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No. 19

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 No.
CA/2008/76	UNiTAB Agents Association (R.J. & P.J. Meiklejohn) Enterprise Bargaining - Certified Agreement 2008	29/8/08	
CA/2008/319	South Bank Employing Office Employees' Certified Agreement - 2008	27/11/08	CA/2004/632

G.D. SAVILL,
Industrial Registrar.

#####

INDUSTRIAL COURT OF QUEENSLAND

Industrial Relations Act 1999 - s. 172 - appeal against issue of electrical safety notification

Chief Kitchenware Pty Ltd AND Chief Executive of the Electrical Safety Board (Queensland) (C/2008/33)

PRESIDENT HALL

9 December 2008

DECISION

The declared aim of the *Electrical Safety Act 2002* (the Act), is elimination of the human cost to individuals, families and the community, of the death, injury and destruction which may be caused by electricity, see s. 4(1). In fulfilment of that aim, it is the purpose of the Act to establish a legislative framework for preventing people from being killed or injured by electricity and preventing property from being destroyed or damaged by electricity, see s. 4(2). The Act seeks to achieve that purpose, *inter alia*, by imposing obligations upon persons who may affect the electrical safety of either persons or their property, see s. 5(a). Included amongst those persons are the designers, manufacturers, importers and suppliers of electrical equipment, see ss. 31 to 34. Breach of an obligation imposed by the Act is a criminal offence attracting significant penalties (see s. 27), multiplied by 5 in the case of a corporation, see *Penalties and Sentences Act 1992*, s. 181B. Additionally to the obligations imposed by ss. 31 to 34, designers, manufacturers, importers and suppliers may be burdened by obligations under an Electrical Safety Notification. Section 206 provides:

"206 Electrical safety notification

- (1) The chief executive may issue a notification (electrical safety notification) that -
 - (a) is directed at designers, manufacturers, importers or suppliers generally, or at stated designers, manufacturers, importers or suppliers; and
 - (b) states requirements about the use or supply of stated electrical equipment, or a stated type of electrical equipment, including, if appropriate, requirements about preventing the use or supply of the electrical equipment or type of electrical equipment.
- (2) A designer, manufacturer, importer or supplier is taken to have enough notice of an electrical safety notification if -
 - (a) the chief executive gives the designer, manufacturer, importer or supplier a copy of the notification; or
 - (b) a copy of the notification is published in -
 - (i) the gazette; and
 - (ii) a newspaper circulating generally in the State.
- (3) The chief executive may issue an electrical safety notification only if -
 - (a) the chief executive is satisfied on reasonable grounds that -
 - (i) the supply or use of the electrical equipment, or the particular type of electrical equipment, that is the subject of the notification is putting, or will put, persons or property at electrical risk; or
 - (ii) appropriate information is not available about the electrical equipment, or the particular type of electrical equipment, that is the subject of the notification; and
 - (b) the decision to issue the notification is made by the chief executive personally; and
 - (c) the requirements included in the notification are reasonable in the circumstances.
- (4) For subsection (3)(a)(ii), information about electrical equipment, or a particular type of electrical equipment, is appropriate information if the information states -
 - (a) the use for which the electrical equipment or type of electrical equipment has been designed and tested; and
 - (b) all conditions that must be observed to ensure the electrical equipment, or electrical equipment of the type, is electrically safe."

Once an Electrical Safety Notification is issued, s. 35 operates to impose an additional obligation attracting penal sanctions under s. 27. Section 35 provides:

"35 Additional obligation of designer, manufacturer, importer or supplier of electrical equipment

A designer, manufacturer, importer or supplier of electrical equipment has an obligation to comply with the requirements of an electrical safety notification that apply to the designer, manufacturer, importer or supplier."

This Appeal is about an Electrical Safety Notification issued by the Acting Chief Executive, directed at a stated manufacturer of electrical equipment, *viz.*, Chief Kitchenware Pty Ltd (ACN 007 682 475). The Notification (dated 1 July 2008 and received by Chief Kitchenware Pty Ltd on 3 July 2008) was in the following terms (Appendix 1 omitted):

"In accordance with section 206 of the *Electrical Safety Act 2002* ('the Act') I, as Chief Executive, direct you Chief Kitchenware Pty Ltd, as manufacturer of the following bathroom light, fan, heater combination equipment:-

