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INDUSTRIAL COURT OF QUEENSLAND

Workers' Compensation and Rehabilitation Act 2003 - s. 561(1) - appeal against decision of industrial magistrate

Acehigh Pty Ltd AND Q-COMP (C/2008/36)

PRESIDENT HALL 10 November 2008

DECISION

In February 2007, WorkCover Queensland exercised the authority vested in it by s. 56 of the *Workers' Compensation and Rehabilitation Act 2003* (the Act) to re-assess the premium for Acehigh Pty Ltd's Policy of Accident Insurance for the period 1 July 2003 to 30 June 2004, and issued a re-assessment premium notice for the period. Whereas the original assessment for the 2003/2004 financial year had been issued on the basis of Acehigh Pty Ltd being the employer of only one worker (to whom total wages of $55,000 had been paid), the re-assessment was based on the hypothesis that 23 named individuals who had performed work for Acehigh Pty Ltd over the period (and whose wages totalled $523,797.10) were also workers employed by Acehigh Pty Ltd. Acehigh Pty Ltd sought a Statutory Review. Q-COMP confirmed the decision of WorkCover. There was an appeal to the Industrial Magistrate's Court at Townsville. On 4 July 2008, the Acting Industrial Magistrate into whose hands the matter had fallen dismissed the appeal. Acehigh Pty Ltd now appeals to this Court. As in the proceedings before the Acting Industrial Magistrate, the issues are whether the named individuals were "workers" and whether Acehigh Pty Ltd was their "employer".

It is common ground that the Court is concerned with the Act in the form which it took over the premium period, and that the relevant version of the Act is captured by the document commonly referred to as Reprint No. 1. When one goes to Reprint No. 1, one finds that the starting point is s. 11 which provided:

"**11. Who is a 'worker'**

(1) A **'worker'** is an individual who works under a contract of service.

(2) Also, a person mentioned in schedule 2, part 1 is a **'worker'**,

(3) However, a person mentioned in schedule 2, part 2 is not a **'worker'**.".

The Review Decision reversed WorkCover's conclusion that the requisite degree of control existed in the relationship between Acehigh Pty Ltd and the 23 named individuals to warrant characterisation of the contract as a "contract of service" for the purpose of s. 11(1). That matter was not further agitated before the Acting Industrial Magistrate. All attention focused on s. 11(2) and Schedule 2, Part 1 which provided:

"**PART 1 - PERSONS WHO ARE WORKERS**

1. A person who works under a contract, or at piecework rates, for labour only or substantially for labour only.

2. A person who works for another person under a contract (regardless of whether the contract is a contract of service) is a worker unless -

(a) the person performing the work -

(i) is paid to achieve a specified result or outcome; and
(ii) has to supply the plant and equipment or tools of trade needed to perform the work; and
(iii) is, or would be, liable for the cost of rectifying any defect in the work performed; or

(b) a personal services business determination is in effect for the person performing the work under the *Income Tax Assessment Act 1997* (Cwlth), section 87-60.".

It is common ground that there was not in effect a "personal services determination" for the purposes of s. 2(b). The Review Decision reversed WorkCover's conclusion that the 23 individuals were not paid to achieve a specified result or outcome but, confirmed WorkCover's conclusions that s. 2(a)(ii) and (iii) were satisfied and WorkCover's decision that the 23 individuals were not workers by operation of s. 2. That issue was not re-opened before the Acting Industrial Magistrate. The issue pursued before the Acting Industrial Magistrate was whether, as each of WorkCover and the Review Officer had concluded, s. 1 operated to deem the 23 individuals to be "workers" for the purposes of the Act. The Acting Industrial Magistrate answered the question in the affirmative. In my view Her Honour was correct.

