. A structure which placed a school officer in such a position, with the attendant authority over classroom teachers, could only be described as innovative. I note that Mr Collins was required to hold a “blue card” and registration under the *Education (Teacher Registration) Act 1988* and that he had a background as a teacher. The teaching and spiritual development course and the performance of playground duty seem to me to be relevant, not as an attempt to pull Mr Collins into the classification of Teacher on the basis of incidental activities, but as supporting an inference that he was embedded in the teaching staff of the school. I note that the *Education (Teacher Registration) Act 1988* defines “Teacher” to mean a person “who is or is eligible to be part of the educational staff of the school”. And, finally, before at last setting forth clause 3, I stress that the duties were to be performed at and in the course of the educational experience at each of two schools. The circumstance that, for example, a lecturer in a faculty of education at a university might digress at large about curriculum development to teachers drawn from a variety of schools without becoming a Teacher for the purposes of the *Teachers' Award – Non-Governmental Schools*, says nothing about the appropriate characterisation of an employee who actively assists classroom teachers to develop and implement a curriculum within a particular school and who scrutinises student attainment in order to ensure the exercise has been successful. Clause 3 provides:

**“3. Duties and Responsibilities**

On behalf of the Executive Principal (who is the Chief Executive Officer of EDUCANG Limited), the Head of Middle Schooling will undertake the following key duties in a manner that is consistent with and complementary to the direction, aspirations and ethos of the company.

- 3.1 Lead authoritatively, inspire exceptionally and plan meticulously in such a way that Year Four to Nine students who constitute our Middle Schools at Forest Lake College and The Springfield College, experience innovation and best practice in curriculum, teaching and learning, and professional development;
- 3.2 Maintain Forest Lake College and The Springfield College at the leading edge of Middle Schooling practices;
- 3.3 Supervise the achievement, by teaching staff in Yrs Four to Nine, of high order skills in:
  - 3.3.1 Thorough curriculum planning including all short, medium and long term planning documents (reporting to the respective Heads of Colleges on the appropriateness and timelines of such planning);
  - 3.3.2 lesson deliver including well managed classrooms featuring motivated learners who treat teaching and learning as sacrosanct;
  - 3.3.3 measurement and evaluation of the effectiveness of teaching and learning episodes and the progress of individual students; and
  - 3.3.4 reporting to parents in both written and oral forms.
- 3.4 Conduct regular, formative, performance appraisals of all teaching and support staff in Years Four to Nine identifying professional development needs;
- 3.5 Liaise and work closely with the Heads of Campuses on all logistics and student management issues relating to the Middle schools;
- 3.6 Formulate ongoing professional development activities for all staff in Years Four to Nine across the company according to needs, imperatives of the Certified Agreement, the corporate vision and the constraints of budget;
- 3.7 Perform close monitoring of all students learning activities by regular inspection of student work samples;
- 3.8 Design and develop curriculum documents to incorporate innovative curriculum practices and content that focus on the principles of Middle Schooling;
- 3.9 Teach as required from time to time;

- 3.10 Develop team bonds across and between the two colleges in Middle Schooling;
- 3.11 Maintain high standards of staff conduct and staff morale;
- 3.12 Maintain, in concert with the Dean of Students (at Forest Lake College), high standards of Middle School student dress, grooming, courtesy and conduct codes, especially when students are in the public eye;
- 3.13 Recommend to the Executive Principal through the Head of College (Forest Lake College) or the Head of College Campus (The Springfield College) any proposed serious discipline action to be instituted against any student especially where suspension or cancellation of enrolment might be an eventual outcome, the company's focus on rehabilitation notwithstanding. The authority to suspend or cancel enrolment agreements is vested exclusively in the office of Executive Principal;
- 3.14 Maintain high quality workplace relations among all Middle Schooling staff and between Middle Schooling staff and the company;
- 3.15 Work in concert with EDUCANG's Head of Senior Schooling (Years Ten to Twelve) to produce class timetables that enhance learning outcomes for Middle School students;
- 3.16 Work in concert with EDUCANG's head of Junior Schooling (Prep. To Year Three) to ensure a seamless garment of curriculum;
- 3.17 Liaise with the Head of Mary McConnel School (MMS) in relation to the integration of MMS students with Middle school classes at Forest Lake College and The Springfield College on curriculum, teaching and learning matters;
- 3.18 Liaise with the Head of Forest Lake College International Centre (FLCIC) in relation to the enrolment of Full Fee Paying International Students (FFPIS) into Middle School classes at Forest Lake College and The Springfield College on curriculum, teaching and learning matters;
- 3.19 Supervise, direct and appraise the work of the heads of Years, Four to Nine;
- 3.20 Participate in selection panels for the recruitment of Middle school staff;
- 3.21 Maintain effective and productive parent communication; and
- 3.22 Perform all other tasks as may be assigned from time to time by the Executive Principal or his delegates.".

[Where emphasis has been added, the emphasis was in the document handed to the court.]

Clauses 3.4, 3.5, 3.6, 3.10, 3.14, 3.15 and 3.22 would be perfectly compatible with characterisation of the position as a Teacher support position. However, the emphasis on outcomes and dealings with students in the remaining subclauses suggests that Mr Collins was employed as a Teacher.

On the whole of the materials I am satisfied that Mr Collins was employed as a Teacher and that the *Teachers' Award – Non-Governmental Schools* applied to his activities.

Whilst the Commissioner who dealt with the matter at first instance determined (favourably to the Respondent) that Mr Collins' engagement expired with the effluxion of time, the Commissioner had rejected a submission that Mr Collins was withdrawn from the protection of Chapter 3, part 2 of the Act because he had been employed for a specific period, see s. 72(1)(d). In the course of coming to that conclusion the Commissioner referred to and adopted the federal authorities, viz *Cooper v Darwin Rugby League Inc.* (1994) 57 IR 238, *Anderson v Umbakumba Community Council* (1994) 56 IR 102 and *Grycan v Total Tennis Australia Inc.*, Print R 7452, which established that where both parties has a right to terminate the contract of employment which is not conditional upon a breach of any term of the contract, the hiring is to be classified as an indefinite hiring rather than a hiring for a specific period of time. It was in reliance upon that proposition that the Commissioner held that because Mr Collins' engagement might be terminated by either party on twelve weeks' notice. The engagement was not a hiring for a specific period of time. It is contended for the Respondent that it follows that Mr Collins cannot be held to be a "fixed term appointee" for the purposes of the *Teachers' Award – Non-Governmental Schools*. The submission is not unattractive. A conclusion that an employee is a "fixed term employee" for the purposes of the Award, whilst not employed for a specific period for the purposes of s. 72(1)(d) is not appealing. However, it would do violence to the limitations imposed upon the use of "fixed term appointees" by the *Teachers' Award – Non-Governmental Schools* to permit avoidance in the case of any particular fixed term appointee by the reservation of a contractual right to terminate on notice.

In all the circumstances the appeal must be allowed. The outer limit on the duration of the contract must yield to s. 135(2) and the Award. Whether the circumstances of Mr Collins' termination amounted to a termination at the initiative of the Respondent when viewed against an Award modified as required by s. 135(2) has not been argued on the appeal and nothing in this decision is intended to shed light on the difficulties which may arise in attempting to answer the question.

I allow the appeal. I set aside the decision of the Queensland Industrial Relations Commission dismissing application B266 of 2004 and remit the matter to the Commission to be heard and determined according to law.

Dated 13 December 2004.

D.R. HALL, President.

Released: 13 December 2004

*Appearances:*

Mr J. Merrill instructed by Macrossans Lawyers for the Appellant.

Ms S. Moody instructed by Jones Ross Pty Ltd for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

*Industrial Relations Act 1999 – s. 331 – power to dismiss cause*

**Kentlands Pty Ltd t/a Bluebird Taxi Trucks AND Transport Workers' Union of Australia, Union of Employees Queensland Branch)  
(No. B67 of 2002)**

VICE PRESIDENT LINNANE  
DEPUTY PRESIDENT BLOOMFIELD  
COMMISSIONER EDWARDS

DECISION

9 December 2004

- [1] The substantive application is one by the Transport Workers' Union of Australia, Union of Employees Queensland Branch (TWU) pursuant to s. 275 of the *Industrial Relations Act 1999* (Act). This particular application is one made pursuant to s. 331(b) of the Act, by the Thirteenth Respondent, Kentlands Pty Ltd trading as Bluebird Taxi Trucks, to have the Commission dismiss or refrain from further hearing the substantive application against it.

#### **Brief history of the application against the Thirteenth Respondent**

- [2] The TWU became entitled to file an amended application conforming with the then *Industrial Relations (Tribunals) Rules 2000*, following a decision of this Full Bench in *Transport Workers' Union of Australia, Union of Employees (Queensland Branch) v The Queensland Road Transport Association Industrial Organisation of Employers and Others* (2002) 171 QGIG 101. In paragraph 4(p) of the Amended Application filed on 26 July 2002, the TWU stated in respect of the alleged contractual arrangements concerning the Thirteenth Respondent that:

"Further particulars of the contract under which the class of person described in Schedule A to this Amended Applicant, and which is [sic] engaged by the Thirteenth Respondent, work will be provided after discovery."