Brands and models as listed on certificate of approval S/1 or S/10:-

- Brand: Mistral
Models: M6600.0, M6601, M6700-DUCT, M6715DUCT, M6725.0, M6740.0, M6715 AUTOHEAT, M6705.0, M7615.0
- Brand: Airflow Sunshine (and all variations of this brand name)
Models: 6600R, 6600A, 6601A, 6625A, 6600H, 6600ATP, 6600X, 6600H, 6600D (with or without the suffix WE)
- Brand: Plugz
Models: P3NI-2, P6601
- Brand: Vogue Design
Models: VD2N1/2, VD3N1/DUCT
- Brand: Ringgrip (and all variations of this brand name)
Models: 6600.0, 6700.0, 6601.0, 6725.0, 6705.0, 6715.0
- Brand: Lanson
Models: LANFHL550W
- Brand: Clipsal
Model: 6600DH

Additionally, model not listed on approval S/1 or S/10 but included in original recall:

- Brand: P&R
Models: PR6600ATP, WE

To take appropriate action to prevent the use and supply of the electrical equipment which puts, or will put, persons or property at electrical risk.

The actions required to meet your obligations under this section of the Act include but are not limited to the following:-

1. Conduct a Public Recall consistent with the *Electrical Safety Recall Guide for Industry* as published at <http://www/erac/gov.au/news.htm>.
2. Public recall advertising to include, at a minimum, all Queensland publications listed in the *Electrical Safety Recall Guide for Industry*, as well as the 12 Brisbane suburban newspapers.
3. Public recall advertising to be included in Queensland Electrical Contractors Association publications and Electrical Trade Unions publications. This recall activity to include a request for, and assistance to, electrical contractors to review their customer records and either inform that customer of the recall or pass onto Chief Kitchenware Pty Ltd information of locations that they may have installed any of the units subject to the recall.
4. Direct notification in writing to be made to retail and wholesale outlets known to have been supplied with these units. Chief Kitchenware Pty Ltd to supply such locations with point of sale recall advertising with a request to prominently display the recall details. This recall activity to include a request for, and assistance to, such retailers/wholesalers to pass on recall details to any customers they have records of having sold the units to, and to also request Chief Kitchenware Pty Ltd be informed of outcomes of such actions.

5. Any recall newspaper and point of sale advertising to be approved by the Electrical Safety Office prior to publication and to include the wording RISK OF FIRE prominently in capital bold text.
6. The recall actions to be conducted by Chief Kitchenware Pty Ltd to include a removal of each unit identified that has 'Vollmann' brand or 'Vosslohe Schwabe' brand plastic heat lamp lampholders, or replacement of those units with units containing ceramic heat lamp lampholders, or replacing the plastic heat lamp lampholders with ceramic heat lamp lampholders in those units not removed.
7. Report to the Electrical Safety Office, 75 William Street, Brisbane, Queensland, initially on a monthly basis, on the status of the recall including (for units identified in the original recall activities already conducted as well as new units identified from the recall required by this ESN):-
 - i) The quantity of each brand and model sold;
 - ii) The quantity of each brand and model returned from retail/wholesale outlets;
 - iii) The quantity of each brand and model remaining in the marketplace;
 - iv) The quantity of each brand and model where the end user has been identified;
 - v) The quantity of each brand and model where end user has been identified and units are confirmed as having been rectified;
 - vi) The name and location of each retail/wholesale outlets informed of the recall, and details of verification that they have, or have not, informed customers, or have no customer records;
 - vii) The location (address) of each brand and model identified from response to the recall, the date Chief Kitchenware were informed, and the date of rectification, or expected date of rectification.

You must advise the Electrical Safety Office in writing within one month of receipt of this letter on the actions listed above. The report is to be made on the form in Appendix 1 accompanying this notice (or emailed electronic version).

You must also advise the Electrical Safety Office no later than the second working day of each month for a further minimum period of twelve months of ongoing progress and any further actions you are taking to ensure all of the defective units in Queensland are recovered.

The reporting arrangements and a decision on further enforcement action will be reviewed after the minimum twelve month period. Additional advertising may be required should the recall rate not be sufficient.

Failure on your part to take all reasonable action to recover all of the defective products may lead to further action under the *Electrical Safety Act 2002*. Penalties for this type of offence can be severe and in relation to a corporate defendant, can increase five fold at the discretion of the Industrial Magistrate."