This Court has been required to address the difficulties posed by s. 1 of Schedule 2, Part 1 on other occasions, see *WorkCover Queensland v J.M. Kelly (Project Builders) Pty Ltd* (2003) 173 QGIG 589 and *Brett Holt Plumbing Pty Ltd v Q-COMP Review Unit* (2005) 178 QGIG 255. The difficulties arise from the use of antipathetic adjectives, *viz.,* "substantially" and "only". The effect of the decisions of this Court is that one should focus upon the remuneration paid rather than upon the nature of the contract, should adopt a robust approach and should inquire whether in reality or "to all intents and purposes" the remuneration is for "manual labour". That is what the Acting Industrial Magistrate did. Her Honour's "Reasons for Decision" include the passage:

"The test to be applied in this matter is that stated by His Honour President Hall in the matter of *Brett Holt Plumbing Pty Ltd v. Q-Comp Review Unit.*

'Having regard to the nature and purpose of the statutory benefits scheme, the scheme at s. 12 and Schedule 2 and the deficiencies in the language of Schedule 2, Part 1, s. 1, it seems to me that the second limb of the section is about the remuneration paid under a contract, not the nature of the contract, and is satisfied where in reality or "to all intents and purposes" the remuneration is in return for manual labour.'.

The Respondent, Q-Comp, in reviewing WorkCover's decision was in agreeance with the decision-maker's finding that:

'the supply of glue, fastenings and plaster were incidental supplies and that the independent contractors were engaged substantially for their labour only.'.

The evidence adduced in this matter relates mainly to a number of invoices which were issued to Acehigh Pty Ltd by the various contractors. On no invoice that I viewed were any of the materials supplied by the contractors itemised. I note there is no obligation for the contractors or for Acehigh Pty Ltd to provide or require this information on their respective invoicing and payment systems. Essentially the Appellant argues that the details on the invoices are insufficient to conclude that the contractors worked for substantially labour only.

In [sic] note in particular, on this point, page 13 of the Appellant's written submissions where it is stated:

'It is impossible to conclude that the "substantially for labour only" test is satisfied under circumstances in which, as is the case here, a component as essential to the completion of the plastering job as, for example, the plaster itself (as opposed to the plasterboard) is supplied by the named contractors.'.

I note, and I do not think it is a point of contention, that all materials supplied by the contractors are essential to the completion of the plastering job. But, with respect, and as was rightly pointed out by Counsel for the Respondent, that is not the test. The test is to consider what the remuneration was for.

In my opinion it was open to Q-Comp to make the decision it did. When one views the invoices and considers what the contractors were actually paid for it would seem clear to me that the work involved in fixing and plastering the plasterboard sheeting was 'to all intents and purposes' what the contractors invoiced Acehigh Pty Ltd for. It would therefore follow that I am in agreeance with the Q-Comp decision that the contractors worked under a contract for substantially labour only.

It would also therefore follow that I am satisfied that the contractors were 'workers' within the definition in Part 1, Section 1 of the Act.". [Footnotes omitted.]

On the Appeal to this Court, Senior Counsel for Acehigh Pty Ltd presses the proposition that one cannot conclude that the "substantially for labour only" test is satisfied where a component as essential to the completion of the plastering job as the plaster itself (as opposed to the plasterboard) was supplied by the 23 named individuals. With respect, when one puts aside issues about the nature of the contract and focuses on "what the remuneration was for" it seems to me that one can conclude that "to all intents and purposes" the remuneration was "for labour only". Each tradesman was asked to come and put up the plasterboard. On a robust approach, one may reach that conclusion and conclude also that the materials supplied, important though they may have been, were but incidentals though the invoices do not tease out the components of the total sum. The difficulty created by the invoices is that they confirm the Review Officer's opinion that the 23 named individuals were paid to achieve a result or outcome.

A convenient starting point is s. 30 of the Act which provided:

"**30 Who is an 'employer'**

(1) An **'employer'** is a person who employs a worker and includes -
(a) a government entity that employs a worker; and
(b) a deceased employer's legal personal representative.

(2) Also, a person mentioned in schedule 3, part 1 is an **'employer'**.

(3) However, a person mentioned in schedule 3, part 2 is not an **'employer'**.

(4) A reference to an employer of a worker who sustains an injury is a reference to the employer out of whose employment, or in the course of whose employment, the injury arose.".