- [3] On 1 October 2002 this Full Bench gave the TWU a further opportunity to file and serve a sufficiently particularised application. A Further Amended Application was filed on 17 December 2002. The particulars of the contract alleged against the Thirteenth Respondent were contained in Schedule P to the Affidavit of Hughie Williams. The Thirteenth Respondent contested the sufficiency of, and alleged deficiencies in, the pleading. In our decision of 3 September 2003 in *Transport Workers' Union of Australia, Union of Employees (Queensland Branch) v Zip Express Couriers Pty Ltd and Others* (2003) 174 QGIG 123 at paragraphs [66] and [67] we said:

"At this time we are of the view that the case against the Thirteenth Respondent is not sufficiently particularised. We have not however formed the view that the position with respect to the Thirteen Respondent meets the test of s. 331(b) such that we could dismiss the claim against the Thirteenth Respondent or refrain from further hearing the matter against the Thirteenth Respondent.

Instead we will order the Thirteenth Respondent to discover to the TWU any documents evidencing the material terms of the contracts identified in Schedule P should any such documents exist. The Schedule does at least identify two persons who, it is alleged, have had conversations with couriers resulting in contracts being formed between the couriers and the Thirteenth Respondent. Once discovery of any such documents have been made and the TWU is able to further particularise its claim against the Thirteenth Respondent we will further consider the Thirteenth Respondent's application under s. 331(b)."

- [4] The Thirteenth Respondent contends that it has complied with that Full Bench order. It provided the TWU with a List of Documents on 26 September 2003 wherein it stated, *inter alia*, that there were "no documents which evidence the material terms of the contract alleged by the Applicant as identified in Schedule P to the Application."
- [5] The TWU, on 6 April 2004, filed an application for Further and Better Discovery (B631 of 2004) which was dealt with by this Full Bench as an application for further pre-pleading discovery. The TWU in that matter adduced evidence of proceedings in another matter involving the Thirteenth Respondent and its courier drivers. Ultimately the TWU sought discovery of, *inter alia*, recipient created tax invoices and any License Agreement applicable to any owner driver in the period of the last twelve months. In so doing, the TWU annexed to its written supplementary submissions a proposed amended particulars in respect of Schedule P to the Further Amended Application.
- [6] The TWU then filed a Further Further Amended Application in respect of the Thirteenth Respondent on 20 September 2004. This was done in accordance with a direction of this Full Bench in its decision of 24 August 2004 in B631 of 2004 i.e. *Transport Workers' Union of Australia, Union of Employees (Queensland Branch) v Zip Express Couriers & Others* (2004) 177 QGIG 32. In that decision we said at paragraph [49] that:

"The only aspects of the claim for further discovery against the Thirteenth Respondent that we are prepared to order be discovered is that found in (a) i.e. the RCTI's or remittance advices issued to each of its drivers for the period 1 March 2004 to 31 August 2004 and that found in (d) i.e. all documents and paper writings which set out changes to the rates paid to drivers in that same six (6) month period."

- [7] Further we stated at paragraph [51] that:

". . . If the TWU wishes to make further applications in respect of the . . . Thirteenth Respondent it should do so in writing by 20 September 2004."

#### **Thirteenth Respondent's Position**

- [8] The Thirteenth Respondent objects to the amendments contained in the Further Further Amended Application arguing that to allow the amendments would enable the TWU to plead a completely different contract to that previously pleaded. The contracts were previously alleged to be oral. Now the pleading alleges that the contracts are oral "for the most part" but "with the exceptions that". . . Then three categories of contractual documents are listed.
- [9] The first such category is alleged to be "correspondence . . . exchanged from time to time before the commencement of the operation of the contract dealing with the contract or arrangements between the parties including setting the rate to be paid . . . and, after the commencement of the operation of the contract, varying the terms of the contract including the rate to be paid". The second category of documents is the recipient created tax invoices and remittance invoices. The third category is alleged to be a document titled "Licensed Agreement" which is said to evidence "some of the terms of the contract".
- [10] The Thirteenth Respondent relies on the evidence of its Managing Director, Donald John Dodds. Mr Dodds' evidence is that all contracts are "oral with no exception". He rejects "that any correspondence is exchanged as alleged in paragraph 5(a) of the affidavit in support of the Further Further Amended Application". Mr Dodds also states that the documents referred to in paragraph 5(b) of the affidavit "do not relate to the terms of the contract". Such documents, according to Mr Dodds, are "charge and payment records required by the Australian Taxation Office (ATO) under the GST provisions". Further Mr Dodds states that the Thirteenth Respondent has not used the document entitled "Licensed Agreement" since 30 June 1997. Since that date the license has not been used in any form, according to Mr Dodds.

**TWU's Position**

- [11] The TWU submits that the Thirteenth Respondent's application pursuant to s. 331(b) of the Act is premature in that the process of discovery against the Thirteenth Respondent has not been completed. The TWU argues that it filed the Further Further Amended Application by 20 September 2004 in order to comply with the Full Bench's decision of 24 August 2004 in B631 of 2004. The Thirteenth Respondent's discovered documents were, according to the TWU, only supplied on or about 20 October 2004, i.e. after the date it was required to file its Further Further Amended Application. The TWU said it should not be prejudiced by its attempt to meet the Full Bench's requirements in circumstances where the Thirteenth Respondent was late in its discovery or disclosure.

**Conclusion**

- [12] Whilst we have sympathy for the situation that the Thirteenth Respondent finds itself in, we can also see the dilemma for the TWU in having to meet a deadline imposed by this Full Bench when it did not have access to the documents ordered to be discovered in paragraph [49] of our decision of 23 August 2004.
- [13] As we understand the position, the Thirteenth Respondent has now provided the documents. At the date of hearing of this application, the TWU was in the process of inspecting the Thirteenth Respondent's discovered documents. The TWU contends that the case against the Thirteenth Respondent will be re-pleaded consistent with the information provided in the discovered documents.
- [14] In our view it would not be appropriate for this Full Bench to exercise its discretion under s. 331(b) of the Act in circumstances where it was envisaged that the TWU would have access to the discovered documents prior to finalising its pleadings in respect of the Thirteenth Respondent. In the circumstances we will thus adjourn this application. The Thirteenth Respondent will have the right to seek a re-listing of the application after the TWU has filed its final version of the application. We note that a direction for the filing and service of the final version of the application is to be determined at the mention of this matter on 17 December, 2004.

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 Kentlands Pty Ltd t/a Bluebird Taxi Trucks, 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: 9 December 2004

*Hearing Details:*

2004 15 November

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 278 – power to recover unpaid wages, superannuation contributions etc.*

**The Queensland Public Sector Union of Employees AND Queensland Health Pathology & Scientific Services  
(No. W121 of 2004)**

**DISTRICT HEALTH SERVICES EMPLOYEES' AWARD – STATE 2003**

COMMISSIONER EDWARDS

8 December 2004

Application for Unpaid wages – Penalty Rates – Overtime – Overtime on Recall – Rest Period After Overtime – Fatigue Leave – Evidence – Respondent Interpreted Award Correctly – Application Refused.

DECISION

By application filed on 1 September 2004 The Queensland Public Sector Union of Employees (Union) sought an order for the payment of penalty rates for the sum of \$2,066.24 to Pamela Lobegeier.

The applicant's claim relates to eleven occasions when overtime was worked by Ms Lobegeier at her employer's request between termination of ordinary work on one day and commencement of ordinary work on the next. During this period Ms Lobegeier worked continual overtime as well as overtime on recall. On each occasion the amount of overtime on recall did not exceed two hours. Ms Lobegeier did not receive a continuous break of 10 hours at any time prior to being required to report the next day for work. She was paid at the ordinary rate for the ordinary hours on that next day, and at the prescribed overtime rate (time and a-half for the first 3 hours and double time thereafter) for overtime on that next day. In lieu of access to a ten continuous hour break between termination of ordinary work on the first day and commencement of ordinary work on the next, the Union on behalf of Ms Lobegeier claims the fatigue penalty rate prescribed in clause 6.9.1 of the *District Health Services Employees' Award – State 2003* (the Award) (i.e. double time for all the hours worked after recommencing work until she was released from duty for a 10 continuous hour break) (Exhibit 2A).

The particulars of the claim showing times actually worked as well as penalty rates claimed are annexed to the application. At the commencement of proceedings the parties agreed that all relevant time and wages records pertaining to the application would not be challenged. For simplification Ms Lobegeier detailed one incident in her application which occurred on 15 May 2001 when Ms Lobegeier worked 7.25 normal hours from 07.45 until 16.00. She then worked continuation overtime of 3.75 hours from 16.00 until 19.45. Later that night she was recalled and worked 1.5 hours from 01.45 until 03.15 on the 16<sup>th</sup> May. She was then required to report for duty at the normal starting time of 07.45 although she had not had a break of 10 continuous hours.

The relevant sections of the Award include:

“6.8.5 Recall

- (g) The provisions of clause 6.9 shall apply when an employee has actually worked in excess of two (2) hours on one or more call-outs.

6.9 Rest Period After Overtime

*Fatigue leave*— An employee who works so much overtime between termination of ordinary work on one day and the commencement of ordinary work the next day, that ten (10) consecutive hours off duty between those hours has not occurred shall be released after completion of such overtime until ten (10) consecutive hours off duty occur without loss of pay for ordinary working time occurring during such absence. If on the instructions of the employer, such an employee resumes or continues work without having had ten (10) consecutive hours off duty, the employee shall be paid double rates until released from duty for such period, and shall then be entitled to be absent until ten (10) consecutive hours off duty has occurred without loss of pay for ordinary working time occurred during such absence.