The Appeal, which was filed on 4 August 2008, is limited to some aspects only of the Acting Chief Executive's decision to issue the Electrical Safety Notification, viz. those parts of the Notification which relate to bathroom fan/light/heater combination equipment which have a "Vosslohe Schwabe" brand plastic heat lampholder and those parts of the Notification which relate to certain brands and models of fan/light/heater combinations which are alleged not to have been produced. The grounds of the Appeal are:

- "(a) The Chief Executive did not have reasonable grounds, before the decision to issue the ESN [Electrical Safety Notification] to Chief [Chief Kitchenware Pty Ltd], to be satisfied that the supply or use of FLHU [Fan/light/heater] Units containing the VS [Vosslohe Schwabe] Lampholder were putting, or would put, persons or property at electrical risk.
- (b) The Chief Executive did not have reasonable grounds, before the decision to issue the ESN, to be satisfied that appropriate information was not available about the FLHU Units containing the VS Lampholder or the non-existent units.
- (c) The ESN applies to brands and models of FLHU Units that have not been produced.
- (d) The requirements included in the ESN in relation to FLHU Units containing the VS Lampholder or the non-existent units are not reasonable in the circumstances."

A Directions Order of 7 August 2008 (varied 19 September 2008), set a timetable for the exchange of affidavits and written submissions prior to a hearing scheduled to commence on 18 November 2008. When the matter was called, Mr Douglas SC for the Appellant, informed the Court that the Appellant proposed to take a point which was not raised by the Application to Appeal and which had not been canvassed in the written submissions. The point sought to be raised was that to the extent that the Electrical Safety Notification required the "recall actions" specified at paragraph 6, viz.;

"6. The recall actions to be conducted by Chief Kitchenware Pty Ltd to include a removal of each unit identified that has 'Vollmann' brand or 'Vosslohe Schwabe' brand plastic heat lamp lampholders, or replacement of those units with units containing ceramic heat lamp lampholders, or replacing the plastic heat lamp lampholders with ceramic heat lamp lampholders in those units not removed.",

the notification exceeded the statutory power vested in the Acting Chief Executive by s. 206 of the Act. Hitherto, the attack on the Electrical Safety Notification had been on the basis that the requirements of the notification were not reasonable (s. 206(3)(c)) and/or that the Acting Chief Executive did not have reasonable grounds for formation of the opinion, that supply or use of the Vosslohe Schwabe plastic heat lampholders would put persons or property at electrical risk (s. 206(3)(a)). Whilst those points were not abandoned, the Appellant sought to take as a preliminary point that paragraph (6) might not be characterised as a requirement about "use or supply". Notwithstanding that the point was taken at the very cusp of the commencement of the case and the Respondent's opposition, I allowed the Appellant to raise the point. The disruption to the orderly progress of appeals and the inevitable delay seemed to me to be an inadequate basis on which to deny the Appellant to argue a critical point which might obviate the requirement for the Appellant to put in evidence commercially sensitive and otherwise confidential material in order to go to the matters about reasonableness. For the same reasons, I ruled that the point should be determined before any evidence about reasonableness was put before the Court.

I accept the Appellant's submission that "reasonableness" of belief and of requirement is not the touchstone of validity. An Electrical Safety Notification must be directed at a person or persons described at s. 206(1)(a) and its requirements must be about the "use or supply" of electrical equipment or a stated type of electrical equipment. Section 206 cannot be read as a delegation of the legislative powers of the Queensland Parliament over electrical safety to the Chief Executive, subject only to a requirement that the Chief Executive act on reasonable grounds and impose reasonable requirements.

I accept also, that it follows from the operation of ss. 27 and 35, that s. 206 must be read as a penal provision. Because the Act imposes penalties for its breach, if two reasonable constructions are open, the more lenient one should be preferred; see *Schiliro v Peppercorn Child Care Centres Pty Ltd* (No. 2) [2001] 2QdR 538 at [75]. Particularly is that so where, as here, ss. 23 and 24 of the *Criminal Code Act 1899* are excluded, see s. 46(2) of the Act, and the Defendant is restricted to a defence based on proof that the commission of the offence was due to causes over which the Defendant had no control, see s. 46(1) of the Act.

I have not been convinced by the submission that s. 206 should be read in light of the presumption against retrospectivity. The Appellant did not have an accrued right to the various installations of its heat lamps being left in place and unmolested. In fairness, the core of the proposition seems to have been: (a) that the heat lamps had not been released to the market in a legal void but had complied with a statutory safety regime which was in force at the time; and (b) that it would be exceptional for a complying manufacturer/supplier to be expected to bear the burden of recall, repair or replacement at some future time. The difficulty of the more refined form of the submission is that s. 206 will operate (in any event) only in the exceptional case in which the belated requirement to recall, repair or replace originally compliant electrical equipment is reasonable and based on reasonable grounds. In those circumstances the submission does not justify a forced and limited reading of s. 206.

