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No. 10

INDUSTRIAL COURT OF QUEENSLAND

*Industrial Relations Act 1999* - s. 341(2) - appeal against decision of industrial magistrate

**Park Avenue Motor-Hotel Pty Ltd, Godwin's Hotels Pty Ltd, Godwin's Holding Company Pty Ltd, George Darby Godwin and Skeeta Pty Ltd AND Juergen Willi Beck (C/2007/63)**

and

**Juergen Willi Beck AND Park Avenue Motor-Hotel Pty Ltd, Godwin's Hotels Pty Ltd, Godwin's Holding Company Pty Ltd, George Darby Godwin and Skeeta Pty Ltd (C/2008/2 and C/2008/3)**

PRESIDENT HALL

25 June 2008

DECISION

On 9 August 2005, by an Application in Form 48 (see *Industrial Relations (Tribunals) Rules 2000*), Mr Juergen Willi Beck applied to the Industrial Magistrate at Rockhampton for an order that all or some of the four named Defendants pay to him "the amount unpaid particulars of which are in attachment A". The four named Defendants were each of three corporations under the law, *viz.*, Park Avenue Motor-Hotel Pty Ltd, Godwin's Hotels Pty Ltd, and Godwin's Holding Company Pty Ltd, together with a natural person, *viz.*, George Darby Godwin. At all material times Mr Godwin was a director of each of the three corporations. Subsequently, in early November 2006, a further corporation, Skeeta Pty Ltd, was added as a fifth Defendant.

Whilst "Attachment A" to the Application in Form 48 did indeed give particulars of the amount said to have been unpaid, it was accompanied by a number of annexures. Importantly, the annexures included a Statement of Claim which, in short form, made plain to the Defendants that the "amount unpaid" was said to have been payable under each of two awards of the Queensland Industrial Relations Commission and that, in the alternative, the claim was pursued as a contractual claim based on an "Employment Agreement" made between Mr Beck and all or some of the Defendants.

The two awards of the Queensland Industrial Relations Commission relied upon by Mr Beck were the *Hotels, Resorts and Certain Other Licensed Premises Award - State (Excluding South-East Queensland)* and the award which replaced that award, viz., the *Hotels, Resorts and Certain Other Licensed Premises Award - State (Excluding South-East Queensland) 2003*. For convenience I shall refer to the award first named as the "1996 Award" and to its successor as the "2003 Award".

The Industrial Magistrate's "Reasons for Decision" summarises the amounts said to have been due and unpaid under the Awards and under the Employment Agreement as follows:

- "[3] The application had attached to it particulars of claim wherein relief was claimed against each of the defendants either jointly or severally for payment of:
- Unpaid wages under the 1996 and 2003 industrial instruments referred to in the sum of \$267,688 from 7 October 2002 until 9 August 2004
  - Unpaid annual leave loading of \$1125.40
  - Unpaid superannuation \$24,091 being unpaid superannuation for the period 7 October 2002 until 18 June 2004
  - Wages payable in lieu of notice \$3822.633 [sic]
  - Unpaid severance pay of \$3528.60.
- [4] A claim; in the alternative was made for the sum of \$144,433.74 being unpaid wages for work performed by the claimant on weekends during the period 7 October 2002 until 18 June 2004."

Because at first instance there was an unsuccessful application to amend the claim and because the refusal of the application is attacked by Mr Beck on appeal, I shall subsequently revisit the claim. However, for present purposes the Industrial Magistrate's summary may be adopted.

At paragraphs [5] to [11] of the "Reasons for Decision", the Industrial Magistrate rehearsed the history of the matter at first instance as follows:

- "[5] The Industrial Magistrates Court file indicates that the first mention of the matter was on 25 October 2005. It was again mentioned on 29 November 2005 at which time the defendants were represented by Mr John Lamb of the Queensland Chamber of Commerce and Industry. The matter was adjourned to 10 and 11 May 2006 for hearing, with a pre-hearing mention on 18 April 2006.
- [6] On 18 April 2006, Mr Lamb again appeared, uncertain of the purpose of the mention. The matter remained listed for hearing on 10 May 2006 on which date an application for default judgment was made following the non-filing of documents by the defendants. Consent orders were filed and the matter was adjourned for hearing scheduled for a 2 day hearing commencing on 2 August 2006.
- [7] The hearing commenced on 2 August 2006, with the defence foreshadowing an application at the conclusion of the claimant's case to dismiss the claim insofar as it was based on an Award. The hearing continued on 3 August 2006 at which time the claimant's case had closed. An application to dismiss the claim insofar as it was based on an Award was made and a decision on that application was given on 21 September 2006. The application was refused.
- [8] On 21 September 2006, there was an application by the claimant to be allowed to re-open his case and for full and frank disclosure. The application to reopen was granted and Directions were given in relation to that and the application for full and frank disclosure (including third party disclosure from the Queensland Chamber of Commerce and Industry (QCCI)).
- [9] There followed a series of mentions and arguments about interlocutory processes. On 9 November 2006 an application to join a further defendant - Skeeta Pty Ltd - was made by the claimant and an oral application by the defendants to adjourn the proceedings until the determination of the appeal. The company Skeeta Pty Ltd was joined as the fifth defendant without opposition by the existing defendants. The application to adjourn proceedings pending appeal was refused. Further mentions took place on 10 November 2006, 15 November 2006 and 17 November 2006.

[10] The hearing resumed on 20 November 2006 and the evidence was concluded on 21 November 2006. The hearing was then adjourned for written submissions to a date to be fixed, pending a decision by the Industrial Court on the appeal from my decision on the application where I refused to dismiss the proceedings in so far as they were based on an Award.

[11] The parties consented to a timetable for preparation and delivery of written submissions. The last of those submissions were received at the Court on 12 April 2007."

I interpolate that the Appeal to this Court referred to in the extract was dismissed on 7 February 2007 (see 184 QGIG 78). An earlier application for an order staying proceedings in the Industrial Magistrates Court was dismissed on 9 November 2006 (see 183 QGIG 855).

The decision of the Industrial Magistrate was delivered on 24 October 2007. At paragraph [189] the Industrial Magistrate summarised the decision and at paragraph [190] the Industrial Magistrate published the Court's Order:

"[189] Having regard to the jurisdiction afforded by section 292 of the *Industrial Relations Act 1999* and for the reasons set out above, I the find [sic] claimant is entitled to payment from the defendants jointly and severally of the following amounts of pre-tax pay:

Severance Pay	\$ 3528.60
Termination Pay	\$ 2909.52
7 October - 27 October 2002 see appendix 2 Part B	\$ 7595.27
28 October 2002 - 30 June 2003 see appendix 3 Part B	\$ 24350.56
1 July 2003 - 29 February 2004 see appendix 4 Part B	\$ 23061.12
1 March 2004 - 18 June 2004 See appendix 5 Part B	\$ 10360.48
<b>Total</b>	<b><u>\$ 71805.55</u></b>

[190] **I order** the defendants, or one or other of them, to pay to the claimant the sum of \$71,805.55 in respect of his claim within 14 days."

The Defendants filed an Application to Appeal on 8 November 2007. By an Application to Appeal dated 12 November 2007, Mr Beck also appealed against Her Honour's decision. By an Application to Appeal dated 12 December 2007, Mr Beck also appealed against a further decision of the Industrial Magistrate rejecting an application for indemnity costs. (Neither of Mr Beck's Appeals has been date stamped by the Industrial Magistrate's Court at Rockhampton. It is not suggested that either appeal is out of time.)

The Defendants subsequently sought to stay the orders of the Industrial Magistrate. The Application was not pressed. Mr Beck successfully sought costs, see 187 QGIG 1. The three Appeals were listed for hearing on 26 and 27 February 2008. Subsequently, at the request of the parties, the issue whether the parties had "contracted out" of the "overtime" provisions of the 1996 Award and of the 2006 Award was listed for hearing as a preliminary issue on 25 February 2008. On 26 February 2008, I held that the parties had not contracted out of the "overtime" provisions of the 1996 Award and of the 2003 Award. I now proceed to publish the reasons for that decision.

Clause 1.2.3 of the 1996 Award and clause 1.8 of the 2003 Award are in identical terms. Each clause provides:

"Where the employer and the employee agree in writing, the following clauses shall not apply where an employee is paid at least wage level 6 plus 25%:  
Hours of Work - Weekly Employees, Hours of Work - Part-Time Employees, Overtime, Weekend Penalty Rates and Late Allowances, and Statutory Holidays."

The clause could be taken to mean that the named clauses do not apply:

- (a) where the contract of employment has been reduced to writing (or a note or memorandum thereof prepared) and the contract rate is the Level 6 rate plus 25%, or, in the alternative;
- (b) where the contract of employment has been reduced to writing (or a note or memorandum thereof prepared) and the contract rate is and is identified to be the Level 6 rate plus 25%.