...”.

By this application the Commission is determining whether the claim for wages as specified in the application should be granted.

The applicant made reference to the decision of *Asbury C* in 174 QGIG 465-472 wherein principles relevant to construction of awards were cited in the *Humes Pipes* case(1930-31) 11 SAIR 1 at 2, as follows:

- “(i) the intention must be gathered from the instrument itself;
- (ii) the words of the instrument must be taken in their grammatical sense and ordinary usage;
- (iii) the grammatical and ordinary sense will not be modified unless to avoid absurdity, repugnance or inconsistency;
- (iv) the instrument must be considered as a whole; and
- (v) it follows that a bare statement of intention wherever found, cannot of itself govern the legal effect when that legal effect is ascertainable by application of the rules of construction to the document itself.”.

Mr Hayward in his evidence indicated:

“The employee is not entitled to fatigue leave on Tuesday as the period of recall was less than two hours and therefore not considered to interrupt the 10 hour breaks which is necessary between 9pm which is when they finished their continuation overtime. You can’t combine continuation overtime and recall or call-back or whatever you want to call them.

Well, that’s what the proviso in the award that 6.8.5 (g) says.”.

An examination of the evidence of Mr Cumberland indicates he was answering questions in his professional capacity based on his understanding and interpretation of the Award especially clause 6.8.5 (g). As such it was his evidence that clause 6.8.5 (g) must be invoked. Ms Lobegeier believes termination of the ordinary work day was 1600 hours with overtime concluding at 1945 hours.

Clause 6.8.5(g) is a savings clause. Ms Lobegeier availed herself of 10 hours between 1945 and 0745. The recall was from 01.45 until 03.15 which is a period of less than 2 hours. As such the Commission does not accept the submission of the Union that clause 6.9.1 grants an entitlement to fatigue leave as long as so much overtime (of any time, and cumulative) is worked between termination of ordinary work on one day and commencement of ordinary work on the next day that 10 consecutive hours off duty have not occurred.

A significant percentage of the submissions of the applicant would be relevant if the Commission was hearing an application to amend the award. Obviously the recall to work between the hours 0145 and 0315 on 16 May resulted in a situation whereby Ms Lobegeier was not able to avail herself of a break of 10 consecutive hours. The affidavit of Ms Lobegeier would provide support for such an application especially when consideration is given to the contents of paragraphs 7, 13, 15, 16, 17, 18, 31, 36, 37 and 38. Of special concern is paragraph 44 of the affidavit which states:

“The award allows for the amount of overtime on call to be cumulative. I therefore believe that wherever a person works overtime of more than 2 hours between the normal finishing time on one day and the normal starting time on the next, they should be compensated for fatigue, provided there has not been a 10 continuous hours break in that period.”.

If the Union maintains such a concern the correct method to address the issue is by means of a formal application to amend the Award with all parties being given an opportunity to be heard.

The Commission has given consideration to all the evidence, exhibits and submissions and is satisfied that the respondent has interpreted the Award correctly.

The application is refused.

The Commission orders accordingly.

K.L. EDWARDS, Commissioner.

*Appearances:*

Ms J. Cannon and with her Mr M. Thomas of The Queensland Public Sector Union of Employees, Queensland on behalf of the applicant.  
Mr P. Eldon and with him Mr D. Hill of Queensland Health on behalf of the respondent.

*Hearing Details:*  
2004 15, 16 & 17 November

Released: 8 December 2004

#####

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 – s. 229 – notice of industrial dispute*

**Queensland Nurses’ Union of Employees AND Sundale Garden Village, Nambour (Case No. D308 of 2004)**

COMMISSIONER ASBURY

8 December 2004

DECISION

Arbitration of dispute – Directions in relation to disclosure – Request for hearing to be conducted “in camera” – *Uniform Civil Procedure Rules 1999* – Documents relevant to an issue in proceeding – Financial position a central issue in dispute – Orders as to disclosure – Transcript of 19 and 20 November 2004 released for use of parties only – Issue as to whether transcript should be released generally will be revisited at request of either party.

**Background**

On 2 August 2004, Sundale Garden Village (Sundale) notified an industrial dispute pursuant to s. 229 of the *Industrial Relations Act 1999* (the Act), D308 of 2004. Pursuant to s. 230(3)(b) the dispute was referred for arbitration by Deputy President Bloomfield by a memorandum issued to the parties on 7 September 2004 in the following terms:

“... ”

Acting pursuant to the provisions of s. 230(3)(b) of the *Industrial Relations Act 1999* (the Act), and the delegation of Vice President Linnane dated 26 August 2004, I hereby refer matter number D308 of 2004 to arbitration as follows:

#### **Background**

To address continuing and mounting losses the Board of Sundale Garden Village decided to reduce hours of staff employed in the James Grimes Care Centre from approximately 22 July 2004.

The Queensland Nurses' Union of Employees (QNU) and its members object to the hours reduction arguing:

- that the economic circumstances of Sundale Garden Village do not warrant the reductions;
- the hours' reductions are such that:
  - [1] they impose unreasonable workloads on employees;
  - [2] they are impacting upon or affecting the professional accountability of licensed nurses;
  - [3] they are affecting the standards of resident care; and
  - [4] they entitle employee(s) to refuse to perform certain tasks in accordance with s. 241 of the Act on the basis any refusal is based on a reasonable concern by the respective employee(s) about an imminent risk to his or her health or safety.

#### **Issue to be arbitrated**

*“To the extent that QNU's concerns/arguments are valid, what changes (if any) should be made to the rosters at the James Grimes Care Centre such that any valid concern(s)/argument(s) of QNU is/are rectified/overcome.”*

#### **Carriage of matter**

Pursuant to s. 230(5) the QNU is to have carriage of the matter.

#### **Member assigned**

The arbitration of this matter is assigned to Commissioner Asbury.”

#### **Directions in Relation to Disclosure**

On 22 September 2004 a Directions Order was issued to the parties, reflecting matters canvassed in the hearing of 17 September 2004, relevantly requiring the following in relation to disclosure:

“... ”

3. That the Applicant supply to the Respondent a request for the type of documents the applicant requires access to that are in the Respondent's possession or under their control relevant to a matter in issue in the proceeding, by 4.00 p.m. on Tuesday 21 September 2004.
4. That the Respondent supply to the Applicant a list of documents of the type requested by the Applicant in their possession or under their control relevant to a matter in issue in the proceeding, by 12.00 noon on Thursday 23 September 2004.
5. That the Applicant advise the Respondent by 4.00 pm on Friday 24 September 2004 of those documents from the list of which copies are required.
6. That the Respondent supply to the Applicant by 4.00 p.m. on Thursday 30 September 2004, copies of those documents contained in the list disclosed which the Applicant requests and for which the [Respondent] has no legal claim for privilege.”

The rationale for the Directions Order as it deals with disclosure is found in transcript of proceedings before Deputy President Bloomfield on 17 September 2004, and it is apparent from the transcript that:

- the provisions of the Directions Order in relation to the QNU providing a list of the type of documents it required was based on the fact that the QNU might not be aware of the precise nature of the documentation held by Sundale;
- submissions were made on behalf of Sundale to the effect that there should be a tight restraint in relation to the use of documents and that such use should be confined to persons who had an interest in the preparation of cases for the respective parties;
- Sundale sought a direction in relation to statements of contentions from the parties;
- consideration was given by Deputy President Bloomfield to the confidentiality of financial material and leave granted to Sundale or the QNU to refer any issues in relation to such material to the Commission for further directions if required;

On 21 September 2004, the QNU filed and served its request for documents. Types of documents sought by the QNU were broadly described in its list as relating to financial matters; workload; professional accountability of licensed nurses; standards of resident care; workplace health and safety and other documents such as agenda papers and minutes for board and management meetings and communications between senior management of the wings subject of this dispute.

On 7 October Solicitors for Sundale forwarded correspondence to my Associate requesting a further Directions hearing in relation to the matters not relevant to the issue of disclosure. Correspondence was also received on 7 October 2004 from the QNU, indicating that the further directions hearing should also deal with a number of additional matters including an assertion that Sundale had failed to properly disclose material and to provide it to the QNU.

At the further Directions hearing conducted on 8 October 2004, by the Commission as presently constituted, a number of matters were dealt with. In relation to the issue of disclosure, it was contended by the QNU that the respondent had not complied with the Directions Order of 22 September 2004. Essentially the QNU's complaint was that it had provided a list of the types of documents sought, and Sundale's list had simply used the descriptions provided by the QNU and had objected to certain categories of documents being provided under those descriptions, without listing the actual documents with Sundale's possession or under its control. Senior Counsel for Sundale contended that the QNU's approach to the matter of disclosure had been grossly oppressive; that Sundale had already provided in excess of 2,500 sheets of paper and that documentation not provided was not relevant to matters in dispute. Counsel for the QNU responded by contending that the reason 2,500 sheets of paper had been requested by the QNU was that Sundale had not provided a list of documents in the proper form identifying specific documents in each category or type, thereby requiring the QNU to ask for everything that had been disclosed.