From that point one goes to Schedule 3, Part 2 which provided:

"SCHEDULE 3

WHO IS AN EMPLOYER

…

PART 2 - PERSONS WHO ARE NOT EMPLOYERS

1. A person is not the employer of a person who works for the person under a contract (regardless of whether the contract is a contract of service) if -

(a) the person performing the work -

(i) is paid to achieve a specified result or outcome; and
(ii) has to supply the plant and equipment or tools of trade needed to perform the work; and
(iii) is, or would be, liable for the cost of rectifying any defect in the work performed: or

(b) a personal services business determination is an effect for the person performing the work under the *Income Tax Assessment Act 1997 (Cwlth)*, section 87-60.".

If s. 1(a) of Schedule 3, Part 2 is given a literal construction, the inevitable consequence of the operation of s. 1(a) of Schedule 3, Part 2 upon the findings of the Review Officer which were not reopened below, is that Acehigh Pty Ltd is not, for the purposes of the Act, an employer of any of the 23 named individuals.

At paragraph [22] of the Appellant's written outline of argument, Senior Counsel for the Appellant submits:

> "[22] At p.5 of his reasons, the learned Acting Industrial Magistrate accurately articulated the appellant's contentions so far as concerned the scope and effect of Schedule 3 Part 2 where he said:
>
>> It was argued … that Section 1, Part 2 of Schedule 3, read literally and given its plain meaning, combined with the Review Officer's decision, would lead to a conclusion that Acehigh Pty Ltd are [sic] not the employers of the contractors and therefore not liable to the amended premium.".

In my view the contention jumps the style.

I quite accept that s. 1(a) of Schedule 3, Part 2, if read literally and given its plain meaning, operates upon the Review Officer's decision to produce a conclusion that Acehigh Pty Ltd was not the employer of any of the 23 named individuals. However, I also accept that s. 1 of Schedule 2, Part 1, if read literally and given its plain meaning, operates upon the facts as found by the Acting Industrial Magistrate (which findings are confirmed by this Court) to produce a conclusion that each of the 23 named individuals is a "worker".

The proposition that a person who performs work for another is a "worker", whilst the person for whom work is performed is not an "employer", is a proposition with a ring of novelty about it. Particularly is that so where the proposition is developed about a relationship subject to the Act. One might reasonably enquire rhetorically whether the "worker" is to be entitled to all of the statutory benefits under the Act whilst no one is to be required to pay premiums to finance the provision of the benefits. The outcome produced by literal construction of the Act is simply anomalous. I accept the submission of Senior Counsel for the Appellant that at the end of the day, any conflict between the proposition that the individuals were "workers" and the proposition that Acehigh Pty Ltd was not the employer of any one of them, may be overcome by falling back upon the established tenet of statutory interpretation which holds that, where it is not possible to reconcile two provisions within an Act, the latter provision prevails over the earlier: *Wood v Riley* (1867) LR 3 CP 26; *Mount Isa Mines Limited v FCT* (1976) 10 ALR 629 at 639; *Ross v R* (1979) 25 ALR 137 at 145 and *Lyons v Registrar of Trademarks* (1983) 50 ALR 496 at 508. However, it seems to me that before taking the singular step of rendering nugatory s. 1, Schedule 2, Part 1 of the Act, the Court should go to the legislative history and any extrinsic materials to which the *Acts Interpretation Act 1954* authorises reference. The ultimate objective is to give preference to the interpretation which will best achieve the purpose of the Act, compare *Acts Interpretation Act 1954*, s. 14A.

By s. 14B of the *Acts Interpretation Act 1954* reference to extrinsic materials is permitted, where there is ambiguity and where the ordinary meaning of legislation would lean to an unreasonable result. It seems to me that the perplexing conundrum thrown up by the literal construction of the Act does constitute ambiguity. It seems to me also that a construction, which might potentially lead to the creation of unfunded liabilities, is a construction which would lead to an "unreasonable" result.

As mentioned above, it is common ground that the relevant form of the Act is accurately captured by Reprint No. 1. Reprint No. 1 produces the Act in its unamended form. It precedes the amendment affected by the *Workers' Compensation and Rehabilitation and Other Acts Amendment Act 2004* and for that reason, I put aside the Explanatory Notes to the Workers' Compensation and Rehabilitation and Other Acts Amendment Bill 2004 relied upon by the Respondent. The Explanatory Notes to the Act are, in themselves, unhelpful. There is a reason for that.