Descending to the detail of s. 206, it is immediately apparent that there are deficiencies in the drafting. One may only speculate why it is that s. 206(1)(b) twice uses the expression "use or supply" whilst s. 206(3) uses the expression "supply or use". However, that drafting seems to me to be an insufficient basis to assert that "use or supply" is a composite expression or otherwise that drafting seems to treat the disjunctive "or" as the conjunctive "and". Having said that, I hasten to add that in an appropriate case, the Chief Executive might well run the two concepts together. One may readily envisage an Electrical Safety Notification which restricts the supply of stated electrical equipment to persons proposing to use the equipment commercially. Conversely, in the case of equipment such as heat lamps, one might envisage an Electrical Safety Notification restricting the supply of the lamps to persons proposing to put the lamps to domestic use as distinct from persons proposing to use the heat lamps in aged care facilities. It seems clear also that a person who designs and manufactures a stated item of electrical equipment for his own use may be the target of an Electrical Safety Notification prohibiting that person from using the electrical equipment. It seems equally clear that an importer of stated electrical equipment may be the subject of an Electrical Safety Notification prohibiting any supply whatsoever of that equipment.

The critical issue is whether paragraph 6 of the Electrical Safety Notification is about "use" or alternatively about "supply".

In the circumstances of the case, the critical word seems to me to be the word "use". I think that I should accept that the decision of the New South Wales Industrial Relations Commission in Court Session in *WorkCover Authority (NSW) (Inspector Forster) v Osprey Manufacturing Pty Ltd* (2007) 158 IR 163 at 173, does not operate to restrict the meaning

of "supply" at s. 206(1) to the first supply by a manufacturer/importer, e.g. to a wholesaler or retailer. Given the limitations about reasonableness, requirements about "supply" may well be imposed upon a manufacturer or importer whilst the electrical equipment is in the hands of a wholesaler or retailer awaiting ultimate supply to a consumer. However, it seems to me that once the electrical equipment has reached the ultimate consumer and has been installed in a bathroom ceiling (whether or not it is technically a fixture), any scope to impose requirements about "supply" has been extinguished. Yet, even at that stage the requirement might properly be imposed about "use". For example, to take inspiration from s. 206(3)(a)(ii), a requirement about the supply of information might well be imposed upon a designer, manufacturer or supplier. In this case, of course, the requirement imposed in reliance upon s. 206 is not about the supply of information but, about recall, repair and replacement. Recall, repair and replacement seems to me to be matters which are discrete from "use" and, indeed, so discrete from "use" that any power incidental to the power to impose requirements about use may not legitimately be invoked to reach those matters. For fullness, I should note that the Electrical Safety Notification dated 1 July 2008 is not all about "recall", "repair" or "replacement". Recognising that the Appellant had neither authority nor entitlement to "recall", "repair" or "replace" items installed in the dwellings, or business premises of ultimate consumers, the Chief Executive has utilised the power to impose "requirements" likely to induce voluntary participation by the ultimate consumers in activities by way of "recall", "repair" or "replacement". Such "requirements" do not go to the use of the fan/light/heaters.

The course of argument has drifted over legislation which expressly deals with the matter of "recall" and/or "repair". In New South Wales the *Electrical Safety Act 1945* has contained an express power of recall and repair (see s. 21E) since an amendment which occurred in 1984. The successor to that Act, viz., the *Electricity (Consumer Safety) Act 2004* makes comparable provision (see s. 22). Other "recall and repair" templates are to be found in the Tasmanian *Electrical Industry Safety Administration Act 1997*, (see s. 57), the Victorian *Electrical Safety Act 1998* (see s. 65) and in the South Australian *Electrical Products Act 2000* (see s. 8). The Commonwealth Consumer Protection measure, viz. the *Trade Practices Act 1974*, has provided for "recall", "refund" and "repair" since 1986 (see s. 65F). The scheme adopted by the *Trade Practices Act 1974* has not been replicated in the local consumer protection measure, viz., the *Fair Trading Act 1989*. That may be some indication that the Queensland legislature has not lightly adopted the measures of "recall" and "repair". However, the Queensland legislature has on occasion adopted the remedy of "recall", see *Food Act 2006*, s. 217(1)(d), and on other occasions has provided for "repair", see *Electricity Act 1994*, s. 177(2).