After hearing from both parties, and canvassing competing lists of documents, the Commission formed the view that it was a pointless exercise to embark on the apportionment of blame in relation to which of the parties had or had not complied with Directions Orders made by Deputy President Bloomfield. The Commission also expressed the view that the subject matter of the dispute was as set out in the memorandum issued by Deputy President Bloomfield on 7 September 2004, and that the financial position of Sundale was relevant to the matters in dispute. The Commission also directed that financial information relevant to Sundale be disclosed, and that such material not be confined to the operational area in which the dispute had arisen. Sundale indicated that it would examine the further list of types of documents provided by the QNU on 8 October 2004, and would respond in writing setting out material which could be given in light of that list, the Commission adjourned to enable that process to take place.

The QNU's contentions were filed in the Commission on 12 October 2004. Broadly, the QNU contended that nursing hours in the operational area of Sundale where the dispute centres, have been cut, and that the cut has resulted in workloads that are excessive, unreasonable, unfair, unjust and/or unsafe. At point 24 of its contentions, the QNU said:

"Sundale has purported to justify the cuts on the grounds of financial necessity. In fact, Sundale is in a strong financial position and has the capacity to pay for higher staffing levels."

There was further correspondence between the parties, again copied to the Commission, wherein the QNU continued to object to alleged failure of Sundale to comply with Directions in relation to disclosure. Correspondence on behalf of Sundale to the QNU advised that Sundale would be objecting on the grounds of relevance, to disclosure of a number of documents listed in Schedule 2 of its list, and would be happy for the Commission to determine the issue should the QNU wish to pursue it.

At a hearing on 19 October the QNU advised that it had received two statements of contention on behalf of Sundale, one raising jurisdictional issues, which the QNU believed should be addressed prior to the hearing of the substantive matters surrounding the dispute. Essentially the jurisdictional issue was that a decision by Sundale to direct its resources in a particular manner, for reasons of financial prudence, was a matter for management and as such the Commission did not have jurisdiction to deal with a claim by the QNU for those resources to be directed in another manner. Sundale maintained that it did not want the jurisdictional matters dealt with on a preliminary basis but believed that they would more appropriately be dealt with when all of the evidence was in, so that they could be argued in context.

The Commission also heard from the parties at length in relation to disclosure. The Commission went through a list of various types of documents sought by the QNU, and with the assistance and co-operation of the parties limited the scope of material sought by the QNU to accommodate concerns of Sundale about the quantum of material and the cost and effort associated with disclosure. Dates for inspection of documents were agreed between the parties and the hearing was adjourned.

On 24 October 2004, Solicitors for the QNU corresponded with Solicitors for Sundale in relation to inspection of documents conducted on 22 October 2004. Essentially, it was contended for the QNU that a number of documents had been provided in censored form. Censorship had been effected in some cases by use of black felt tipped pen and in other cases by hiding sections of documents behind coloured paper. QNU requested that originals of the censored documents be brought and produced to the Commission on 26 October 2004.

At a hearing on 26 October 2004 Counsel for the QNU again raised the issue of disclosure and alleged non-compliance with Directions Orders by Sundale. With the agreement of both parties, consideration of this issue was deferred until 27 October 2004. On that date, it was submitted for QNU that on 19 October 2004 the Commission, after hearing submissions from both parties, had directed Sundale to make available for inspection agendas, papers and minutes for all board meetings from 1 January 2004 until the present. It was further submitted that Sundale had refused to comply with this direction. The QNU's argument was that Sundale has the ability to pay for a proper roster, and the Commission would not be persuaded by an argument that it was nevertheless fiscally prudent to cut hours. However in the absence of material it had sought, QNU was not in a position to particularise any argument to counter the fiscal prudence argument of the respondent, and that it should be in a position to examine the strength of that argument and to take appropriate advice on it.

Sundale rejected any contention that there had been a failure to comply with directions in relation to disclosure or that its actions had been a contemptuous exercise. Rather it was contended that in taking steps to comply with the direction it had been ascertained that there was material within the documents sought by the QNU which was commercially sensitive and confidential and which was not relevant to issues in dispute in this matter. That material was said to be very precious to Sundale and its disclosure would result in injustice to Sundale. Accordingly Sundale was now requesting the Commission to revisit the issue of disclosure.

The Commission determined to hear further argument from Sundale in relation to disclosure of the disputed documents at a hearing on 19 November 2004.

#### **Hearing on 19 November 2004**

##### Request for Hearing to be Conducted "in Camera"

Sundale sought that the hearing of 19 November 2004 in relation to disclosure be conducted "in camera" with only legal representatives for the parties being present. In this regard, Sundale contended that Mr Ross, the official of the QNU who was present for the purpose of instructing counsel, should be excluded from the hearing. Sundale also sought restrictions on the publication of the transcript of the proceedings on 19 November 2004 and on any decision of the Commission arising from those proceedings. The grounds upon which these submissions were put were as follows:

- the material in question related to legal entities other than Sundale;
- in one case, a number of members of the Sundale board were also directors of the other entity and in another case, Sundale was considering a commercial relationship with the entity in question which had not yet been entered into;
- Commission proceedings were unique and the Commission had in its general powers, unfettered capacity to make directions in relation to the conduct of proceedings;
- the present case is an unusual one and the Commission should be innovative in its quest to do justice to the parties;
- a significant injustice would arise with respect to Sundale in the event that it was required to disclose material to an official of the QNU before the Commission had ruled on the argument it sought to put in relation to disclosure of that material;
- this was because information could be used by the QNU in other matters such as enterprise bargaining negotiations which were expected to commence in respect of at least one of the other legal entities;
- notwithstanding the fact that the officer of the QNU Sundale sought to have excluded from the in camera proceedings was also a solicitor, there was a "wearing of two hats";
- while it was not intended to denigrate an official of the QNU, it would be difficult for that official to "un-know" information he may come to know in the proceedings relating to disclosure;
- this could give the QNU the capacity to use that material to formulate "industrial pressure tactics"; and
- any injustice to the QNU could be mitigated by leave being sought for legal representatives to take instructions from QNU officials should this be required at any point during the in camera proceedings.

The following submissions were made on behalf of the QNU:

- as a solicitor the QNU officer in question had a duty to the Commission which was taken very seriously;
- in the capacity as an officer of the QNU, the officer was the only representative of the client and had the right to be present during any hearing in relation to this dispute, unless Sundale demonstrated exceptional circumstances;
- there was a clear *prima facie* right of a party to litigation to personally inspect discovered documents, and it was a far from satisfactory answer that the legal advisor was permitted to inspect the material, as this placed the legal advisor in the difficult position of not being able to obtain instructions;
- the QNU was not a competitor or trade rival and even if this was the case, courts had permitted disclosure to a Chief Executive Officer or Director of the other party, on terms preventing him or her from communicating to those in his or her company who could use the trade secret;
- before the Commission took the extraordinary step of conducting proceedings in camera material had to be put in order to establish that it was necessary;
- at very least, Sundale should provide an affidavit from a relevant manager which set out why the matters were confidential and a hearing in the manner sought by Sundale was necessary;
- if the Commission was minded to exclude the QNU officer from the hearing then the order to that effect should operate only as necessary rather than for the entire hearing; and
- the Commission should not restrict the publication of the transcript of these proceedings or any decision in relation to them.

#### Submissions in Relation to Disclosure

After extensive discussions conducted between the legal representatives of the parties during the course of the hearing on 19 November 2004, agreement was reached in relation to disclosure of a significant quantity of the material which had previously been in dispute. Agreement was not able to be reached in respect of the following material:

- Extract from Sundale Board Meeting, 23 August 2004, page 9;
- Extract from Sundale Board Meeting, 19 April 2004, page 15;
- Extracts from 2004-2005 Budget Paper pages 8; 20; 26; accounts page 3; page 1 of budgeted Cash Flow Comparatives and page 1 of Minor Projects Budget.

In relation to this material it was contended by Sundale that it dealt with the internal financial operation of other legal entities separate from Sundale and was not relevant to issues in dispute between the parties in the current matter. It was further contended that the QNU was embarking on a fishing exercise, and on no basis could the material in question assist the QNU in the presentation and preparation of its case.

In this regard, it was submitted that thus far disclosure had involved 2600 copies of documents passing from Sundale to the QNU, requiring enormous devotion of resources in an organisation with a small administrative workforce. It was relevant that Sundale had been required to do much in respect of disclosure in a short period of time, and to push the matter further would oppress Sundale. If the determination of this matter came down to a question of balance and discretion, then the burden that Sundale had already been confronted with should tip the balance in its favour.

It was submitted that Sundale did not (except at jurisdictional level) contend that any relief should not be granted, on the basis that to do so would require it, as a group entity, to engage in fiscal imprudence. Further, Sundale did not put its financial capacity in issue as a substantive basis for its resistance of the relief sought by the QNU. For example, Sundale did not assert that the Commission should not grant relief on the basis that it would have a particular effect on facility X or facility Y. Sundale's position was that these are the very sorts of investigations and considerations that the Commission should not embark upon, as it will lead to a purported exercise of jurisdiction which the Commission lacks. For the Commission to direct disclosure not relevant to matters in contention between the parties on the "pleadings", would be to work oppression on the party required to make such a disclosure.