The precursor to the Act was the *WorkCover Queensland Act 1996*. That Act was substantially amended by the *Workplace Health and Safety and Other Acts Amendment Act 2003*. The amendments were to take effect on 1 July 2003. In fact, before the amendments took effect on 1 July 2003, the *WorkCover Queensland Act 1996* was superseded by the *Workers' Compensation and Rehabilitation Act 2003* (the Act) which, in all material respects, itself commenced on 1 July 2003. In defining "worker" and "employer" and enhancing the definition of "worker" and "employer" at the Schedules, the Act adopted the changes which would otherwise have been made by the *Workplace Health and Safety and Other Acts Amendment Act 2003*. As a matter of first impression I should have thought that reference might be had to the Explanatory Notes to the Workers' Compensation and Rehabilitation Bill 2003. I quite accept that the Explanatory Notes or Memorandum relating to an earlier (abandoned) Act does not appear in the list of extrinsic materials at s. 14B(3) of the *Acts Interpretation Act 1954*. However, the prefatory words to s. 14B(3) are:

> "***extrinsic material*** means relevant material not forming part of the Act concerned, including, for example…".

Given that "for example" gives emphasis to what is in any event an "inclusionary" definition, and given that it is arguable that even prior to the enactment of s. 14B of the *Acts Interpretation Act 1954*, regard might have been had to the earlier Act and its Explanatory Notes (compare Pearce and Geddes, *Statutory Interpretation on Australia*, 5th Ed, at paragraphs [3.28] and [3.29], it seems to me to be appropriate to have regard to the Explanatory Note to Schedule 3 of the Workers' Compensation and Rehabilitation Bill 2003 which importantly records:

"**SCHEDULE 3**

PERSONS WHO ARE EMPLOYERS

> This schedule replaces Schedule 2A of the *WorkCover Queensland Act 1996* specifying who is an employer of a worker, eg. Labour hire agencies and holding companies are specified as employers of those workers who they arrange to do work for someone else.
>
> This clause incorporates changes made to schedule 2A of the *WorkCover Queensland Act 1996* by the *Workplace Health and Safety Amendment Act 2003* inserting a new part 2 (persons who are not employer) which specifies that a person is not an employer of a person who works for the person (regardless of whether the contract is a contract of service) if the person performing the work can satisfy all three elements of the results test, or it can be shown that a personal services business determination is in effect for the person under the *Income Tax Assessment Act 1997* (Cwlth).".

There is nothing in the text of the *Workplace Health and Safety and Other Acts Amendment Act 2003*, to suggest that the Legislature was about the significant and dramatic task of accepting responsibility for unfunded liabilities. I doubt that the Act is taxing legislation. In any event the example to s. 14A of the *Acts Interpretation Act 1954* is germane. The scheme developed by the Legislature seems to have been to deny that a person for whom work is performed by another is an employer, where the person performing the work is paid to achieve a specified result or outcome and has to supply the plant and equipment or tools of trade needed to perform the work and is, or would be, liable for the cost of rectifying any defect in the work performed. Having denied that such a person is an "employer", the measure also denies that the person performing the work is a "worker". I accept that when one goes to the Explanatory Notes there are passages which taken literally and out of context, suggest that the purpose of the measure was to deny that certain persons were employers and, as a complimentary proposition, deny that those performing the work for the "non-employers" were "workers". Although the Minister's Second Reading Speech is unhelpful, the Minister's Reply at Weekly Hansard, 30 April 2003 at pp. 1460-1463, contains language to the same effect. However, all that was said was said in the context of adoption of the so-called "results test" to determine who was an employer and who was an employee. Neither the Explanatory Notes nor the Minister's Reply touch upon the impact (if any) which s. 1 of Schedule 3, Part 2 was to have upon the situation in which persons were characterised as "workers" independently of the "results test". Indeed, one who sourced information only in the Explanatory Note and in the Minister's Reply would have been unaware that there was such an issue to be dealt with. In my view, there is nothing to suggest that the amendments were directed at that issue. It seems to me that s. 1 of Schedule 3, Part 2 and s. 2 of Schedule 2, Part 1 are complimentary, but that s. 1 of Schedule 3, Part 2 has no role to play where a person is otherwise a "worker" for the purposes of the Act.