Given that each of the Awards expressly requires that every employee is to be advised in writing at the time of engagement whether employment is to be on a weekly, part-time or casual basis, expected hours of work, classification under the Award and rate of pay, (see clause 3.1(b) of 1996 Award, and clause 4.1.2 of 2003 Award), it seems to me that neither construction is likely to have been intended. Whenever the employer observed the relevant Award, the construction at (a) would add nothing and the construction at (b) very little. There are, one should add, awards of the Queensland Industrial Relations Commission which expressly provide for automatic partial exemption on payment of a wage rate in excess of a nominated amount, see e.g. *Cemetery Employees' Award - State 2002*, clause 1.4.4, and *Uniting Healthcare Allied Health Enterprise Award - State 2005*, clause 1.3. The one which accords with the flow of language, is that the agreement in writing is to be about the clauses which are not to apply, viz., "Hours of Work - Part-Time Employees, Week-end Penalty Rates and Late Work Allowances and Statutory Holidays". If one assumes that the plural (clauses) includes the singular (clause) and that the purpose of the partial exemption clause is to enhance workplace flexibility, the interpretation suggested is the one which accords with the purpose of the partial exemption clause, i.e. by permitting escape from all or some only of the listed clauses.

Here, the clause relied upon by the Defendants was contained within the written Employment Agreement of 3 October 2002. The clause provided:

"8. The amount mentioned in clause 6 of this Agreement is inclusive of all entitlements conferred by the operation of Chapter 2 of the *Industrial Relations Act 1999* (Qld)".

Plainly, clause 8 does not expressly exclude all or some of the clauses about "Hours of Work - Weekly Employees, Hours of Work - Part-time Employees, Overtime, Week-end Penalty Rates and Late Work Allowances, and Statutory Holidays", contained within the 1996 Award and within the 2003 Award. Indeed, clause 8 does not in terms refer to either the 1996 Award or the 2003 Award. No amount of resort to extrinsic evidence will assist. Neither Mr Beck nor the Defendants appreciated that either Award applied until after the engagement had come to an end. One may accept that express reference to the Awards by name is not essential. One may envisage an agreement which laboriously asserts understandings about, e.g. Weekend Penalty Rates and Statutory Holidays, which openly conflict with the relevant Award. The operation of the partial exemption clauses may well be triggered by such agreements. However, that case is not this case. It is not a matter of invoking the *contra preferentum* rule to resolve an ambiguity against the Defendants who, of course, prepared the Employment Agreement. There is no ambiguity. The way in which Chapter 2 of the *Industrial Relations Act 1999* (the Act), deals with the matters of Hours of Work, Overtime and Statutory Holidays is quite different to the way in which those matters are dealt with in the 1996 Award and the 2003 Award. In my view clause 8 does not trigger the operation of the partial exemption clause.

For completeness, and lest the construction adopted be incorrect, I move to consider whether Mr Beck was paid "at least wage level 6 plus 25%".

Schedule 2 to the Employment Agreement provided:

## "SCHEDULE 2

### Remuneration

The salary will commence on \$40,000, after a probationary period and subject to the manager's performance the salary will be reviewed. Should the incumbents performance warrant it, remuneration will be increased.

### Commence Gross Salary

Cash component	\$36,697.25
Superannuation Contribution	\$ 3,302.75
<b>Total Salary</b>	<b>\$40,000</b>

An amount of \$20.00 is added to the gross salary. This amount is then deducted as rent.

No loading will be added to your annual leave payment as it is already included in your salary.

The company does not supply free meals to management and/or staff."

The Industrial Magistrate calculated the Level 6 annual wage as \$38,589.20. The calculation appears at Appendix 1 to Her Honour's decision:

"Award level 6 (from 1/9/02) - as per variation to 1996 Award  
\$585.80 X 52  
plus 17.5% loading on 4 weeks  
=\$7.88 per week over 52 weeks  
=\$38 589.20

Cash Salary \$36,697.25 as stipulated in the written agreement."

It is understandable that the Industrial Magistrate concluded that at the commencement of his employment, Mr Beck was not being paid a Level 6 wage plus 25%.

On the thesis, which I have rejected, that clause 8 of the Employment Agreement sought to exclude the provisions of the 1996 Award about Hours of Work - Weekly Employees, Overtime, Weekend Penalty Rates and Late Allowances, and Statutory Holidays, clause 8 would be overridden by the 1996 Award (s. 135(1) of the Act) and the Employment Agreement would be interpreted and given effect "as if it were amended to the extent necessary to make the area of inconsistency conform" to the 1996 Award (s. 135(3) of the Act). The circumstance that Mr Beck's wage subsequently increased to a point at which it exceeded (the correct) Level 6 wage plus 25% is of no consequence. Doubtless, if the parties had been aware that the 1996 Award and the 2003 Award were applicable, an agreement in writing satisfying the partial exemption clause might have been insisted upon as the price of the wage increase. However, the parties were not aware of the application of the Awards and no such agreement was entered into. In those circumstances the grant of the contemplated wage increase seems to me to be but a variation of the Employment Agreement (as already modified by s. 135(3) of the Act) rather than a rescission of that Agreement and the substitution in lieu of a new contract reinstating clause 8; compare *Concut Pty Ltd v Worrell* (2000) 178 ALR 693 at paras [18] to [22] per Gleeson CJ, Gaudron and Gummow JJ and the cases there cited.

Some attack has been made upon the Industrial Magistrate's arithmetical calculation. I accept the criticism that Mr Beck was employed for 365 days per year not 52 weeks per year. However, it seems to me to have been entirely appropriate for the Industrial Magistrate to inflate the Level 6 wage rate by 17.5% X 4 to allow for the annual leave loading made available by the 1996 Award. The Employment Agreement is a difficult document. As previously mentioned clause 8 provides:

"The amount mentioned in clause 6 of this Agreement is inclusive of all entitlements conferred by the operation of Chapter 2 of the *Industrial Relations Act 1999* (Qld)."

It is contended for the Defendants that because clause 8 creates a "loaded rate" instead of denying the operation of Chapter 2 of the Act, clause 8 does not fail for illegality. On the assumption that the submission is correct (and I do not decide the point), one is confronted with the difficulty of dismembering the "loaded rate" to identify the agreed wage rate. Unlike the partial exemption clauses within the 1996 Award and within the 2003 Award, Chapter 2 is not limited to Hours of Work - Weekly Employees, Overtime, Weekend Penalty Rates and Late Allowances, and Statutory Holidays. Amongst other things Chapter 2 confers an entitlement to sick leave (s. 10). Notwithstanding that clause 8 asserts that the wage is inclusive of all Chapter 2 entitlements the Employment Agreement also provides:

"12. The employee will accumulate sick leave entitlements at the rate of one day per six weeks of employment up to a maximum of 8 days per year."

Chapter 2 also confers entitlement to annual leave. Notwithstanding that clause 8 asserts that the wage is inclusive of all Chapter 2 entitlements, the Employment Agreement also provides:

"11. The employee is entitled to 4 weeks paid annual leave for each completed year of employment. The annual leave may only be taken at a time mutually agreed between the Company and the employee. If the parties cannot agree the Company may, by the giving of fourteen days notice, stipulate the time when the leave is to be taken. The leave loading allowance for annual leave has been incorporated into the amount specified in Schedule 2."

[It is, one should add in passing, a curiosity of clause 11 that the Employment Agreement was entered into before Chapter 2 required payment of an annual leave loading, see Act No. 36 of 2005.]

Given the difficulties to which the inconsistencies give rise in dismembering the rate, it seems to me that, the Industrial Magistrate was entitled to inflate the Level 6 wage by 17.5% X 4 and to compare that wage with Mr Beck's agreed wage. It was important to compare apples with apples rather than with oranges.

The Defendants seek to diminish the gap between the Level 6 wage and Mr Beck's wage under the Employment Agreement. The starting point is clause 8.1 and 8.2 of the 1996 Award which provided:

**"8.1 BOARD AND LODGINGS**

- (a) Where board and lodging is made available to employees the employer shall have the right to deduct from the pay of the employees residing on the premises an amount of \$50.40 for adults and \$40.00 for juniors per week:
- (b) Where employees are required to reside in accommodation provided by the employer such accommodation so provided shall be of a fit and proper standard.

**8.2 FOOD**

Meals supplied to employees shall be of good quality and sufficient quantity and well cooked and shall include morning and afternoon tea:

Provided that the employer may deduct from the employee's wage an amount of \$2.00 for each meal so provided."

As to the matter of meals, it was the evidence of Mr Beck that for a period Mr Beck cooked and served a roast dinner at the hotel. There is evidence that Mr Beck, amongst others, participated in the consumption of the roast. Whilst there was evidence that Mr Beck shared hospitality with liquor industry representatives and some customers, there is no basis for a finding that the hospitality was at the Defendants' expense. At best an annual adjustment of \$2 X 52 in the differential is required.

As to the matter of "board and lodging", clause 7 of the Employment Agreement provided:

"7. The Company will provide the employee with board and lodging."

Confusingly, Schedule 2 provided:

"An amount of \$20.00 is added to the gross salary. This amount is then deducted as rent."

The Employment Agreement was the Defendants' document. Giving normal effect to the *contra preferentum* rule of construction, it seems to me that the Employment Agreement should be read as providing for Mr Beck to be given accommodation free of charge with a notional increase of \$20 per week in wages promptly deducted to serve an accounting purpose of the Defendants. So construed, the Employment Agreement is more favourable to the employee than the 1996 Award, and must be allowed to prevail, see s. 135(3) of the Act.