It was also submitted that the Commission should adopt the modern approach to disclosure found in the *Uniform Civil Procedure Rules 1999* Rule 211 which narrows the focus of disclosure to documents "directly relevant to an allegation in issue. The requirement of direct relevance abolished the previous practice where any document which could lead to a train of inquiry, or which could indirectly allow a part to advance its case, was required to be discovered: *Mercantile Mutual Custodians Pty Ltd v Village Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 at 282 per Pincus JA. "Directly relevant" implies that the document is or contains something that tends to prove or disprove an allegation in issue: *Robson v REB Engineering Pty Ltd* [1997] 2 Qd R 102; *Mercantile Mutual Custodians Pty Ltd v Village Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 at 282-3.

Further, in the current proceedings where issues are not defined by "pleadings" except in the most general sense and no attempt had been made by the QNU to otherwise establish relevance, an objection on the grounds of "fishing" was available. Properly characterised, the apparent purpose for the disclosure was so that the QNU could ascertain whether a case existed, and not to compel the production of documents for a case known to exist in the sense that the applicant for discovery already had some evidence for it: *Bertram v Vanstone* [1999] FCA 1743, per Kenny J at [23]. The overriding consideration for the Commission in exercising its jurisdiction in respect of disclosure was natural justice.

QNU submitted that the material in question was contained within documents which the Commission had already directed Sundale to disclose. Accordingly, the onus was on Sundale to establish that there should be further limitations placed on that material. This should be done by direct evidence demonstrating the party's need to preserve confidentiality; the prejudice it would suffer if confidentiality was breached; and the reason why the implied undertaking that the other party will not use documents obtained through disclosure for any other purpose than the litigation, was not sufficient.

It was also submitted by the QNU that the test for relevance in disclosure is broader than the test for admissibility. A document is relevant if it contains information which enables the party calling for production of the document to advance its own case or damage the case of his adversary, or it is a document which may fairly lead him or her to a train of enquiry which may have either of those consequences: *Mulley v Manifold* (1959) 103 CLR 341 at 345.

Specifically the QNU contended that material indicated the view of the Sundale Board in relation to nursing workloads, and this was a subject upon which the Chief Executive, who was to give evidence in the current matter, could be properly cross-examined. Further, the material indicated future priorities of Sundale, and was relevant to the question of the financial prudence defence raised by it. The material also included details of a management finance charge for assistance provided to another entity by Sundale, and at very least that information was relevant. Further, details of inter-company loans to another entity were relevant given the defence of financial prudence.

#### **Conclusions**

In an *ex tempore* decision issued on 19 November 2004, the Commission determined that it would hear the argument in relation to the disputed material in camera, in the manner sought by Sundale. The reasons for reaching this conclusion were that proceedings in the Commission are unique and cover a broad range of matters. Further, the manner in which materials are exchanged between the parties, for example the requirement to provide witness statements, is also unique.

There are also typically relationships between the parties in Commission proceedings, such as those in current case, which will be ongoing and will extend beyond matters currently being litigated. In this regard, it is more likely than not that for example, Sundale and the QNU will engage in enterprise bargaining negotiations in the future. In reaching this view, the Commission does not intend to denigrate Mr Ross, or any officer of the QNU, or to suggest in any way that there would be a prospect that they would misuse information acquired in disclosure.

Rather the decision to hear the matters in camera recognises that rightly or wrongly, Sundale perceives it may be disadvantaged by such proceedings not being conducted in this way, in that it will be compelled to disclose material in the proceedings which the Commission may ultimately withhold from disclosure. This must be weighed against the disadvantage to the QNU as a result of the hearing being conducted in camera. In my view that disadvantage was balanced by providing QNU's legal representatives with adjournments as required to seek instructions, and giving leave for those representatives to request the Commission to allow legal representatives to show specific material to QNU officers during such adjournments, as required. The Commission declined to rule at this point on whether the transcript should be suppressed and whether any decision resulting from the arguments about disclosure should also be suppressed, as has been sought by Sundale.

After hearing and considering the submissions of the parties the Commission further varied Directions Orders in relation to some, but not all, of the material with respect to which Sundale sought to resist disclosure, in a further *ex tempore* decision released on 20 November 2004. Sundale was ordered to disclose the relevant material by 10.00 a.m. on 21 November 2004. The parties were advised on 20 November 2004 that written reasons for this conclusion would be provided at a future date. This decision constitutes those reasons.

The financial position of Sundale has been, and remains, a central issue in the dispute and the matters to be arbitrated. Whether the changes which gave rise to the dispute were financially necessary or financially prudent, does not change the fact that Sundale's financial position is in issue. It is also clear that the operational area in which the dispute has arisen is part of a larger corporate entity – Sundale – and is included in Sundale's accounts as well as being considered as a cost centre. It is apparent from the contentions filed on behalf of Sundale in response to point 24 of the QNU's contentions, that both the overall financial position of Sundale, and the financial position of the operational area in which the dispute has arisen, are relevant to the issues in dispute. The fact that Sundale may raise a jurisdictional issue in relation to whether the Commission has the power to, or as a matter of discretion, should, intervene in a management decision made on the basis of financial prudence, cannot prevent this issue being in dispute during the arbitration process. In this regard I accept the submission of the QNU that Sundale, by pleading financial prudence as a justification for changes to working hours has put the issue "squarely on the table".

It is also relevant that Sundale has maintained the position that the jurisdictional issue should be argued after the evidence is in so that it is not argued in a vacuum, in the face of opposition from the QNU which sought that the issue be determined at the outset of proceedings. The contentions of both the QNU and Sundale indicate that a further issue in the dispute is whether the workloads of nursing staff are reasonable, fair, just and safe.

For the Commission to be fully informed about, and to determine the matters in dispute, both parties must have access to relevant documents, to assist in the formulation of their respective cases. Directions Orders issued by the Commission do not typically contain the same formulation as that found in the *Uniform Civil Procedure Rules*. Those rules refer to documents "directly relevant to a matter in issue". Directions Orders issued by the Commission refer to documents "relevant to a matter in issue". The Directions Orders in this case contain the latter formulation typically used in Commission proceedings. In my view the approach which applies to Directions Orders of the Commission containing the term "relevant to a matter in issue" is that in *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 63 Per Brett LJ, which requires disclosure of a document which may, not which must, either directly or indirectly enable the party requiring the disclosure to either advance their own case or to damage the case of their adversary.

I do not accept the submission that the "pleadings" in this matter are imprecise. In my view the issues in dispute are clearly defined by the memorandum issued by Bloomfield DP on 7 September 2004. Those issues have been further refined as a result of both parties filing outlines of contentions as directed by Bloomfield DP. The Directions in this matter were issued on 22 September 2004. They have been revisited on numerous occasions and altered to accommodate the concerns of Sundale. The Commission has heard all submissions Sundale has desired to put before it, and has acceded to the request of Sundale to take the somewhat unusual step of excluding an officer of the QNU who was instructing Counsel for the QNU, from a hearing.

In relation to the extract from Sundale Board Meeting, 23 August 2004, page 9 I have reached the conclusion that the matters in the paragraph in question are relevant to the question of the views of the Board of Sundale about what constitutes reasonable, fair, just and safe workloads. I am also of the view that the paragraphs surrounding the extract make it clear that there is a relationship between the facility concerned and Sundale. I note that the heading on the page in question is to be amended so that the particular facility to which it refers is not identified and am of the view that this is appropriate.

In relation to an extract from the Sundale Board Meeting of 19 April 2004, at page 15 I am of the view that the payment made by the entity in question to Sundale, indicated as "Less payments made to Sundale" is relevant to its financial position and that entry should be disclosed. Other material in the disputed section is not in my view relevant and should not be disclosed. The Budget Paper pages 8 and 20 relate to the internal operations of another entity entirely and are not relevant to matters in dispute in this case. They should not be required to be disclosed. Page 26 of those budget papers, to the extent that it refers to an intercompany loan between Sundale and another entity, is relevant to Sundale's financial position, and should be disclosed. Page 3 of the accounts refers only to an entity other than Sundale, and should not be disclosed. Page 1 of budgeted cash flow comparatives to the extent that it involves an allocation from Sundale to another entity should be disclosed. The material from the Minor Projects Budget should not be disclosed on the basis that it deals with capital and construction programs in respect of other facilities.

This decision deals only with disclosure of material, not its admissibility. It is open for Sundale to seek suppression of material in the event that QNU seeks to tender it in evidence on grounds provided for in the *Industrial Relations Act 1999*. Further, I note that with respect to disclosure of any material, that there is an implied undertaking on the part of the party to whom the material is disclosed to deal with that material in an appropriate manner and to utilise it for the purposes of the relevant litigation. In this regard, the QNU has indicated in addition to that implied undertaking, that both Mr Ross who is the QNU Officer principally involved in this matter, and the State Secretary Ms Hawksworth, are prepared to give specific undertakings with respect to the material in contention. In my view given the views of Sundale in relation to the material such undertakings would be appropriate and should be given. They are also in my view more than sufficient.

Finally, I do not accept that the provision of the disputed material will be onerous for Sundale. What is required is simply that Sundale remove paper stapled over sections of material already disclosed, and in some cases photocopy some of that material again to overcome the fact that parts of it have been obscured with felt tipped pen.