It follows that I agree with the decision of the Acting Industrial Magistrate. I dismiss the Appeal. I reserve all questions as to costs. If need be, submissions about costs will be taken in writing.

Dated 10 November 2008.

D.R. HALL, President.

Released: 10 November 2008

Appearances:
Mr M. Grant-Taylor SC, instructed by Connolly Suthers Lawyers, for the Appellant.
Mr P. Rashleigh, directly instructed for the Respondent.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 284 - interpretation of industrial instruments

Department of Employment and Industrial Relations AND Peace Lutheran Church Gatton Inc t/as Anuha Services (B/2008/60)

DEPUTY PRESIDENT SWAN 17 November 2008

DECISION

Pursuant to s. 284 of the *Industrial Relations Act 1999* (the Act), the Department of Employment and Industrial Relations (the Department) filed an application for interpretation of the *Civil Construction, Operations and Maintenance General Award - State 2003* (the Award) for the purpose of interpreting clauses 6.1.1 and 6.4.2 of the Award.

Because the Award is a common rule Award, those for which the Award has application were notified of this matter. The Australian Workers' Union of Employees, Queensland (AWU) sought and was granted leave to appear.

The 2 questions posed are as follows:

"(a) Does subclause 6.1.1 of the award for Day Workers apply to the employee.

(b) Do overtime rates as per clause 6.4.2 of the award apply to the work the employee performed on Saturdays and Sundays, as this work was outside the conditions set in clause 6.1.1 and in particular, outside the ordinary hours of work prescribed at subclause 6.1.1(b).". [Application for Interpretation, 22 July 2008.]

The history of the matter is contained within the Statement of Agreed Facts:

"In relation to the above-mentioned matter, both Julie Anne Whelan, Industrial Inspector, of the Department of Employment and Industrial Relations for Maurice Hennessy, and Robert Evelyn of Peace Lutheran Church Gatton Incorporated agree that the following facts are not disputed by either party:

1. Maurice Arthur Hennessy was employed by Peace Lutheran Church Gatton Incorporated trading as Anuha Services. Anuha Services is a Disability Support Service which provides employment and lifestyle support to people with a disability. The service operates 24 hours a day, seven days a week.

2. Anuha Services has a contract with the Gatton Shire Council (now Lockyer Valley Regional Council) for the supervision of its transfer stations and the collection of kerbside recycling conducted as part of its supported employment program for people with a disability. Mr Hennessy was not a client of the service, his work complemented the services programs by provision of additional income to support the organisations programs.

3. His period of employment was from 6/1/2003 to 12/12/2007.

4. He was employed as a transfer station operator at the Helidon Transfer Station. This site is open from 9.00am to 5.00pm. No work was performed outside of these hours.

5. Mr Hennessy was a part-time employee and worked a minimum of three (3) days a week usually from Friday to Sunday.

6. Mr Hennessy worked eight (8) hours per day from 9.00am to 5.00pm. He worked alone at the site every work day but received supervision by the recycling supervisor on a regular basis. He did not have any worker replace him at the end of his work day and no work was performed by anyone before 9.00am at his site.

7. His duties were to supervise the activities of the recycling transfer station including directing and supervising customers in the recycling and dumping of waste and ensuring all activities on site were in accordance with contract requirements.

8. While performing the duties of this job, Mr Hennessy was required to work outside. When Mr Hennessy was not attending to his outside duties he worked in a site office.

9. For the period of 6/1/2003 to 27/4/2003 the work undertaken by Mr Hennessy was covered by the conditions of the Civil Construction, Operations and Maintenance General Award - State.

10. For the period 28/4/2003 to 26/3/2006 the work undertaken by Mr Hennessy was covered by the conditions of the Civil Construction, Operations and Maintenance General Award - State 2003.