In any event, if the Defendants be correct as to the interpretation of clauses 8.1 and 8.2 of the 1996 Award, the Defendants will still be defeated by the arithmetic. The Employment Agreement wage was still not 25% more than the Level 6 wage.

I turn then to Mr Beck's unsuccessful attempt to amend his Application.

As recounted earlier, after the close of evidence, submissions were taken in writing. By his written submissions Counsel for Mr Beck sought to amend schedules to the Statement of Claim.

One limb of the amendment went to the hours worked on certain days. Leave to Amend was sought because, on Mr Beck's evidence, he had worked hours in excess of the hours claimed. The purpose of the amendment was to overcome the variance between the evidence and the claim. The other limb of the same amendment went to the multiplier used in the calculation of wages for overtime hours. The need for the amendment was said to be born of a realisation that, on a proper understanding of the authorities, the rate of time and a-half transmogrified to double time after three hours of overtime work in a week rather than after three hours of overtime work on any day.

Counsel for Mr Beck also sought leave to amend his Statement of Claim insofar as it related to overtime work. In its original form, the claim in relation to overtime work was based on the 1996 Award and on the 2003 Award. The amendment sought to base the claim, in the alternative, on s. 9 of the Act.

The grant of leave to make the amendments was opposed and was refused. The Industrial Magistrate concluded:

"[13] In the claimant's submissions, the claimant seeks leave to amend his claim. In view of the lateness of such application and the public and parties' interest in having a decision in the matter without further delay, all such applications for leave are refused."

Neither amendment would have led to additional evidence being put in by any party. The only issues which would have been enlarged were issues of law. To give such weight to delay at the risk of denying the claimant an arguable case seems to me to be an error of principle, compare *Queensland v J.L. Holdings Pty Ltd* (1996-1997) 189 CLR 146 at 155 per Dawson, Gaudron and McHugh JJ, which consistently with the principles in *House v The King* (1936) 55 CLR 499 at 504 to 505 per Dixon, Evatt, and McTiernan JJ, warrants review of what is admittedly a quintessential exercise of discretion. On the matter of the amendments, I allowed Mr Beck's Appeal and granted Leave to Amend. The Amended Application was filed in the Industrial Magistrate's Court at Rockhampton on 14 May 2008.

On the Appeal to this Court, Counsel for Mr Beck sought to further amend the Statement of Claim to rely in the alternative on clause 5.8.5 of the 1996 Award and clause 6.9.5 of the 2003 Award which provide:

"6.9.5 *Does an employee get a break after working overtime?*

If starting work at the employees next rostered starting time would mean that the employee did not receive a full 10 hour break then either:

- (a) the employee may - without loss of pay - start work at such a later time as is necessary to ensure that he or she receives a break of at least 10 hours; or
- (b) the employer must pay the employee overtime rates for all work performed until the employee has received a break of at least 10 hours; or
- (c) in the case of a change over of rosters 8 hours shall be substituted for 10 hours." [Clause 5.8.5 is in the same terms save that the heading employs heavy type and capitals rather than italics.]

It is submitted that on its plain and ordinary meaning the clause is unambiguous. The contention is that an employee may take a break without loss of pay (at his ordinary rate), but may choose to work his ordinary hours in which case must be paid by his employer at overtime rates. I emphasise "choose" because the very reason for relying upon the clause is to defeat submissions that Mr Beck was not entitled to payment for particular hours because the working of the hours was not authorised by the Defendants.

I do not accept that the clause is unambiguous. The meaning propounded by Counsel for Mr Beck is the meaning which would be attributable to the clause if a comma had appeared at the end of paragraph (a). In fact, a semi-colon appears. It is entirely arguable that the purpose of the clause is to allow an employee burdened with excessive overtime to enjoy a break without loss of income AND to require an employer, who overrides the employee's right to a break, to pay for ordinary time at overtime rates until the employee is permitted to take a break from work. Such a construction, one should add, accords with the history of clauses of this genre, compare *Re: Mechanical Engineering Award - State* (1962) 50 QGIG 78. Further, it is apparent from the use of a semi-colon to separate paragraphs (b) and (c) in circumstances where paragraph (c) should be a stand-alone sentence that the normal rules of grammar and punctuation were being shown scant regard. Consistently with *Kucks v CSR Limited* (1996) 66 IR 182 at 183 per Madgwick J, I approach the clause as the product of framers of practical bent concerned with an industrial environment rather than English usage. In my view, the clause is about rest and absence from work rather than about maximising income, and paragraph (b) is confined to the case in which work is performed on the instruction of the employer. If Leave to Amend is granted, further evidence would have to be taken on the matter of instruction. Counsel for Mr Beck does not seek Leave to Amend in such circumstances.

It is apparent from the quantum of Mr Beck's claims that the matter of cardinal importance is Mr Beck's claim that very many of the hours which he worked should have been paid for at overtime rates. To that matter I now turn.

The starting point is Part 5 of the 1996 Award and Part 6 of the 2003 Award. Given that the differences are cosmetic and about drafting style and given the length of the Parts, I shall reproduce only Part 6 of the 2003 Award:

**"PART 6 - HOURS OF WORK, BREAKS, OVERTIME, SHIFT WORK, WEEKEND WORK**

**6.1 Hours of work**

6.1.1 The ordinary hours of work for all full-time employees shall be an average of 38 hours per week to be determined within the following work cycles:

- (a) 38 hours within a work cycle not exceeding 7 consecutive days; or
- (b) 76 hours within a work cycle not exceeding 14 consecutive days; or
- (c) 114 hours within a work cycle not exceeding 21 consecutive days; or
- (d) 152 hours within a work cycle not exceeding 28 consecutive days.

6.1.2 Where the employer and the employees in a work section or sections agree, 160 hours may be worked within a work cycle not exceeding 28 consecutive days with provision for one Rostered Day Off per cycle up to a maximum of 5.

**6.2 Arrangement of ordinary hours**

6.2.1 The ordinary hours of work may be worked in any of the following combinations:

- (a) 4 days of 8 hours and one of 6 hours;
- (b) 19 days of 8 hours each day in a work cycle of 28 consecutive days;
- (c) The banking of a day each month up to a maximum of 5 days, to be taken at times mutually acceptable to the employer and the employee, but not later than 12 calendar months of the date on which the first Rostered Day Off was accrued;
- (d) 4 days of 9 and a-half hours per day;
- (e) 5 days to be worked at a total of 7 hours and 36 minutes per day;
- (f) 4 or 5 days to be worked with no less than 4 hours nor more than 10 hours on any day;
- (g) Any combination of the above arrangements over a normal roster period is permissible.

6.2.2 The ordinary hours of work arrangement agreed upon in clause 6.1.1 shall be subject to the following conditions:

- (a) The hours of work may be worked within a minimum of 6 hours and a maximum span of 12 hours per day exclusive of meal breaks;

Provided that where shifts shall exceed 8 hours per day, such hours of work shall only be worked by agreement in writing between the employer and the employee:

Provided further that the maximum span of 12 hours within which ordinary hours may be worked on any day may be extended by written agreement entered into between the employer and the relevant Union.

- (b) Where shifts greater than 10 hours per day are to be worked, such shifts shall only be worked by agreement in writing between the employer and the appropriate Union.

(c) Provided that where shifts of more than 10 hours per day are rostered for work, employees working such hours cannot be rostered for work on more than 3 consecutive days without a break of at least 48 hours, and further provided that no more than 8 shifts of more than 10 hours can be worked in a 4 week period.

(d) No employee shall work more than 10 days in succession without a Rostered Day Off.

(e) 9 rostered days off duty shall occur each 4 week period.

### **6.3 Special provisions for banking of days**

(a) Where a Rostered Day Off which has resulted from the method of implementation of the 38 hour week set out in clause 6.1.2 hereof falls on a public holiday, an extra day may be taken where practicable in lieu thereof.

(b) Each day of paid leave taken (not including annual leave, long service leave and periods of worker's compensation) and any public holiday occurring during any cycle of 4 weeks shall be regarded as a day worked for accrual purposes.

### **6.4 19 day month provisions**

6.4.1 As far as practicable the Rostered Day Off brought about by the 19 day month should be continuous with normal rostered days off.

6.4.2 Where the Rostered Day Off falls on a public holiday the following day may be taken where practicable in lieu thereof.

6.4.3 Subject to clauses 5.5.2 and 6.11, employees shall be entitled to a week's wages in accordance with clause 5.2 (Wage rates) for each week of the cycle.

The employer may, subject to agreement with the relevant officer of the relevant Union, pay wages fortnightly according to the average hours worked or the actual hours worked in that fortnightly pay period.

6.4.4 The entitlement to a Rostered Day Off on full pay is subject to the following:

(a) Each day of paid leave taken (not including annual leave and long service leave) and any public holiday occurring during any cycle of 4 weeks shall be regarded as a day worked for accrual purposes.

(b) An employee who has not worked a completed 4 week cycle in order to accrue a Rostered Day Off shall be paid a *pro rata* amount for credits accrued for each day worked in such cycle payable for the Rostered Day Off (i.e. an amount of 24 minutes for each 8 hour day worked or 2 hours each 40 hours worked). For the purpose clause 6.4.4, 'worked' includes paid leave referred to in clause 6.4.4(a).