At the time of issue of this Decision, the transcript of the proceedings of 19 and 20 November 2004 has not been released, even to the parties. In my view the discussion of the disputed material on the transcript of proceedings on 19 and 20 November 2004 did not reveal sufficient detail about the substance of that material to justify its continuing to be withheld from release to the parties. The transcript of the other dates of hearing of this matter indicates that it has been released only to the parties and not generally, on the basis that this is the usual practice with respect to disputes. At this stage, I have decided to similarly release the transcript of 19 and 20 November 2004 for the use of the parties, so that it is released on the same basis as the transcript of the remainder of the proceedings. I will revisit the issue of whether the transcript should be released generally at the request of either party. In this decision I have ensured that the material in respect of which Sundale has resisted disclosure, has been described only in the most general terms, and accordingly, I have decided to release this decision in the normal way and place no restriction on it.

I.C. ASBURY, Commissioner.

*Hearing Details:*

2004 8, 19, 25, 26 and 27 October  
19 and 24 November

*Appearances:*

Mr J. Allen and with him Ms C. Klease of counsel instructed by Mr G. Rebetzke of Roberts and Kane for the applicant.  
Mr J. Murdoch SC with him Mr A.A. Horneman-Wren of counsel instructed by Ms A. Fitzpatrick of McCullough Robertson for the respondent.

Released: 8 December 2004

*Industrial Relations Act 1999* – s. 72(1)(c) – application to determine whether applicant is an excluded employee

**Blake Douglas Patch AND Pindara Private Hospital Pty Ltd (Case No. B1107 of 2004)**

COMMISSIONER FISHER

9 December 2004

Application for reinstatement – Jurisdictional point – Section 72(1)(c) *Industrial Relations Act 1999* – Respondent maintain applicant is an excluded employee – Performance issues – Unnecessary to determine category of employment – Continuity of service – Sections 47 and 72(8)(a)(ii) – AIRC found casual employee cannot be on probation – Applicant not a short term casual and not excluded from filing an application for reinstatement – Application referred to callover for hearing dates.

DECISION

Blake Patch has filed an application for reinstatement to his former position of Registered Nurse Level 1 with the Pindara Private Hospital Pty Ltd (Pindara). The respondent, Pindara, has raised a jurisdictional point that Mr Patch is an excluded employee pursuant to s. 72(1)(c) of the *Industrial Relations Act 1999* (the Act) and thus prevented from filing an application for reinstatement. This decision deals primarily with this jurisdictional issue.

Mr Patch performed work for Pindara from 21 November 2002 until 10 February 2004. Pindara considered Mr Patch to be at all times a casual employee. By letter dated 23 June 2004 Pindara notified Mr Patch that he would not be offered further casual shifts. In effect, this letter served as notice of Mr Patch's dismissal from employment.

On 10 February 2004 Mr Patch attended a meeting about a number of serious performance issues with Pindara management. Pindara believed that one of the outcomes of the meeting was that Mr Patch agreed to take two weeks unpaid leave and return on 24 February 2004 whereafter the performance issues would be further investigated. Mr Patch said no such agreement had been reached. In any event he did not return to work on 24 February 2004. Mr Patch said he was waiting for a response to his letter to Pindara of 13 February 2004; a letter that Pindara said it did not receive. While I found some of Mr Patch's explanations of events to be implausible, this view does not impact on the decision I am required to make here.

Pindara submitted that Mr Patch abandoned his employment at some time on or after 24 February 2004. It is unnecessary to make a finding about this as it is not the jurisdictional point that is presently before the Commission. Although Pindara was concerned about the absence of Mr Patch and his failure to provide an explanation for parts of that absence, Pindara and Mr Patch's Solicitors exchanged correspondence between March and June 2004. Some of the correspondence included Pindara seeking Mr Patch's response to the performance issues that had been first raised with him on 10 February 2004 and Mr Patch's response through his Solicitors. In my view this exchange of correspondence does not support a conclusion that Mr Patch had abandoned his employment.

Pindara's primary contention is that at the time Mr Patch was notified of the decision not to offer him further casual shifts, he was a short term casual employee. Pindara reached that view given the break in his continuity of service between 10 February 2004 and 23 June 2004. Pindara's position relied on the provisions of s. 47 of the Act – **Continuity of service – additional considerations for casual employees**. In the alternative, if the Commission was to find that Mr Patch was other than a short term casual employee, then Pindara submitted that Mr Patch was a probationary employee under s. 72(1)(a) of the Act and hence excluded from making an application for reinstatement under s. 73(1) of the Act.

Mr Patch contested that he was either a short term casual employee or a probationary employee. Rather, Mr Patch submitted that his employment was as a permanent part-time employee. For the reasons that follow I have found it unnecessary to determine the category of Mr Patch's employment.

Pindara's arguments centred on a notion that there was a break in Mr Patch's service from 10 February 2004 until 23 June 2004. It is the case that Mr Patch last performed work for Pindara on 10 February 2004. He did not however recommence work at Pindara on 23 June 2004 or at any date thereafter. It was conceded by Pindara that as at 10 February 2004 Mr Patch was other than a short term casual employee as defined by s. 72(8) of the Act. If he had been dismissed at that point Pindara acknowledged that Mr Patch was within jurisdiction to file an application for reinstatement. All of Pindara's concerns related to the gap between 10 February 2004 and 23 June 2004.

The success of one or other of Pindara's arguments rests largely on a conclusion that Mr Patch's service was broken by a period of more than three months and that his service recommenced. In terms of the contention that Mr Patch was a short term casual employee the consequence of the break in service of this magnitude is, according to Pindara, that he had not been engaged for several periods of employment during a period of at least one year. This is one of the criteria that must be met in s. 72(8) of the Act in order to be found to be other than a short term casual employee.

Pindara did not press an argument about whether Mr Patch was engaged on a regular or systematic basis (s. 72(8)(a)(i)) or whether, apart from the employer's decision not to offer him further employment, he had a reasonable expectation of further employment by the employer (s. 72(8)(b)). In the absence of such arguments I do not deal with them.

For Mr Patch to satisfy the provision of s. 72(8)(a)(ii) of the Act and be found to be other than a short term casual employee, he needed to have been engaged for several periods of employment during a period of at least one year. The argument about the break in continuity of service overlooks the words "at least" that precede the words "one year" in the subsection. In determining whether the time period of at least one year was met it is necessary to examine the period(s) of Mr Patch's employment and the duration of that employment. In this case Mr Patch worked continuously from 21 November 2002 until 10 February 2004 – a period of 14 ½ months. On any view of the matter, whether the employment came to an end on 10 February 2004 or 23 June 2004 Mr Patch had been employed for a period of at least one year.

The provisions of s. 47 of the Act do not assist Pindara. This section is contained within Part 3 of Chapter 2 of the Act which deals with general conditions of employment and specifically long service leave entitlements. It provides additional considerations for the calculation of "continuous service" of casual employees, following on from the definition of "continuous service" in s. 42 of the Act. That section is expressly stated to be for the purpose of Chapter 2 Part 3 of the Act. Accordingly, I am of the view the provisions of s. 47 of the Act are for the purpose of calculating long service leave entitlements of casual employees and were not intended to apply to the Act generally or in particular Chapter 3 of the Act which deals with dismissals.

Further s. 47 is only relevant where there have been two or more employment contracts. Specifically, s. 47(2) of the Act provides that continuous service ends if the employment is broken by more than three months between the end of one employment contract and the start of the next employment contract. Each period of casual employment ceases when the particular set of hours has been worked. For an employment contract to commence there needs to be an offer and acceptance. This did not occur here; there was no offer of further shifts. It is clear that Mr Patch's employment contract ceased on 10 February 2004. Another employment contract did not commence at any time thereafter. Notification of no further shifts being offered can not in any way be construed as the start of the next employment contract. Nor can an employment contract be established simply because an employer says it would have investigated certain matters had the employee returned to work.

Equally, the probationary employee argument advanced by Pindara also rests on a view that a new engagement commenced on or after 23 June 2004. How else would a period of probation commence except for a new engagement? Because there was no new engagement, it follows that Mr Patch was not a probationary employee as at 23 June 2004.

The issue of probation raises the question of whether Mr Patch, as a casual employee as Pindara contends he was at all times throughout his employment, can simultaneously be a probationary employee. As no submissions were made by either party on this point I do not intend to deal with the matter in any depth. However, the Australian Industrial Relations Commission has found that a casual employee cannot be on probation as the nature of casual employment is such that it lacks the permanency for which a probationary period is generally justified. In contrast, a probationary employee is a permanent employee whose continued employment after the probationary period has expired is contingent on a range of factors such as employer satisfaction as to performance or suitability of work. (*Kancilija v Small & Group 111 Crowd Control Ltd t/a Security Group 111 Print 4725*). If these views are adopted then Pindara would have to decide whether Mr Patch was a casual or permanent employee as he cannot be both. Mr Patch's letter of appointment stated that he was a casual employee and it also referred to a period of probation. In this matter Pindara have said that the letter of appointment was in error and have maintained that Mr Patch was always employed as a casual employee. Accordingly, the jurisdictional challenge on the grounds of Mr Patch being a probationary employee must also fail.

For the foregoing reasons I find that Mr Patch was not a short term casual employee and hence not excluded from filing an application for reinstatement.

The application will be referred to callover so that dates of hearing for the substantive application can be set.

Order accordingly.

G.K. FISHER, Commissioner.

*Appearances:*

Ms K. Garner of Counsel instructed by Ms M. Ban of Stephens and Tozer for the applicant.