I hasten to add that it is not suggested that the statutes are *in pari materia* with the provisions of the *Electrical Safety Act 2002*. The purpose of the journey is to demonstrate that Australian Legislatures, including the Queensland Legislature, are well capable of using the words "recall" and/or "repair". In those circumstances, it is not appropriate in the construction of a power authorising delegated legislation breach of which involves exposure to penal sanctions, to treat "recall" and/or "repair" and/or "replace" orders as authorised by words which apparently mean much less. The burden which a "recall" and/or "repair" and/or "replace" order casts upon a designer, manufacturer, importer or supplier with no property in and no right to possession of the item to be "recalled" and/or "repaired" and/or "replaced", is patent and is here, exacerbated by the intimation that "additional advertising may be required should the recall rate not be sufficient". I do not accept the Respondent's submission that, if s. 206 does not authorise "recall" and/or "repair" and/or "replace" orders, those responsible for implementation of the Act will be frustrated in the elimination of electrical risk when the risk becomes apparent after electrical equipment is installed. The powers at Part 11, Division 4 of the Act remain available, as do the powers of seizure at Part 11, Division 3.

It is unnecessary to determine whether this is a case in which s. 14B of the *Acts Interpretation Act 1954* permits reference to extrinsic materials as an aid to interpretation. I have been taken to the Minister's Second Reading Speech and to the Explanatory Note relating to s. 206 of the Act. Neither the Second Reading Speech nor the Explanatory Note is helpful.

The Second Reading Speech of the then Minister (the Honourable G. Nuttall) is largely in general and aspirational terms. However, at 2723 of the Weekly Hansard for the week commencing Tuesday, 6 August 2002, the Honourable Minister is recorded as saying:

"The Electrical Safety Bill will also establish clear obligations on persons and entities about electrical safety. Obligation holders include designers, manufacturers, importers, suppliers, self employed persons, employers, persons in control, electricity entities; repairers, installers, workers and other persons. Those obligations are consistent with the workplace health and safety obligations in the *Workplace Health and Safety Act 1995*."

If one turns to the *Workplace Health and Safety Act 1995* in the form which it took as at August 2002, the nearest equivalent to s. 206 of the *Electrical Safety Act 2002* was s. 185. With respect to the Honourable Minister, there were significant differences between the two sections. Importantly, s. 185 of the *Workplace Health and Safety Act 1995* authorised the Chief Executive to require a designer, manufacturer, importer or supplier of plant or specified high risk plant, to prevent the use of unsafe plant at a workplace or elsewhere, but did not permit the Chief Executive to descend into the detail of how prevention was to be achieved. The provision which was the closest equivalent to s. 35 of the *Electrical Safety Act 2002* was s. 32(4). Section 32(4) imposed upon a designer, manufacturer, importer or supplier of

plant which was specified high risk plant, the obligation to take the action the Chief Executive reasonably required to prevent the use of unsafe plant anywhere. Ironically, there was a statutory example of the operation of s. 32(4)(b). The example given was "The Chief Executive may require a designer, manufacturer, importer or supplier of plant to recall the plant to prevent its use.". Section 35 of the *Electrical Safety Act 2002* does not, of course, give such a statutory example. For completeness, I note that the statutory example was removed by the *Workplace Health and Safety and Other Acts Amendment Act 2003* which reformulated s. 32 as s. 34.

The Explanatory Note to clause 206 of the Electrical Safety Bill 2002 is simply incorrect. It is in the following terms:

"Clause 206 allows the Chief Executive to issue a notification requiring a designer, manufacturer, importer or supplier of electrical equipment to prevent the use or supply of unsafe electrical equipment that puts or will put, the user at electrical risk."

The whole point of s. 206 is that it authorises the Chief Executive to impose requirements about how the use or supply of electrical equipment is to be prevented and, in cases where supply and use is not to be prevented, impose requirements about use and supply. The Explanatory Note to clause 35 compounds the error. The Explanatory Note drops the reference to "use", refers to "... any action the Chief Executive reasonably requires to stop electrical equipment that is not electrically safe from being supplied to another person" and also, refers to clause 204 whereas the correct clause was cl. 206.

The more intriguing aspect of the Explanatory Note to the Electrical Safety Bill 2002, appears in the notes to Schedule 1. Schedule 1 was the location of the provisions which made consequential amendments to other Acts. The Explanatory Note to clause 27, which omitted s. 177 of the *Electricity Act 1994* (to which I have previously referred), was in the following terms:

"Clause 27 omits section 177, which deals with making unsafe things safe, as this matter has been dealt with in the Bill."

The first issue of course is whether s. 206, which is plainly a section about making unsafe things safe, deals with the topic in the same way. The second issue is whether the counterpart provisions are truly found in Part 11, Division 4 rather than s. 206. However, at the point at which one begins to deal with those matters, one has ceased to use the Explanatory Note as an aid to construction of the Act and has embarked upon construction of the Explanatory Note.

In short, even if reference to the extrinsic materials is permissible, I can find nothing in those materials to support the expansive construction from which Counsel for the Respondent is compelled to contend.