6.4.5 Sickness on a Rostered Day Off which has resulted from the 19 day work cycle.

Where an employee is sick or injured on the employee's Rostered Day Off the employee shall not be entitled to sick pay, nor shall the employee's sick pay entitlement be reduced as a result of the employee's sickness or injury on that day.

### **6.5 Spread of hours**

Where broken shifts are worked the Spread of Hours shall not exceed the ordinary hours by more than a total of 2 hours, provided that no ordinary Spread of Hours shall be greater than 12 hours per day.

### **6.6 Minimum break between shifts**

The roster for all permanent employees shall provide for a minimum of 10 hours break between the finish of ordinary hours on one day and the commencement of ordinary hours on the following day. In the case of changeover or rosters, 8 hours shall be substituted for 10 hours.

## 6.7 Meal breaks

6.7.1 Employees are entitled to the following meal breaks:

- (a) No employee shall be required to work for more than 6 hours continuously, excluding a rest pause, without an unpaid meal break of at least 30 minutes, nor more than one hour.
- (b) Where employees do not receive at least a 30 minute break before the completion of 6 continuous hours of work, then such employees are to be paid at one and a-half times their ordinary rate until a break of 30 minutes is taken.
- (c) A further meal break of 30 minutes is to be provided where employees work more than 5 hours after taking the first meal break. This further meal break is to be paid at ordinary rates.
- (d) Where employees are required to work overtime for 2 hours or more after their normal rostered ceasing time, then the employee is to be allowed a meal break of at least 30 minutes which is to be paid at ordinary time. In such circumstances, the employer is to either provide a meal of reasonable quality and quantity or pay \$9.60 in lieu of such meal.
- (e) These provisions apply equally to full-time, part-time and casual employees.

## 6.8 Rest pauses

6.8.1 Full-time employees are entitled to a rest pause of 10 minutes' duration in the employer's time in the 1st and 2nd half of the daily work. The rest pauses are to be taken at such times so as not to interfere with the continuity of work when continuity is necessary.

6.8.2 All casual and part-time employees are entitled to a 10 minute rest pause within any work period which is in excess of 4 continuous hours.

Casual and part-time employees are entitled to a second 10 minute rest pause where that work period is of at least 8 continuous hours.

6.8.3 Notwithstanding clause 6.8.1, where there is agreement between the employer and the majority of employees concerned, the 2 rest pauses may be combined into one 20 minute rest pause to be taken in the first part of the ordinary working day, with the 20 minute rest pause and the meal break arranged in such a way that the ordinary working day is broken up into 3 approximately equal work periods.

## 6.9 Overtime

6.9.1 *Reasonable overtime*

An employer may require an employee - other than a casual employee - to work reasonable overtime at overtime rates. An employer must, if practicable, offer employees the opportunity to work overtime in preference to employing casuals.

6.9.2 *When is an employee paid at overtime rates?*

An employee, other than a casual, is paid at overtime rates for any work done outside of the Spread of Hours or rostered hours set out in clause 6.2.

6.9.3 *What are overtime rates?*

The overtime rate payable to an employee depends on the time at which the overtime is worked.

- (a) Monday to Saturday: All employees other than casual, are paid at the rate of time and a-half for the first 3 hours and double time thereafter.

- (b) Sunday: All employees other than casuals, are paid at the rate of double time.
- (c) On an employee's Rostered Day Off an employee is to paid at the rate of double time.
- (d) On a Rostered Day Off:
  - (i) twice the employee's normal rate of pay for any work done; and
  - (ii) the employee must be paid for at least 2 hours even if the employee works for less than 2 hours.
- (e) The 4 hour minimum payment does not apply:
  - (i) to work which is part of the normal roster which began the day before the Rostered Day Off; or
  - (ii) when overtime worked is continuous from the previous day's duty.

#### 6.9.4 *The payment of overtime*

- (a) No employee can work overtime without permission of the employer. Any overtime worked shall be paid on the next pay day for the employee. Overtime will be payable when it is entered on the time sheet and authorised by the employer.
- (b) However, an employee and the employer may agree in writing to take time off with pay. This time off shall be equivalent to the number of ordinary hours pay that the employee would have received for the overtime.
- (c) Accumulated time must be taken within 4 weeks from the time of accrual and at a time mutually agreed between the employee and the employer:

Provided that outstanding accrued overtime shall be paid at the appropriate rate in full at the time of termination, for any reason, by either party.

#### 6.9.5 *Does an employee get a break after working overtime?*

If starting work at the employees next rostered starting time would mean that the employee did not receive a full 10 hour break then either:

- (a) the employee may - without loss of pay - start work at such a later time as is necessary to ensure that he or she receives a break of at least 10 hours; or
- (b) the employer must pay the employee overtime rates for all work performed until the employee has received a break of at least 10 hours; or
- (c) in the case of a change over of rosters 8 hours shall be substituted for 10 hours.

### **6.10 Rosters**

- 6.10.1 Each employer shall keep posted in a position accessible to employees, a roster settling out the ordinary starting and ceasing times and the period which is allotted for each meal.
- 6.10.2 In the case of full-time and part-time employees unless otherwise mutually agreed between the employer and employee:
  - (i) 2 weeks notice of Rostered Day Off or days off shall be given;
  - (ii) 2 days notice of an altered starting and/or ceasing time within a roster.
- 6.10.3 Rosters may be changed by mutual agreement between the employer and employee to cover specific operational needs such as covering sick leave or other cause which is outside the control of the employer.

### 6.11 Weekend penalty rates - full-time and part-time employees

6.11.1 All ordinary time worked between midnight Friday and midnight Saturday shall be paid at the rate of time and a quarter.

6.11.2 All ordinary time worked between midnight Saturday and midnight Sunday shall be paid at the rate of time and a-half."

The first step to be taken in implementing Part 6 in the case of a particular employment is to nominate a cycle from the limited range at clause 6.1.1. Once the work cycle has been established, it is possible to nominate the actual days of work and the ordinary hours to be worked on those days. There is, of course, a restriction on the right to nominate. The parties are limited to the arrangements at clause 6.2, or to a combination of those arrangements, over a normal roster period. The purpose of the scheme is readily apparent from clauses 6.3 and 6.5. In substituting the 38 hour week for the 40 hour week the Queensland Industrial Relations Commission pursued a policy of ensuring that the reduction in working hours increased employees' leisure hours, e.g. by allowing a three day weekend once a month. The spectre of inflation was alive and well. There was understandable concern that existing patterns of work would continue with hour 39 and hour 40 paid for at overtime rates. Whilst Part 6 does, of course, make provision for the payment of worked time at overtime rates (see clause 6.9) the fundamental proposition is that overtime is payable when work is performed outside the arrangement selected from clause 6.2.

Whether the cycle of hours and the daily arrangement is to be set by agreement between employer and employee or is to be determined by the employer, is not readily apparent. The expectation may well have been that the process would be driven by the procedures about consultation and dispute resolution at Part 3 of the 2003 Award. In any event, those matters are of no present concern. It is patent that no cycle was selected for Mr Beck and that no arrangement of hours was chosen. In those circumstances, the Industrial Magistrate constructed a spread of hours compliant with clauses 6.1.1 and 6.2.1. With respect to the Industrial Magistrate, at that point Her Honour ceased interpreting and started arbitrating. There can be no suggestion that the Industrial Magistrate simply adopted what was in fact happening. The evidence, which went to total hours rather than to cycle and to arrangement, showed that what was typical was that no day was the same as the next (save that the alarms were disarmed by Mr Beck at 5.30 a.m.). Additionally, in determining the spread of working hours the Industrial Magistrate took account of normative factors, e.g. that a forty hour week had been agreed and that having regard to the nature of the industry, it was unreasonable for Mr Beck to treat all weekend work as penalty rate work. The Industrial Magistrate's finding must be set aside. Absent a finding about cycle and arrangement, the determination of Mr Beck's entitlement (if any) under Part 6 becomes impossible.

There was a further significant obstacle confronting Mr Beck. The obstacle arose out of clause 6.9.4(a) of the 2003 Award which provides:

*"6.9.4 The Payment of Overtime*

- (a) No employee can work overtime without permission of the employer. Any overtime worked shall be paid on the next pay day for the employee. Overtime will be payable when it is entered on the time sheet and authorised by the employer."

The construction of clause 6.9.4(a) is a matter involving some difficulty. One would like to treat the sub-clause as embracing the proposition that the working of overtime requires the employer's permission and proffering some very sensible advice. It is sensible for the time worked and for the authorisation of the work to be promptly recorded. If all is well, the documentation will be generated and the employee will be paid on his next pay day. If there is disagreement, it will emerge promptly and whilst memories are fresh. In such circumstances, there is some prospect of the "Grievance and Dispute Settling Procedure" at clause 3.2 producing a harmonious resolution of the differences between employer and employee. However, the final sentence of clause 6.9.4(a) is not couched in the language of recommendation. It can be taken to mean that an employer who permits and recants may avoid liability. It can be taken to mean that an employer who fails to keep the time and wages records required by s. 366 of the Act and clause 11.2 of the 2003 Award, may profit from his misconduct. In making that comment about "time and wages records", I quite accept that the recording of the overtime hours and the authorisation in a "working record" used in the preparation of the formal historical record will suffice to satisfy clause 6.9.4(a). However, the situation in which documents are generated is a situation in which all is well with the world. The concern is with the situation in which all is not well with the world and there are no documents. It is in those circumstances that Counsel for Mr Beck advances an alternative argument based on s. 9 of the Act.