Mr L. Olsson of Employer Services and with him Ms L. Hepworth on behalf of the respondent.

*Hearing Details:*

2004 15 November

Released: 9 December 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**The Australian Workers' Union of Employees, Queensland (for Dennis Tardiani) AND CSR Macknade Mill  
(No. B1539 of 2004)**

COMMISSIONER EDWARDS

10 December 2004

Application for Reinstatement – Termination of Employment – Dismissal – Inspections – Evidence – Removal of two concrete pots – Breach of Discipline – Intolerable Breach Notice issued – Procedural Fairness extended – Dismissal not harsh, unjust or unreasonable – Application refused.

DECISION

By application filed on 13 October 2004 The Australian Workers' Union of Employees, Queensland (AWU) sought relief under the provisions of the *Industrial Relations Act 1999* on behalf of Dennis Tardiani who was employed by CSR Limited at the Macknade Mill, Mill Road, Macknade (the respondent). The Macknade Mill Estate consists of a sugar mill, associated equipment together with houses owned by the respondent. These houses are occupied by authorised employees of the respondent.

Dennis Tardiani commenced employment in 1989 and at the time of his termination he was employed as a gardener under the *CSR Sugar Mills Certified Agreement 2003*.

The gardening team of which Dennis Tardiana was a member is responsible for maintaining Mill surrounds including the golf course and residential properties on the Mill Estate. Dennis Tardiana also performed bagasse carting duties. The upkeep of residential properties on the Mill Estate involves mowing and maintenance of the grounds. Gardeners use large ride-on mowers.

The house to which reference is made in this decision was occupied by Mal Blain whilst he was employed by the Mill. Subsequently, it was occupied by Graham Dickson, Civil Infrastructure Manager, CSR Herbert Region.

On 4 October 2004 Dennis Tardiana was issued with an Intolerable Breach Notice (Exhibit 1). By this Notice his employment was terminated immediately. The conclusion to the Notice stated:

**Conclusion**

Dennis Tardiani had removed two concrete pots from Graham Dickson's residence on Macknade housing estate and transferred them to his personal residence without the permission of Graham Dickson or the permission of Dennis Tardiani's supervisor, Barry Dickson, and without contacting alternative potential owner (Kylie Girgenti).

**You are hereby advised the Company considers this action (stealing) to be an intolerable breach of discipline as defined in the CSR Sugar Employee Handbook.** This notice advises that your employment will be terminated effective immediately. Your full entitlements including payment in lieu of notice will be deposited to your bank account by electronic funds transfer."

The Commission undertook inspections prior to the commencement of the hearing.

In evidence Dennis Tardiana outlined as follows:

- approximately one week prior to 24 September 2004 he approached Barry Dickson, Supervisor about removing a fence enclosure from Mal Blain's house and tidying the yard;
- subsequently approval was given to remove the fence and tidy the yard;
- on Friday 24 September 2004 he asked Barry Dickson if he could have the pots which he believed belonged to Mal Blain who he understood had left them behind;
- Barry Dickson advised he would find out and reply;
- later that day when he had finished work he transported the pots to the gardener's shed for safe keeping so that they wouldn't be damaged or thrown out with the rest of the rubbish;
- he placed the pots next to the green's mower and told Elio Fratus what he had done;

- on Tuesday 28 September he took the pots home because it was too hot in the shed and he was worried that the plants might die;
- he planned to show Kylie Girgenti (Mal Blain's daughter) and to ascertain if her father wanted the pots or if he could keep them;
- he intended to see Kylie one day after work that week but things kept coming up after work and he didn't get time, so he planned to go and see Kylie on the Saturday;
- he didn't see Kylie on the Saturday because he received a phone call from Wayne Abraham on Friday afternoon requesting him to call Russell Brown;
- he called Russell Brown who enquired about the pots;
- he told Russell that he had taken them to the gardener's shed but he did not like talking on the telephone because he has a very bad stutter;
- he forgot to tell Russell that he had the pots at his home;
- Russell also asked about missing cactus and he told Russell that he did not touch any cactus;
- subsequently he told Russell that he was prepared to bring the pots back if Kylie's parents wanted them;
- at approximately 7.30 p.m. that night Ingham Police arrived at his residence and enquired about the two pots;
- Dennis showed the police the two pots in the front yard which were in full view of anyone passing by;
- he informed the Police that he wasn't trying to hide them but was looking after them until he could speak to Kylie and see if it was alright for him to keep them because Mal had left them behind;
- the Police then took the pots and put them in the back seat of the Police car;
- the Police then questioned Dennis about missing cactus and he told the Police he did not have them and did not know anything about them;
- he authorised the Police to inspect the grounds and to check inside his home;
- the Police took a verbal statement and gave him a receipt for the pots;
- before leaving the Police indicated they would contact him one afternoon the following week;
- he believed the pots belonged to Mal Blain because no one was living there after Mal moved out;
- if someone had told him that the pots belonged to Graham Dickson he would have returned them;
- he has never been warned or disciplined in the entire time he worked for CSR Limited.

The evidence of Elio Fratus confirmed that:

- Dennis Tardiana requested permission from Barry Dickson to remove the pots;
- Barry Dickson indicated he would make enquiries;
- the same day Dennis Tardiana loaded the two pots on the front of the mower and placed them in the shed.

In evidence, Graham Dickson advised he commenced duties approximately August/September 2004 and assumed occupancy of the residence at River Road, Macknade Estate. On Wednesday 8 September 2004 he went to the residence to collect the keys. He believed Mal Blain had moved out on 1 September 2004. On Sunday 12 September he packed some of his cactus and garden ornaments into a work utility and went to the Mill house at River Road to store his belongings. On Tuesday 21 September he returned to the house to water the plants and at this time everything was as he had left it. On Friday 1 October he proceeded to the house to water the plants and noticed that a number of his cactus and also his planter box and planter wagon were missing.

Graham Dickson stated the plants and the pots (Exhibits 2 and 3) have been owned by his family for many years. The cactus in the pot was given as a gift from his father-in-law 10 to 15 years ago and the planter box was a Christmas gift from a relative. He also indicated that on approximately 26 August he and his wife had purchased approximately \$695.00 worth of rugs and fittings etc. which were owned by the Blains and by arrangement had been left in the house.

In further evidence Graham Dickson stated he reported the missing items to Russell Brown and subsequently drove around the streets of Halifax. He saw the planter box and planter wagon in the carport of a house in Stephensen Street. He then contacted Russell Brown. The Halifax Police were contacted and they went to the house and collected the items.

In re-examination Graham Dickson outlined that his wife placed sentimental value on the pots and has been informed that they were in the possession of a Mill employee but she had not been advised of his name. As a result of the incident she was anxious to leave the residence and does not wish to live there.

The evidence of Barry Dickson, Senior Operations Engineer, CSR Macknade Mill revealed his position included responsibility for the gardening team. He confirmed that Dennis Tardiana had requested permission to take the two garden pots from Mal Blain's old house. He was under the impression Dennis Tardiana desired them for his personal use. He informed Dennis Tardiana he would find out and get back to him.

The evidence of Russell Brown, Operations Manager, Herbert Region revealed he has overall responsibility for operations at CSR's Macknade and Victoria Mills. As a result of the incidents he arranged for Dennis Tardiana to be at his office at 10.45 a.m. on Monday 4 October 2004. In addition to himself and Dennis Tardiana, Frank Girone and Barry Dickson were present. Upon Dennis Tardiana completing his statement to the meeting he was stood down on full pay and informed he would be contacted within 24 hours. On considering all of the statements he reached the following conclusions which he outlined in his affidavit:

- "Dennis had asked for permission to take the pots, but did not receive permission; and
- Dennis had taken the pots home; and
- Dennis had said to me on the Friday night (1 October) that the pots had been safely locked up in the gardener's shed because Dennis had noticed that cactus were missing, but in fact he had taken the pots home; and
- Dennis had said to me on the Monday that he had taken the pots home intending to call Kylie Girgenti (nee Blain), but in fact had not attempted to do so in the period between the afternoon of Tuesday 28 September and the afternoon of Friday 1 October."

On Tuesday 5 October he arranged a meeting with Dennis Tardiana. Also present were Frank Girone, Trevor Forde (AWU delegate), Barry Dickson and Danny Van der Berg (CSR Engineering Manager, Herbert Region). After giving the parties an opportunity to consider the statements he summarised the contents of the Intolerable Breach Notice he had prepared. He then informed Dennis Tardiana that the outcome of the Notice was dismissal.

The Commission is satisfied that:

- as an employee of CSR Limited, Graham Dickson is the occupier of the residence;
- the pots which are owned by Graham Dickson were under the carport of his residence;
- Dennis Tardiana was of the belief that the pots were owned by the previous occupants and had been left when they vacated the premises;
- Dennis Tardiana sought the permission of Graham Dickson to have the pots for his personal use;
- Graham Dickson advised he would check and get back to him;
- that day Dennis Tardiana transported the pots from the carport to the new garden shed;
- on Tuesday 28 September 2004 Dennis Tardiana took the pots home for his own use.