I allow the Appeal. I set aside the Electrical Safety Notification issued by the Acting Chief Executive, dated 1 July 2008 and directed at Chief Kitchenware Pty Ltd (ACN 007682475).

I doubt that there is power to award costs but, as a matter of prudence, I reserve all questions as to costs.

Dated 9 December 2008.

D.R. HALL, President.

Appearances:

Mr R.J. Douglas SC and with him Mr J.M. Harper, instructed by Holding Redlich Lawyers for the Appellant.

Released: 9 December 2008

Mr S.P. Sapsford, directly instructed for the Respondent.

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INDUSTRIAL COURT OF QUEENSLAND

Dangerous Goods Safety Management Act 2001 - s. 105 - stay of operation of directive

Freight Specialists Pty Ltd AND Queensland Hazardous Industries Chemical Branch (C/2008/47)

PRESIDENT HALL

10 December 2008

REPORT ON DECISION (as edited)

In giving a Decision from the Bench on 10 December 2008, the President said:

"Having heard Mr Bradac for the Applicant (and potential Appellant) and having heard Mr Matthews for Queensland Hazardous Industries and Chemicals Branch of Workplace Health and Safety Queensland (hereafter HICB) and by consent of the parties, I stay the Directive, serial number D506795 issued on 18 November 2008, until completion of a Review of the Directive by Mr Harry Pirvics, Director of HICB pursuant to s. 102 of the *Dangerous Goods Safety Management Act 2001*.

On the basis of that which I have been told, I grant the Director of HICB, liberty to apply for the revocation of the stay, if the information sought by the Director's letter of 26 November 2008 (directed to Mr Aaron Howard-Smith of Freight Specialists Pty Ltd), is not provided within seven days of today's date, or such longer period as the Applicant (and potential Appellant) and HICB may agree.

In those circumstances, the only proper course is to adjourn the proceedings and I do."

Dated 10 December 2008.

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

Appearances:
Mr J. Bradac for the Applicant.
Mr P. Matthews of Workplace Health and Safety, Legal and
Prosecution Services, for the Respondent.

Released: 10 December 2008

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INDUSTRIAL COURT OF QUEENSLAND

Dangerous Goods Safety Management Act 2001 - s. 105 - stay of operation of directive

Freight Specialists Pty Ltd AND Queensland Hazardous Industries Chemical Branch (C/2008/47)

PRESIDENT HALL

10 December 2008

ORDER

Having heard Mr Bradac for the Applicant and *having heard* Mr Matthews for the Respondent and *by consent* of the parties, the Court orders that the Directive, serial number D506795 issued on 18 November 2008, be stayed until completion of a Review of the Directive pursuant to s. 102 of the *Dangerous Goods Safety Management Act 2001*, by the Director of Queensland Hazardous Industries and Chemicals Branch of Workplace Health and Safety Queensland (hereafter HICB).

Liberty to apply for the revocation of the stay is granted to the Director of HICB, if the information sought by the Director's letter of 26 November 2008, is not provided within seven days of today's date or such longer period as the Applicant and Respondent (HICB) may agree.

Dated 10 December 2008.

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

Operative Date: 10 December 2008.
Order - Stay
Released: 10 December 2008.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Workers' Compensation and Rehabilitation Act 2003 - Chapter 4, Part 6 - protection for injured workers

**David Stuart Randle AND Osborne Family Trust
(TD/2008/124)**

DEPUTY PRESIDENT BLOOMFIELD

11 December 2008

DECISION

On 11 August 2008 Mr David Stuart Randle lodged an application for reinstatement with the Queensland Industrial Relations Commission (the Commission), purportedly made pursuant to s. 74 of the *Industrial Relations Act 1999*. The application sought that Mr Randle be reinstated to his former position as a concrete agitator truck driver with Osborne Family Trust.

In his application Mr Randle stated he injured his back at work on 15 July 2008 in the course of swinging a hammer. On 22 July 2008 (this might actually have been 21 July 2008 - see below) he was told by Mr Kym Osborne, in words to the effect, "*David I have to let you go. You cannot work while you are injured and I have employed someone else fulltime. Sorry, but I came around to tell you. I'm giving you a weeks notice.*".

When the matter came on for hearing in Cairns on 8 December 2008 Mr Randle tendered a letter from WorkCover Queensland, dated 15 October 2008, which disclosed that WorkCover had accepted Mr Randle's application for workers' compensation for an injury sustained on 15 July 2008, said to be an acute left C6-7 disc injury with neurological compression.

This information had the effect of altering the nature of Mr Randle's reinstatement application from one involving a dismissal because of an absence from work, or for some other reason, to one involving a dismissal of an injured worker, as contemplated by Part 6 of Chapter 4 of the *Workers' Compensation and Rehabilitation Act 2003* (Workers' Compensation Act).