Resort to s. 9 is entirely understandable. Section 9 does not require written authorisation of overtime by an employer. As the Industrial Magistrate correctly found, even acquiescence will suffice. Indeed, proof that the employer voluntarily accepted the benefit of the work will suffice; *The Australia Workers' Union of Employees, Queensland v Guiseppa Gullo* (1964) 57 QGIG 58 at 59 per Hanger, President.

In determining the application of s. 9, the starting point is s. 9(7) which provides that the section does not apply "if an industrial instrument provides otherwise". This Court had occasion to refer (indecisively) to s. 9(7) in *Feldman v Ocean Ford Pty Ltd* (2003) 174 QGIG 372 at 376, the relevant\* passages being:

"The section of the *Industrial Relations Act 1999* which provides minimum general employment conditions for employees whose engagement is regulated by an industrial agreement is subject to an exception cast in quite different language. Pursuant to s. 9(7), s. 9 does not apply 'if an industrial instrument provides otherwise'.

In *Federated Sawmill, Timberyard and General Wood-Workers' Employees' Association Adelaide Branch v. Alexander* (1912) 15 CLR 308 at 313 Griffith CJ held that a statute 'otherwise provided' when it 'otherwise expressly declared'. In *Faithorn v. Territory of Papua* (1938) 60 CLR 772 at 794 Dixon J took the wider view that a regulation might otherwise provide by 'implication or inference'."

[\*The present Appeals do not raise the issue whether s. 9 yields to an industrial instrument only where the industrial instrument otherwise provided at the commencement of the Act.]

The general proposition is, of course, that "it is quite clear that whatever the language used necessarily or even naturally implies is expressed thereby" per Willes J in *Charlton v Lings* (1868) L.R. 4 C.P. 374 at 387. The problem here is with the purpose of s. 9(7). Whilst it may be constitutionally possible for the Legislature to authorise delegated legislation overriding a substantive provision of the enabling act, see generally *Hotel Esplanade Pty Ltd v City of Perth* [1964] WAR 51 at 54 per Hale J and *Del v Director-General, New South Wales Department of Community Services and Anor* (No. 2) (1997) 190 CLR 207 at 212 per Brennan CJ and Dawson J, such legislation is exceptional. An industrial award should not lightly be read as "providing otherwise" so as to oust the operation of s. 9, compare, however, the case of *Hall v Manahan* [1919] St. R.Q. 217. In my view, whether s. 9(7) extends to awards made after the commencement of the Act or does no more than preserve award schemes about overtime extant at the commencement of the Act, an award of the Queensland Industrial Relations Commission should not be treated as "otherwise providing" unless the intention to set a contrary and exhaustive scheme is "manifest", compare *Kaye v Attorney-General for Tasmania* (1955-56) 94 C.L.R. 193 at 204 per Williams J. Neither Part 5 of the 1996 Award nor Part 6 of the 2003 Award employs language displaying such an intention. There is no difficulty in reading s. 9 and the Awards together. The Awards seek to increase the leisure time available to employees. In an industrially literate and unionised workplace, the scheme will work well. Where an employee is unaware that one or other of the Awards governs his/her employment, or lack the skills to negotiate a work cycle and a spread of hours, the Awards provide no safety net at all. It is not inflationary and does not frustrate the implementation of the 38 hour week to treat s. 9 as a pre-38 hour week overtime scheme sitting beneath the Awards to catch hapless employees falling through the drafting.

Notwithstanding that the Industrial Magistrate rejected the application to amend to add an alternative case based on s. 9, Her Honour did apply s. 9 and concluded that (by and through Mr Godwin) the Defendants had acquiesced to the working of overtime by Mr Beck. Her Honour was indubitably correct. Mr Godwin's evidence that he did not know the detail of Mr Beck's workload may well be correct, but he knew or ought to have known of the general extent of Mr Beck's labours and seems to have averted his eyes (rather than pursue the detail), whilst taking the benefit of Mr Beck's work. I do not, however, accept that it was legitimate for the Industrial Magistrate to (a) find acquiescence on the basis of s. 9; (b) treat the acquiescence as "authorisation" for the purposes of the Awards; and (c) substitute a 40 hour week for the 38 hour week provided for in the Awards because the Employment Agreement provided for a 40 hour week.

One has to accept that on the evidence one cannot identify the hours worked by Mr Beck with any measure of precision. The Defendants had no records. Mr Beck, who should have recorded his hours for the benefit of his employer, had no private records. There was a discrepancy between the hours identified in his Statement of Claim and Mr Beck's evidence. Given that there are 168 hours in a week, Mr Beck's evidence that he worked 140 hours a week over an 18 month period is implausible. On the specifics of work performed and frequency of performance, Mr Beck's evidence was in conflict with that of other witnesses, (including witnesses called by Mr Beck). However, it is clear that Mr Beck was working hours in excess of the 40 hours set by his contract. It may be that Mr Beck should have appointed staff to work as "floaters", rather than undertaking a variety of tasks because he was on call 24 hours a day seven days a week and was available. It may be that he should have appointed capable persons to whom his more significant tasks might have been delegated. If the problem was absence of authority to appoint staff - and the extent of his authority was a matter of dispute at first instance - it may be that Mr Beck should have pressed Mr Godwin to appoint adequate staff and appropriate deputies. It may be that living on the premises, required to be on call 24 hours a day seven days per week and told to manage the hotel as if it was

his own, Mr Beck was simply unable to relinquish control. I note that at paragraph [169] the Industrial Magistrate concluded:

"The claimant, Mr Beck, presented as a dedicated worker who took significant pride in his work. He had extensive experience in the hotel industry. I accept that he was engaged as the manager and had been told run the place as if it were his own. The evidence shows that he had the flexibility within his role to engage staff. I accept that some staff were inexperienced. In my view, he seemed reluctant to allow other (often very experienced) staff to perform their allocated tasks without his regular direct supervision, rather than periodic oversight of tasks needed to be performed daily."

However, without descending into particularity, it was open to the Industrial Magistrate to conclude that Mr Beck was working no less than a stated number of hours per week. In fact, the Industrial Magistrate did not adopt quite that course. It is apparent that the Industrial Magistrate discounted the hours actually worked to allow for Mr Beck's reluctance to delegate, and to grant autonomy, to allow for Mr Beck's omission to organise his schedule to allow "time off" and his failure to perform efficiently. But it has to follow that the hours at the Appendices to the Industrial Magistrate's Decision are less than the hours which in the Industrial Magistrate's opinion had been worked by Mr Beck. Given the modest nature of the hours attributed to Mr Beck, e.g. a little over 4 hours a day during the period 28 October 2002 to 30 June 2003, and approximately 3.5 hours per day over the period 1 March 2004 to 18 June 2004, I am quite unable to contradict the Industrial Magistrate and to assert that Mr Beck did not work at least those hours.

One may not fit the hours at the appendices around the constructed cycle and spread of hours. Indeed, one cannot resort to the rates of overtime in the Awards. One must use s. 9 of the Act. On that calculation Mr Beck will be underpaid. He will be underpaid because on the evidence one may not safely go beyond a finding that he worked at least the hours in the Appendices. Regrettably, it will be necessary to re-list the matter to hear submissions on the arithmetic and deal with any arguments about whether Mr Beck's ordinary time rate was the loaded rate.

I turn now to the outstanding issues of smaller monetary significance.

Mr Beck made a claim for payment in lieu of notice. The Defendants contended that Mr Beck had resigned. Having found that Mr Godwin had torn up the resignation, having found that Mr Beck was paid during an extended "holiday" and having found that Mr Beck had not been paid his entitlements after his return from that holiday and after being informed that the ownership group had assumed the management of the hotel, the Industrial Magistrate rejected the Defendants' argument. The Industrial Magistrate's findings were open to Her Honour and in my view, Her Honour's conclusion was correct.

By clause 4.9.2 of the 2003 Award Mr Beck was entitled to 3 weeks' notice or payment in lieu. The Industrial Magistrate allowed Mr Beck, who did not receive any notice, one month's notice because the Employment Agreement entitled him to one month's notice. The Industrial Magistrate erred. The Employment Agreement did not entitle him to payment in lieu of notice. It may well be that, if Mr Beck's alternative claim in contract is finalised, he will be found to have taken reasonable steps to mitigate his loss and to be entitled to damages in the sum of one month's pay. However, his claim for payment in lieu is based on the 2003 Award and he is restricted to 3 weeks' pay in lieu of notice.

The Industrial Magistrate allowed Mr Beck's claim for severance pay. The Defendants' complain that the Industrial Magistrate did make a finding that Mr Beck's position was redundant. The Industrial Magistrate did not make such a finding. Her Honour relied on a concession in the Defendants' written submission. There is no error in relying on a concession formally made. Neither, I should add, did the Industrial Magistrate err in failing to deal with an issue about the availability of alternative employment. That issue was a matter for the Queensland Industrial Relations Commission.