The respondent has placed considerable weight on the decisions of management to dismiss employees for stealing. Russell Brown indicated that the relevant CSR Limited policies were followed in respect of the investigation and subsequent management action. The policies are outlined in the CSR Employee Handbook which was supplied to Dennis Tardiana and receipt was acknowledged by him. In addition to regular notices all employees were issued with a specific notice on 2 August 2002 from the CSR General Manager in relation to theft. Specifically it indicated that on 1 August 2002 an employee was terminated for an intolerable breach of contract (Exhibit 11 RSB 14). Reference was also made to the fact that on 30 June 1999 an employee was terminated on the grounds of conduct classified as intolerable in accordance with CSR Limited Policies (i.e. stealing) (Exhibit 11 RSB 15). On 16 July 1999 an employee was dismissed on the grounds of gross misconduct (Exhibit 11 RSB 16). In addition a message from the Regional Manager regarding theft was issued on 21 September 2004 (Exhibit 11 RSB 17).

The issue of theft of CSR property has continued to be addressed by management. In July 2004 meetings were convened to discuss retention strategies for "personal issue equipment". CSR therefore has addressed the issue of theft in a strenuous, consistent and determined manner. The instances of dismissal to which reference has been made by Russell Brown are not decisions of Industrial Tribunals but decisions of management which have not been challenged by the dismissed employees. The essence of each dismissal turns on its own facts and the Commission has approached this aspect of the evidence of Russell Brown with caution and weighted it accordingly.

The Commission is considering the matter in terms of the provisions of the *Industrial Relations Act 1999* and not the Criminal Code to which reference was made by the applicant in submissions.

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

- “(2) Misconduct under subsection (1)(b) includes:
  - (a) theft; and”.

Dennis Tardiana undertook his duties on the Mill Estate as well as in the grounds adjacent to occupied houses. As such there was an integral relationship between the occupier of the residence and the employer/employee. When permitting a person to enter a residence to perform duties the occupier of the residence is entitled to have confidence that no items whether of value or otherwise will be removed from the premises without approval. The employer of that person is also entitled to maintain similar confidence.

On being notified that pots were missing Russell Brown initiated an investigation in accordance with the respondent’s policies and procedures. This investigation extended procedural fairness to Dennis Tardiana to a level expected in a contemporary industrial environment.

As a result he prepared an Intolerable Breach Notice and confirmed the dismissal.

On consideration of all the evidence, exhibits and submissions the dismissal was not harsh, unjust or unreasonable. The application is refused.

The Commission orders accordingly.

K.L. EDWARDS, Commissioner.

Hearing Details:  
2004 15, 23 & 24 November

Appearances:  
Mr D. Broanda and with him Mr R. Stockham of The Australian Workers’ Union of Employees, Queensland on behalf of the applicant.  
Mr J. Murdoch, SC instructed by Mr M. Procter of Minter Ellison on behalf of the respondent.  
Released: 10 December 2004

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QUEENSLAND INDUSTRIAL REGISTRAR

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

**Queensland Teachers Union of Employees (No. Q32 of 2004)**

REGISTRAR SAVILL

9 December 2004

Request for Conduct of Elections – Prescribed Information – Expiry of Terms of Office – Methods of Elections – Electoral Commission to Conduct Elections.

DECISION

On 24 November 2004, the Queensland Teachers Union of Employees lodged in the Registry under s. 481 of the *Industrial Relations Act 1999*, the information prescribed in section 36 of the *Industrial Relations Regulation 2000* and supporting material, in relation to the conduct of elections by the Electoral Commission of Queensland for the following positions of office:-

Office	Number of Positions	Method of Election
TAFE Executive Committee Member.....	6	by members of TAFE Council
Members of Executive.....	12	by and from members of Council
Member of Executive from TAFE Division.....	1	by and from members of TAFE Council
Trustee.....	2	by and from members of Council

**Timing of Elections**

The Rules prescribe that nominations shall be called by advertisement in the "Queensland Teachers' Journal" with the closing date of nominations no earlier than twenty-one days after the date upon which such notice first appears in the Journal. I am advised that the next Journal is to be printed on 10 February 2005. This Journal will also include advertisement for those positions determined by the Electoral Commission of Queensland as not filled as a result of the calling of nominations in the Journal of 25 November 2004.

**Methods of Election**

I am satisfied that the methods of election are as specified above.

**Conduct of Elections**

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

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

Dated 9 December 2004

G. SAVILL,  
Industrial Registrar.

Released: 9 December 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland AND Department of Industrial Relations and Others (No. B1662 of 2004)**

**BUILDING TRADES PUBLIC SECTOR AWARD – STATE 2002**

COMMISSIONER EDWARDS

7 December 2004

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 29 November and 7 December 2004, this Commission orders that the said Award be amended as from 7 December 2004:

- 1. By deleting from clause 8.1.2 the amount of "\$10.00" and inserting the amount of "\$10.40" in lieu thereof.
- 2. By deleting from clause 8.1.3 the amount of "\$0.73" and inserting the amount of "\$0.75 in lieu thereof.

Dated 7 December 2004.

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

Operative Date: 7 December 2004  
Amendment – Allowances  
Released: 9 December 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

**The Construction, Forestry, Mining & Energy, Industrial Union of Employees, Queensland AND Department of Industrial Relations and Others (No. B1664 of 2004)**

**CIVIL CONSTRUCTION, OPERATIONS AND MAINTENANCE GENERAL AWARD – STATE 2003**

COMMISSIONER EDWARDS

7 December 2004

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 29 November and 7 December 2004, this Commission orders that the said Award be amended as from 7 December 2004:

- 1. By deleting from clause 8.1.1 the amount of "\$0.73" and inserting the amount of "\$0.75" in lieu thereof.
- 2. By deleting from clause 8.1.2 the amount of "\$0.39" and inserting the amount of "\$0.40" in lieu thereof.
- 3. By deleting from clause 8.2.4(a)(iii) the amount of "\$6.60" and inserting the amount of "\$9.60" in lieu thereof.
- 4. By deleting from clause 8.2.4(b) the amount of "\$16.10" and inserting the amount of "\$16.60" in lieu thereof.

Dated 7 December 2004.

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

Operative Date: 7 December 2004  
Amendment – Allowances  
Released: 10 December 2004

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

Local Government Association of Queensland (Incorporated) AND Federated Engine Drivers' and Firemens' Association of Australasia Queensland Branch Union of Employees and Others (No. B1802 of 2004)

LOCAL GOVERNMENT EMPLOYEES' (EXCLUDING BRISBANE CITY COUNCIL) AWARD – STATE 2003

VICE PRESIDENT LINNANE
DEPUTY PRESIDENT SWAN
DEPUTY PRESIDENT BLOOMFIELD

8 December 2004

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 8 December 2004, this Commission orders that the said Award be amended as follows as from 8 December 2004:

By deleting clause 5.10 Superannuation and inserting the following in lieu thereof:

5.10 Superannuation

An employer as defined in clause 1.5.3 of this Award shall provide a superannuation benefit to all eligible employees engaged under the terms of this Award, as prescribed by the Local Government Act 1993 in accordance with the terms of the Local Government Superannuation Scheme.

In respect to casual employees engaged under this Award an employer shall provide superannuation benefits to eligible employees as prescribed by the Superannuation Guarantee (Administration) Act 1992.

Dated 8 December 2004.

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

Operative Date: 8 December 2004
Amendment – Superannuation
Released: 9 December 2004

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

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

Liquor Hospitality and Miscellaneous Union, Queensland Branch, Union of Employees AND Australian Industry Group, Industrial Organisation of Employers (Queensland) and Others (No. B1634 of 2004)

SECURITY INDUSTRY (CONTRACTORS) AWARD – STATE 2004

DEPUTY PRESIDENT SWAN

7 December 2004

AMENDMENT

THIS matter coming on for hearing before the Commission at Brisbane on 7 December 2004, this Commission orders that the said Award be amended from 7 December 2004 as follows:

By adding a new clause 5.3.14:

5.3.14 Aviation Security Allowance

An all-purpose allowance of \$1.05 per hour will apply to employees working at an airport performing the following functions: passenger screening, checked bag screening including by x-ray and/or trace element detection equipment (i.e. Barringer machine or similar), freight screening, operation of control room and any other functions to which the Aviation Security Allowance in the Security Employees (Victoria) Award 1998 applies.

Dated 7 December 2004.

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

Operative Date: 7 December 2004
Amendment – Allowances
Released: 10 December 2004

Separator line of hash symbols

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999

THE DRAFTPERSONS, PRODUCTION PLANNERS AND ENGINEERING ASSISTANTS AWARD – STATE 2002

(Gazette, 22 November, 2002)

(AR81 of 2002)

DEPUTY PRESIDENT SWAN
COMMISSIONERS EDWARDS AND BECHLY

6 December 2004

AWARD REVIEW
(Correction of Error)

WHEREAS an error occurred in the Award as published in the *Queensland Government Industrial Gazette* of 22 November 2002, Vol. 171, No.12, pages 627-647, the following correction is made to be effective as from 23 December 2002.

1. By deleting clause 7.1.5.
2. By renumbering clauses 7.1.6 and 7.1.7 as clauses 7.1.5 and 7.1.6 respectively.
3. By deleting the reference "clause 7.1.6" from where it appears in clauses 7.1.2, 7.1.3, 7.1.4 and renumbered clause 7.1.5 and inserting the reference "clause 7.1.5" in lieu thereof in each instance.

Dated 6 December 2004.

G.D. SAVILL,  
Industrial Registrar.