To obviate the inconvenience which would be caused if Mr Randle was required to lodge a fresh application under section 232E of the Workers' Compensation Act, Mr Osborne, as the representative of the Respondent, consented to Mr Randle's original application of 11 August 2008 being amended to record that it was an application lodged pursuant to the Workers' Compensation Act rather than the *Industrial Relations Act 1999*.

Accordingly, I intend to deal with, and determine, the application under the relevant provisions of the Workers' Compensation Act (i.e. Part 6 of Chapter 4).

Relevantly, the Workers' Compensation Act provides:

- A worker must not be dismissed solely or mainly within 12 months after the worker sustains an injury because the worker is not fit for employment in a position because of the injury (s. 232B(1)).
- An employer who wants to employ a replacement worker while an injured worker is not fit for employment in a position because of the injury may engage a replacement but must give that worker a written notice informing that person of the temporary nature of the employment and the injured worker's right to return to work (s. 232C).
- The worker may apply to the employer, within 12 months after the injury, for reinstatement to the workers' former position (s. 232D(1)).
- The worker must give the employer a Doctor's Certificate that certifies the worker is fit for employment in the former position (s. 232D(2)).
- The Commission may make a reinstatement order if satisfied the worker is fit for employment in the former position (s. 232E(3)).
- Any reinstatement order may specify terms of reinstatement including, for example, the day the reinstatement is to take effect (s. 232E(4)).
- The only order the Commission may make on an application under section 232E is a reinstatement order under the section (s. 232F(2)).

Mr Randle's Evidence

In addition to the information recorded above, Mr Randle also said he had suffered a pinch to a nerve between his C6-7 vertebrae in approximately October 2007 which necessitated 10 days off work on workers' compensation.

Further, Mr Randle advised the Commission he had been given no indication his position at work was on the line before he was dismissed by Mr Osborne on, he believed, 22 July 2008. While he had hit a small cylinder valve under the truck in the first few weeks of employment, caused \$11,000 damage to the back of a hire car which had changed lanes in front of him and been photographed running a red light, he regarded those accidents and incidents as being no different to the types of problems encountered by many other professional drivers, including other employees of Mr Osborne.

Mr Randle also indicated that he had been cleared to resume work on a graduated basis commencing 5 November 2008 by a WorkCover Doctor, a Dr Todd. However, because this was only part-time work (4 hours per day) and because of problems with the regularity of payments by WorkCover, he began to look for full-time employment in order to meet his living and other expenses. After working with a roofing company for 2 and a bit days he had to cease that work because of the effect it was having on his injured back. Ultimately, he found employment with a different roofing company on, he believed, Thursday 23 November 2008 and was still employed with that company at the time of the hearing.

Mr Randle said that he was now fit to resume his previous driving duties with Osborne Family Trust and sought reinstatement to his former position, a role which he enjoyed and which paid more than his current employment. However, he also indicated in closing submissions he had "slackened off" in about the last month of his employment after discovering that another worker was being paid more than him. He also expressed his concern that any reinstatement order might be problematic because of the deterioration in the relationship between himself and Mr Osborne as a result of the current case and the prelude to it.

Mr Osborne's Evidence

Mr Osborne said the Osborne Family Trust (as distinct from JTBO Pty Ltd, the Corporate Trustee) operated 3 concrete agitator trucks which were contracted to carry concrete for a major cement manufacturing firm in Cairns. After employing Mr Randle in July 2007 he established that Mr Randle had a criminal record which required him to report to a parole officer each Thursday. Mr Osborne said he was not impressed that this history was not disclosed to him during the employment interview.

Mr Osborne also recounted a series of other events and incidents concerning Mr Randle's employment, which I summarise, essentially using Mr Osborne's own words, as follows:

- 9 October 2007 - David went on compo for his sore back. In the Report it said, "*he hurt his back while sitting in the truck adjusting the mirror.*". 10 days off.
- 17 March 2008 - David ran a red light resulting in a traffic fine. He did not inform me of this until I received a traffic infringement notice in the mail 2 weeks later. Because David was concerned he would have no points left on his license if he signed for the infringement we reached an agreement the Trust would pay the fine. He agreed to pay us back an amount that he could afford every week. He still owes us \$735.00.
- 25 March 2008 - While delivering a load of concrete he drove up the rear end of a rental car. The damage cost to the car was \$11,065.53. The excess on our insurance, which we have paid for, was \$1,500.00 as well as higher premiums.
- 23 June 2008 - David rang to say he was sick (one day off).
- 24 June 2008 - David told me he had to have days off to appear in court for accumulation of points on his license. I was not happy as I thought we had solved the problem with us paying the fine. He wanted me to write a letter to the court saying that if he lost his license he would lose his job. I did this but he told me the letter was no good and it had to be more official. We had a letter drafted by a JP and signed it. David was happy then.
- 14 July 2008 - David told me he hurt his heel jumping out of the truck, so he went home at 10.30am. The truck had delivered three loads.
- 15 July 2008 - It was a wet day. David did 2 loads for the day. David has worded in his statement that he hurt his back on 15 July. Company policy is that if you are injured at work you must inform your superior of your injury and write out a written report. This procedure was not followed.
- 16 July 2008 - This was another wet day with no concrete delivered. David kept asking if he could go home early as there was no work on. He kept harping about wanting to go home. The company drivers heard what was going on so, for a bit of fun, they placed large concrete blocks around his car. This resulted in a wrestling match with one of the company drivers in the crib room. I saw no evidence of a sore back in the days before this wrestling match.
- 17 July 2008 - David came to see me in the morning and said his back was sore. I was not happy and told him to go home, (as) he was no good to me with a sore back.
- 18 July 2008 - Cairns show holiday.

- o 21 July 2008 - *"I went to see David at home after I finished work, where he showed me the sick leave papers from his Doctor, and said he did not know when he would be back at work. Workers' compensation medical certificate shows estimated time to return to normal work duties as UNKNOWN. This is when I told him I would have to let him go, as I could not work like this anymore. I had to find a permanent driver, as the company (Pioneer North Queensland) was not happy with the truck parked all the time. I told him I would give him a weeks (sic) notice with pay, plus all his holiday entitlements."*

Elsewhere in his written statement (Exhibit 4) and verbal evidence, Mr Osborne indicated that the above history showed the Trust had: "been down a bumpy road with David"; been very tolerant with David in helping him to keep his job; given David advances on his pays; worked out his child support and traffic infringement dramas; and, incurred considerable cost in truck downtime, extra wages, traffic fines, damage to vehicles, increased WorkCover policies, higher insurance premiums and accounting fees.

Mr Osborne also indicated that his experience with David had "slowly worn him down" to the point where the lack of certainty about when, and if, David could return to work had become "the straw that broke the camels back".

Finally, Mr Osborne informed the Commission he had not appealed WorkCover Queensland's decision to accept Mr Randle's workers' compensation claim.

Conclusions

Notwithstanding Mr Osborne's assertions that the decision to terminate Mr Randle's employment was based on considerations associated with Mr Randle's overall performance as a driver, I have reached the clear conclusion that the decision to terminate was grounded solely or mainly on Mr Randle's inability to attend for duty because of the workplace injury sustained on 15 July 2008. Indeed, Mr Osborne's evidence about how, and why, he informed Mr Randle on 21 July 2008 of his termination (see chronology above) allows for no other conclusion.

In the normal course of events Mr Randle would be entitled to receive an order from the Commission directing his reinstatement into his former position, in accordance with s. 323F of the Workers Compensation Act. However, Mr Randle has not yet given the employer (or the Commission) a Doctor's certificate which certifies that he is fit for employment in his former position as a concrete agitator truck driver with Osborne Family Trust. As such, the Commission cannot be satisfied that Mr Randle is fit for employment in his former position (see s. 232E(3)). Further, Mr Randle has expressed reservations about whether the former employment relationship could be restored.

In all of the circumstances, I propose to defer the making of any order in this matter pending a conference between the parties to see if the issues associated with a potential return to work can be addressed and resolved. To this end, I direct that there be a conference of the parties before Commissioner G.K. Fisher (by telephone) at 9.00am on Tuesday 16 December 2008.

I further request Commissioner Fisher to inform me after her participation in the conference simply whether the matter has been resolved between the parties or whether the Commission as presently constituted is required to make a determination in respect of the matter. If the latter situation be the case I shall immediately direct that the conference conclude and shall resume the matter as a formal hearing. At that time I shall ask each of Mr Randle and Mr Osborne to make any further submissions they might need to make in respect of the matter before I issue a final decision.

It would assist the proceedings on 16 December 2008 if Mr Randle could obtain an opinion from a medical practitioner prior to that date as to his fitness, or otherwise, to resume work in his former position.

The Commission determines and orders accordingly.

A.L. BLOOMFIELD, Deputy President.

Appearances:

Mr D. Randle, Applicant, conducting his own case.

Mr K. Osborne, Respondent, conducting his own case.

Hearing Details:

2008 8 December

Released: 11 December 2008

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