The Industrial Magistrate declined to take judicial notice of the date of the Rockhampton Show. Counsel for Mr Beck now seeks to rely on the *Holidays Act 1983* and the Notification thereunder in respect of Show Holidays for 2003 and 2004. The Notifications could and should have been proved at first instance, "Cross on Evidence", paragraph 3095. Section 320(2) of the Act does not apply to actions in the Industrial Magistrate's Court for the recovery of wages. I am not prepared to allow the evidence.

I shall defer making orders until after the hearing about the arithmetical matters under s. 9. My Associate will make the administrative arrangements. Mr Beck's appeals about costs may need to be listed. I reserve all questions of costs on the Appeals.

Dated 25 June 2008.

D.R. HALL, President.

Released: 25 June 2008

*Appearances:*

Mr J. Murdoch SC, with him Mr J. Dwyer, instructed by Mr C. Mossman of BCI Duells Lawyers, for Park Avenue Motor-Hotel Pty Ltd, Godwin's Hotels Pty Ltd, Godwin's Holding Company Pty Ltd, George Darby Godwin and Skeeta Pty Ltd.

Mr B. Codd, instructed by O'Keefe Mahoney Bennett Solicitors, for Mr Juergen Willi Beck.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999* - s. 320 - basis of decisions of the commission and magistrates  
*Workers' Compensation and Rehabilitation Act 2003* - s. 549 - who may appeal

**Coles Group Limited AND Kylie Michelle Reed and Q-COMP (WC/2008/46)**

DEPUTY PRESIDENT SWAN

27 June 2008

DECISION

Ms Kylie Reed (the first respondent) is the appellant in an application [WC/2008/43 (the appeal)] made against the Review Unit of Q-COMP (the second respondent).

The employer in that matter is Coles Group Limited (the applicant) which now makes the application pursuant to s. 549(3)(b) of the *Workers' Compensation and Rehabilitation Act 2003* (the Act) and s. 320 of the *Industrial Relations Act 1999* (the IR Act) for leave to appear and be heard in the appeal between the first respondent and the second respondent.

Below is a summarised version of the applicant's submissions, which have been accepted by the first respondent and the second respondent:

- In brief, the applicant stated that it is a self-insurer pursuant to Chapter 2 of the Act and it became a self-insurer on 1 July 1999.
- Pursuant to the Act, the applicant as self-insurer is required to make payments pursuant to Chapters 3 and 4 of the Act in respect to any application for compensation which is accepted.
- The applicant has financial and statutory obligations to the first respondent should she be successful in the appeal. It has financial and legal interest in the outcome of such an appeal.
- The applicant has direct knowledge of the employment history and standard operating procedures of the business conducted by it.
- *Middleton v Teys Brothers (Holdings) Pty Ltd* [2001] QIC 1 is authority for the proposition that s. 320(2) of the IR Act permits a discretion to be exercised by the Queensland Industrial Relations Commission in allowing a person to be heard subject to any conditions imposed by the Commission (and the Industrial Magistrates Court). This discretion includes appeals under the Act. *BP Refinery (Bulwer Island) Pty Ltd v Bloor* [2003] QIC 121 states that whether an employer ought to be permitted to appear and be heard at the appeal is a matter entirely within the discretion of the Commission.
- The applicant in this matter has a direct pecuniary interest in the outcome of the appeal. Counsel for the applicant states that there has been no delay in making the application and the involvement of the applicant will not delay the determination of the appeal which has yet to be set down for hearing.

- Counsel for the applicant states that it will be able to assist the Commission in relation to its management and procedures and given that its pecuniary interests as a self-insurer and/or its reputation could be affected by the outcome of the appeal, it seeks that it be heard and that the Commission exercise its discretion under s. 320(2) of the IR Act for that to occur.

A decision was given from the Bench stating that the application had been granted and that brief written reasons would follow.

This having occurred, the Commission so orders that the applicant (Coles Group Limited) be at liberty to:

- call and adduce evidence in the appeal to the Queensland Industrial Relations Commission;
- cross-examine witnesses in the appeal to the Queensland Industrial Relations Commission; and
- make submissions at the hearing of the appeal to the Queensland Industrial Relations Commission.

Order accordingly.

D.A. SWAN, Deputy President.

*Appearances:*

Mr M. O'Sullivan, Counsel, instructed by HWL Ebsworth Lawyers, for Coles Group Limited.

Mr M. Forbes, of MurphySchmidt Solicitors, for Ms K.M. Reed.

Ms J. Webb, of Q-COMP.

*Hearing Details:*

2008 26 June

Released: 27 June 2008

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#### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 - s. 278(1)A - power to recover unpaid wages*

**David Francis Cox (for Fabiola Del Carmen Martinez) AND Photogrove Pty Ltd (B/2007/58)**

**and**

**Photogrove Pty Ltd AND David Francis Cox (for Fabiola Del Carmen Martinez) (B/2007/70)**

DEPUTY PRESIDENT BLOOMFIELD

25 June 2008

Application for unpaid wages - Proportionate long service leave on termination - Jurisdiction of the Commission to consider application - Whether application out of time - Meaning of provisions at s. 43(4)(c) of the Act - Held application within time and Commission possesses jurisdiction.

#### DECISION

##### **Background**

In a decision now published at 187 QGIG 127, Hall P resolved a jurisdictional point raised by Photogrove Pty Ltd (the Respondent) in relation to whether the Queensland Industrial Relations Commission (the Commission) possessed the ability to hear and determine an application for a proportionate payment of long service leave pursuant to s. 43(4)(c) of the *Industrial Relations Act 1999* (the Act) where the former employee:

- was employed by a constitutional corporation; and
- has not pursued an application for reinstatement on the basis of the termination of employment being unfair in either the Australian Industrial Relations Commission or the Queensland Industrial Relations Commission.

In doing so, the President held that an employee asserting an entitlement to payment in respect of proportionate long service leave in reliance on s. 43(4)(c) of the Act may launch proceedings in the Commission under s. 278(1)(a), or permit comparable proceedings to be launched on their behalf by a duly authorised Industrial Inspector under s. 278(3)(e).

### **Respondent's Submissions**

The Respondent has now raised several other jurisdictional points, as well as a procedural issue, in relation to an application lodged by Mr David Francis Cox, an Industrial Inspector, on behalf of a Ms Fabiola Martinez. These points can be summarised as follows:

- (a) the interpretation to be applied to paragraphs (i) and (ii) at s. 43(4)(c) of the Act, respectively, and whether the "or" between them should be read disjunctively or conjunctively;
- (b) the criteria the Commission might use in assessing "unfairness" as that word is used in s. 43(4)(c)(ii); and
- (c) whether the delay in lodging the application, outside 21 days of termination, prevents the application proceeding either on the basis that it offends the intent of the Legislature or unduly prejudices the Respondent's ability to defend any allegation of unfair dismissal, given the lapse of time.

Relevantly, s. 43 of the Act states:

#### **"43 Entitlement**

...

- (3) An employee who has completed at least 7 years continuous service is entitled to a proportionate payment for long service leave on the termination of the employee's service.
- (4) However, if the employee's service is terminated before the employee has completed 10 years continuous service, the employee is entitled to a proportionate payment only if-
  - (a) the employee's service is terminated because of the employee's death; or
  - (b) the employee terminates the service because of -
    - (i) the employee's illness or incapacity; or
    - (ii) a domestic or other pressing necessity; or
  - (c) the termination is because the employer -
    - (i) dismisses the employee for a reason other than the employee's conduct, capacity or performance; or
    - (ii) unfairly dismisses the employee; or
  - (d) ...".

At the outset, the Respondent contended that the "or" between s. 43(4)(c)(i) and s. 43(4)(c)(ii) is disjunctive and submitted that the intention of s. 43(4)(c)(i) was to allow a lesser test in the determination of a proportional payment of long service leave than that of an unfair dismissal. The Respondent also argued that where the employee agreed that their employment was terminated for reasons of conduct, capacity or performance then the Commission should only consider whether this was the reason for termination, at the exclusion of any question of fairness. The Respondent went on to submit that if the Commission accepted this submission then it should refrain from further hearing the application on the basis that both Mr Cox and Ms Martinez have sworn that the Respondent did terminate Ms Martinez's employment for reasons associated with her conduct, capacity or performance.

In the event the above submission was not accepted, the Respondent submitted that for the purposes of determining fairness, at s. 43(4)(c)(ii), the Commission should be bound to observe the relevant elements at Chapter 3 - Dismissals of the Act, except where there is a reference to a remedy of reinstatement. In particular, it was argued, the Commission should be bound by Chapter 3 as it relates to:

- (a) s. 73(1)(a) of the Act - the harsh, unjust or unreasonable test (and case law and jurisprudence attached to this);
- (b) s. 73(1)(b) of the Act (should any invalid reason be alleged), which is not the Respondent's understanding in this matter;
- (c) s. 74(2) - matters pertaining to out of time applications;
- (d) s. 77 - matters to be considered when deciding an application;
- (e) Part 3 - s. 83(1) and (2) (matters relating to serious misconduct); and
- (f) other sections the Commission deems appropriate.

The Respondent especially highlighted the 21 day time limit at s. 74(2) and argued that at the time of its proclamation s. 43(4)(c)(ii) was intended to be exercised only after a hearing of an unfair dismissal application pursuant to Chapter 3 of the Act. The Respondent also argued that it was the Legislature's expectation that any question of fairness regarding a termination would be applied for within 21 days, or such later time as the Commission might consider reasonable. However, no authority was referred to to support either of these submissions.

Finally, the Respondent argued that the Applicant's failure to pursue the claim within 21 days of termination denied it a key pillar in its protection against unfair dismissal claims. This was later clarified to refer to the prejudice which the Respondent would suffer because of the impact that the lapse of time would have on the memory of witnesses and the potential loss of other information that would have been more readily available had the matter been pursued in a timely manner. In this regard, it was generally argued that the Commission should exercise its discretion under s. 331 to dismiss, or refrain from hearing, the application on public interest grounds.

### Conclusion

The controversy about the meaning to be ascribed to s. 43(4)(c) of the Act can be easily resolved if the words in the provision are read in their proper context rather than by focusing on one or two words in isolation, as the Respondent appears to have done.

Section 43(4) of the Act sets out those circumstances where an employee with between 7 and 10 years of service is entitled to proportionate long service leave on termination. On my reading, the focus is on prescribing who **is** entitled to proportionate long service leave on termination rather than prescribing who is **not** so entitled. Read that way, s. 43(4) provides that an employee with between 7 and 10 years' continuous service is entitled to proportionate payment of long service leave only if:

- (i) the employee's service is terminated because of the employee's death; or
- (ii) the employee terminates the service because of the employee's illness or incapacity; or
- (iii) the employee terminates the service because of a domestic or pressing necessity; or
- (iv) the employee's service is terminated because the employer dismissed the employee for a reason other than the employee's conduct, capacity or performance; or
- (v) the employee's service is terminated because the employer unfairly dismissed the employee.  
(My emphasis)

Accordingly, where an employee with between 7 and 10 years' continuous service **is** terminated for reasons of conduct, capacity or performance it is necessary to go beyond such words and look at whether the employer unfairly dismissed the employee in order to determine whether such employee is entitled to proportionate long service leave.

Such interpretation is consistent with the explanatory notes to the *Industrial Relations and Another Act Amendment Bill 2001* introduced into Parliament by the then Minister on 22 March 2001 (recourse to such material is permitted by s. 14B of the *Acts Interpretation Act 1954* for the purposes of confirming an interpretation). The Explanatory Notes relevantly provide:

"... an employee who is dismissed by the employer between 7 and 10 years continuous service does not have an entitlement to a proportionate payment if dismissed for reasons of conduct, capacity or performance, **provided** it was not an unfair dismissal." (My emphasis)

As to how "unfairness" might be assessed, the parties are *ad idem* that the body of case law established by the numerous cases considered by the Commission under Chapter 3 of the Act have established the broad criteria to be considered by the Commission in determining whether the Respondent unfairly dismissed Ms Martinez.

In this respect, it would be my expectation that the usual processes associated with the conduct of an unfair dismissal application would generally be followed although the associated legislative provisions would not have been slavishly observed. Naturally, it would be up to the Applicant to prove, on the balance of probabilities, that Ms Martinez was unfairly dismissed.

Finally, there is nothing in either s. 43 of the Act, nor in s. 278, to suggest that an application seeking proportionate payment for long service leave, on the basis that an employer unfairly dismissed an employee, has to be made within 21 days of the employee's dismissal. Indeed, the provisions of s. 278(4) completely cut across such a suggestion, in that the section permits an application to be made within 6 years after the amount claimed became payable.

Given such limit, there is also no substance to the Respondent's submission that the Commission should exercise its discretion under s. 331 to dismiss, or refrain from hearing, the application on public interest grounds on the basis of the prejudicial effect that the lapse of time would have on the memory of witnesses and the like. Had the Legislature intended that such matters be relevant to any particular application under s. 278 then it could have so provided.

For the foregoing reasons, I dismiss Matter No. B/2007/70, being an application by the Respondent for the Commission to dismiss or refrain from hearing, or further hearing, Matter No. B/2007/58.

I shall list Matter No. B/2008/58 for mention at **9.30 a.m.** on **Monday 7 July 2008** for the purpose of issuing directions for the conduct of the application by Mr Cox for payment of proportionate long service leave in reliance on s. 43(4)(c) of the Act.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Deputy President.

*Appearances:*

Mr D. Cox of the Department of Employment and Industrial Relations,  
Southport, the Applicant (for Fabiola Del Carmen Martinez).

*Hearing Details:*  
2008 20 May

Mr M. Heffernan of The Employment Advisor for the Respondent.

Released: 25 June 2008

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#### QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999*

s. 287 - application for declaration of general ruling

s. 288 - application for declaration of policy

**Queensland Council of Unions AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (B/2008/45)**

**The Australian Workers' Union of Employees, Queensland AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (B/2008/50)**

VICE PRESIDENT LINNANE  
DEPUTY PRESIDENT SWAN  
COMMISSIONER FISHER

25 June 2008

#### DECLARATION OF INTENT

- [1] On 13 June 2008 and 24 June 2008 respectively, the Queensland Council of Unions (QCU) and The Australian Workers' Union of Employees, Queensland (AWU) filed with the Industrial Registrar applications seeking:
- (i) a \$29.00 wage adjustment for award employees;
  - (ii) an adjustment to existing award allowances which relate to work or conditions which have not changed and to service increments;
  - (iii) a \$29.00 adjustment to the Queensland Minimum Wage as it applies to all employees; and
  - (iv) an operative date of 1 September 2008.
- [2] Directions have been issued for the further conduct of these matters. Those directions are as follows:
1. That there be a mention of the matter before the Full Bench, Vice President Linnane and Deputy President Swan (Commissioner Fisher absent) at the Queensland Industrial Relations Commission, Central Plaza 2, Floor 13, 66 Eagle Street, (Cnr Elizabeth and Creek Streets), Brisbane, on Friday 4 July 2008 at Sittings commencing at 9:00 a.m.
  2. The Applicants and any other registered union of employees in support of applications B/2008/45 and B/2008/50 are to file and serve on all other parties and intervenors for whom appearances have been entered by close of business on 11 July 2008:
    - a. submissions in support of the applications;
    - b. affidavits of any witness evidence in support of the applications.

3. Any intervenor in support of the applications is to file and serve on all other parties and intervenors for whom appearances have been entered by close of business on 11 July 2008:
    - a. their submissions;
    - b. affidavits of any witness evidence in support of the applications.
  4. The Queensland Government is to file and serve on all other parties and intervenors for whom appearances have been entered, by close of business on 18 July 2008:
    - a. their submissions;
    - b. affidavits of any witness evidence in support of or in opposition to the applications.
  5. All other parties and intervenors opposing the applications are to file and serve on all other parties and intervenors for whom appearances have been entered by close of business on 22 July 2008:
    - a. their submissions;
    - b. affidavits of any witness evidence in opposition to the applications.
  6. The Applicants and any parties or intervenors in support of the applications are to file and serve any reply on all other parties and intervenors for whom appearances have been entered by 9.00 a.m. on 28 July 2008.
  7. Each party and/or intervenor opposing the applications is to file and serve on the Applicants and all other parties or intervenors for whom appearances have been entered, any material in response to the Applicants' replies by close of business on 29 July 2008.
  8. No party or intervenor may file any material after close of business on 29 July 2008 unless by leave of the Commission, which leave shall not be granted unless:
    - a. the material relates to economic data, academic studies or reports not available to the party prior to 29 July 2008; or
    - b. there are special circumstances which warrant the filing of such material.
  9. There will be liberty to any party to apply on 48 hours notice.
  10. That the matter be heard before the Full Bench, Vice President Linnane, Deputy President Swan and Commissioner Fisher at the Queensland Industrial Relations Commission, Central Plaza 2, Floor 13, 66 Eagle Street, (Cnr Elizabeth and Creek Streets), Brisbane, on Thursday 31 July 2008 at Sittings commencing at 8:30 a.m.
- [3] The purpose of this Declaration of Intent is to discharge the duty cast upon us by s. 287(3) of the *Industrial Relations Act 1999*. A copy of this Declaration of Intent is to be published in the *Queensland Government Industrial Gazette* and the *Courier Mail*. If any person wishes to make submissions about the (possible) general ruling and/or the increase in the Queensland Minimum Wage they are at liberty to do so.
- [4] Any such person supporting the QCU and AWU applications are to file in the Industrial Registry and serve their material no later than close of business on Friday 11 July 2008. Any such person opposing the QCU and AWU applications are to file in the Industrial Registry and serve their material no later than close of business on Tuesday 22 July 2008. The hearing of the QCU and the AWU applications will commence at 8:30 a.m. on Thursday 31 July 2008.

Dated 25 June 2008.

D.M. LINNANE, Vice President.

D.A. SWAN, Deputy President.

G.K. FISHER, Commissioner.

Released: 25 June 2008

## QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

*Industrial Relations Act 1999 - s. 500- application for an election inquiry***Cameron Charles Pope (RIO/2008/47)**

REGISTRAR SAVILL

24 June 2008

Election for office of General Secretary, QPU - Application for election inquiry lodged - Who may apply - Hearing by way of written submissions - Definition of irregularity - No irregularity found - Matter not referred to the Commission.

## DECISION

**Background**

On 18 October 2007 the Queensland Police Union of Employees (the QPU) lodged in the Industrial Registry under s. 481 of the *Industrial Relations Act 1999* (the Act), the information as prescribed in section 36 of the *Industrial Relations Regulation 2000* in relation to the conduct of an election by the Electoral Commission of Queensland (the ECQ) for the position of office of General Secretary.

On 22 October 2007 the Acting Industrial Registrar found that the election being sought was for a position of office within the meaning of the Act and required to be held under the Rules of the QPU and under s. 482 of the Act, and made arrangements for the conduct of the election of the abovenamed position by the ECQ.

Subsequently, a Notice to Members/Nomination Form giving details of the election arrangements was published in the Police Journal and distributed to members around 26 November 2007. The timetable for the election was as follows:

- Nominations open at midday on Monday 26 November 2007;
- Nominations close at midday on Thursday 28 February 2008;
- Ballot, if needed, opens on Tuesday 1 April 2008;
- Ballot closes at midday on Wednesday 30 April 2008.

The following persons lodged nomination forms contesting the election for the position of General Secretary of the QPU:

- Michael Ian Barnes;
- Lance Patrick Castle;
- Phillip Roy Hocken.

On 1 May 2008 the Returning Officer of the ECQ declared Michael Ian Barnes elected to the office of General Secretary of the QPU. Of note is that Mr Hocken is the current General Secretary of the QPU and, under the Rules of the QPU, Mr Barnes is due to take up that position from Mr Hocken on 1 July 2008.

On 27 May 2008 Cameron Pope, General President of the QPU, lodged an application for an election inquiry, purportedly on behalf of the QPU. In this regard s. 500 of the Act provides as follows:

**"500 Who may apply**

An application for an election inquiry may be made only by-

- (a) a financial member of the organisation; or
- (b) a person who was a financial member of the organisation within 1 year before the application is made."

It is clear that the QPU itself cannot make such an application and I accept that Cameron Pope is the Applicant in this matter.

The Applicant has applied to the Commission to conduct an election inquiry pursuant to s. 499 of the Act, however, s. 499 of the Act provides as follows:

**"499 Commission may conduct election inquiry**

The commission may, on an application referred to it by the registrar under this part, conduct an inquiry (an *election inquiry*) about a claimed irregularity in an election for an organisation or branch."

Section 502 of the Act provides as follows:

**"502 Referral to commission**

(1) The registrar may refer the application to the commission only if satisfied-

- (a) there are reasonable grounds to inquire whether there has been an irregularity in the election that may have affected, or may affect, the election result; and
- (b) the circumstances justify an inquiry.

(2) In deciding whether to refer, the registrar may consider other appropriate information of which the registrar has knowledge."

Section 654 (1) of the Act makes provision regarding decisions under Chapter 12 of the Act, as follows:

**"654 Hearing to be given before making decision**

(1) The ... registrar (the *industrial tribunal*) must, before making a decision under this chapter, give the following persons an opportunity to be heard about whether the decision should be made-

- (a) a person who applied for the decision or from whose application the decision is proposed to be made;

...

- (e) any other person the industrial tribunal considers should be heard or who has a sufficient interest in the making of the decision."

From an initial reading of the application and supporting material, in addition to hearing from the Applicant, the Acting Registrar decided that the following persons had a sufficient interest in the making of this decision, and should be heard:

- Michael Ian Barnes [candidate and General Secretary elect];
- Lance Patrick Castle [candidate];
- Phillip Roy Hocken [candidate and current General Secretary].

Rule 8 of the *Industrial Relations (Tribunals) Rules 2000* provides *inter alia* that an Applicant has carriage of proceedings and must take all necessary steps in the proceedings until the final determination of the proceeding by the registrar.

Section 32 of the *Industrial Relations Regulation 2000* provides as follows:

**"32 Opportunity to make written submissions**

Giving a person an opportunity to be heard under section 654 of the Act includes giving the person an opportunity to make written submissions within a time decided by the tribunal."

On 10 June 2008 the Applicant's solicitor advised that they desired any hearing of this matter to proceed by way of written submissions from all parties, rather than by the holding of an oral hearing.

On 10 June 2008, a Directions Order was issued by the Acting Deputy Industrial Registrar that the Applicant and interested parties file written submissions in the Industrial Registry by 4:00 p.m. Thursday 19 June 2008.

## Submissions

Written submissions were received on behalf of:

- Cameron Pope;
- Phillip Hocken;
- Michael Barnes.

### Submission of Cameron Pope

The Applicant, both in the application filed on 27 May 2008, and in the submission filed on 19 June 2008, did not argue in support of the application and chose to take no position in the matter. It is apparent that the Applicant was merely referring the matter to the Industrial Registrar on the basis that a non-financial member, Mr Hocken, had raised an issue with the QPU. Whilst this appears to subvert the requirements of s. 500 of the Act, I have decided as per s. 502(2) to accept Mr Pope's submissions which include statements from Mr Hocken to the QPU.

### Submission of Phillip Hocken

Mr Hocken's submission includes the matters detailed in his letter to the Applicant dated 19 May 2008, which was attached to the Applicant's application lodged in the Registry on 27 May 2008. Essentially, Mr Hocken's submission at dot point 4 details the alleged irregularity that is complained of:

"4. The claimed irregularity in the ballot is that the successful candidate in the election, Michael Ian Barnes used a mobile telephone being the property of and/or a resource of the Union to help himself as a candidate in the Election for the office of the General Secretary of the Union in contravention of Section 491 of the Act."

Mr Hocken's submission included an affidavit providing statements about Mr Barnes' use of his mobile phone for election purposes.

Mr Hocken also referred to the High Court decision of *Re Collins and Others; Ex parte Hockings* (1989) 167 CLR 523 Gaudron J.

### Submission of Michael Barnes

Mr Barnes' submission is that there has been no irregularity in regard to the election and that an offence against the QPU under s. 491 of the Act would not amount to an irregularity.

Mr Barnes' submission included affidavits providing statements that it is the current policy of the QPU to reimburse executive members' mobile and home phone accounts.

Mr Barnes' also referred to a number of case decisions including the High Court decision of *Re Collins and Others; Ex parte Hockings* (1989) 167 CLR 523 Gaudron J.

## Conclusion

Both Mr Hocken and Mr Barnes relied on the High Court decision of *Re Collins and Others; Ex parte Hockings* (1989) 167 CLR 523 Gaudron J to support their submission.

As was the case in that decision, the issue in deciding to refer this matter to the Commission turns on whether the matter complained about by Mr Hocken is capable of constituting an irregularity as defined in the Act.

Section 409 of the Act provides a definition for "irregularity" as follows:

**"409 Definitions for ch 12**

...

*irregularity* includes-

- (a) a contravention of an organisation's rules; and
- (b) for an election or ballot, an act or omission by which the following is, or is attempted to be, prevented-
  - (i) the full and free recording of votes by all persons who may record a vote and by no other persons;
  - (ii) a correct working out or declaration of the results of the voting."

A perusal of the QPU's Rules does not reveal any express rule relating to the matter complained about.

Mr Hocken's submission is that Mr Barnes' conduct contravened s. 491 of the Act and therefore created an "irregularity", whilst Mr Barnes' submission is that no irregularity occurred.

Section 491 of the Act provides as follows:

**"491 Using organisation's resources for election purposes**

An organisation must not use, or permit its employees or agents, members or officers to use, the organisation's property or resources to help a candidate for an election against another candidate for the election.

Maximum penalty-80 penalty units."

The High Court decision of *Re Collins and Others; Ex parte Hockings* (1989) 167 CLR 523 Gaudron J is a case that had not too dissimilar circumstances to this matter, including the application of the definition of "irregularity".

In that case the High Court concluded that:

"... the expression "irregularity in or in connection with an election", as used in the Act, does not encompass those activities by which candidates or persons acting in their interests seek, by their advocacy or by promoting or publicising such advocacy, to influence voters in their decision for whom to vote. Accordingly the matters complained of are not capable of constituting an irregularity in or in connection with an election."

Section 491 of the Act relates to an offence for an organisation and not for the member of the organisation. Whether the conduct of the QPU in reimbursing executive members' mobile and home phone accounts is in breach of the Act has, to date, not been determined in an appropriate court of law.

Notwithstanding, I am satisfied that any such offence by the QPU would not create an irregularity with regard to the election.

I find that there has been no contravention of the QPU's Rules and no act or omission regarding the election or ballot preventing the recording of votes or the declaration of the results of voting.

I am not satisfied that there are reasonable grounds to inquire whether there has been an irregularity in the election that may have affected the election result and I am not satisfied that the circumstances justify an inquiry.

I have decided not to refer the matter to the Commission.

G.D.SAVILL, Industrial Registrar.

*Appearances:*  
Nil.

*Hearing Details:*

Written submissions

Released: 24 June 2008

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