11. For the period 27/3/2006 to 12/12/2007 the work undertaken by Mr Hennessy was covered by the conditions of the Civil Construction, Operations and Maintenance General Award - State (Napsa - Qld).".

Relevant legislation

Section 284 of the Act states:

"(1) The commission may give an interpretation of an industrial instrument, other than a certified agreement or QWA, on application by -

(a) the Minister, or

(b) an organisation; or

(c) an employer; or

(d) a person who satisfies the commission that the person is not an officer of, or acting for, an eligible association; or

(e) an inspector.

(2) The Commission may give an interpretation of a certified agreement on application by -

(a) the Minister; or

(b) an organisation, or other person, bound by the agreement; or

(c) an employee whose employment is subject to the agreement; or

(d) an inspector.

(3) The Commission may give an interpretation of a QWA on application by -

(a) a party to it; or

(b) an inspector.

(4) If an inspector's application under this section relates to an alleged ambiguity, the commission must hear and decide the application in the absence of a statement of agreed facts.".

The Award

Clause 1.3.12 of the Award states:

"Employees of contractors and sub-contractors to Joint Boards and Local Authorities within the meaning of the *Local Government Act 1993* who carry out works other than construction and/or maintenance of roads which is normally carried out by employees of Joint Boards or Local Authorities under the provisions of the Local Government Employees' (Excluding Brisbane City Council) Award - State.".

Clause 6.1.1 of the Award states:

"**6.1 Hours of work and shift work**

6.1.1 *Day workers*

(a) Subject to clause 6.2, and subject to the exceptions hereinafter provided, the ordinary hours of work shall be an average of 38 per week, to be worked on one of the following bases:

(i) 38 hours within a work cycle not exceeding 7 consecutive days; or

(ii) 76 hours within a work cycle not exceeding 14 consecutive days; or

(iii) 114 hours within a work cycle not exceeding 21 consecutive days; or

(iv) 152 hours within a work cycle not exceeding 28 consecutive days.

(b) The ordinary hours of work prescribed shall be worked Monday to Friday inclusive.

(c) The ordinary hours of work prescribed herein shall be worked continuously, except for meal breaks between 6.00 a.m. and 6.00 p.m.

The spread of hours prescribed herein may be altered as to all or a section of employees provided there is agreement between the employer and the majority of employees concerned:

Provided further that work done outside the hours of 6.00 a.m. to 6.00 p.m. in these circumstances shall be paid at overtime rates and will be deemed to be part of the ordinary hours of work for the purposes of this clause 6.1.

(d) The ordinary starting and finishing times of various groups of employees or individual employees, may be staggered, provided that there is agreement between the employer and the majority of employees concerned.

(e) The ordinary hours of work prescribed herein shall not exceed 10 hours on any day:

Provided that where the ordinary working hours are to exceed 8 on any day, the arrangement of hours shall be subject to the agreement of the employer and the majority of employees concerned:

Provided further that by arrangement between an employer, the Union concerned and the majority of employees in the work section or sections concerned, ordinary hours not exceeding 12 on any day may be worked subject to:

(i) the employer and the employees concerned being guided by the occupational health and safety provisions of the ACTU Code of Conduct on 12 hour shifts;

(ii) proper health monitoring procedures being introduced;

(iii) suitable roster arrangements being made; and

(iv) proper supervision being provided.

(f) Employees are required to observe the nominated starting and finishing times for the work day, including designated breaks to maximise available working time. Preparation for work and cleaning up of the employee's person shall be in the employee's time.

(g) The span of ordinary hours set out in clause 6.1.1(c) shall not apply to street sweepers and/or cleaners including operators of street sweeping and flushing machines, mechanical brooms etc.

The starting and finishing times of these employees shall be determined by the employer based on the requirements of the work.

When these employees are required to work ordinary hours before 6.00 a.m. or after 6.00 p.m. they shall be paid a loading of 25 percent on their ordinary time rate for all such time worked prior to 6.00 a.m. or after 6.00 p.m.

(h) When an employer considers it necessary on account of tidal or flood waters, or to cater for the needs of industry, including safety vehicular traffic, concrete pours, asphalt laying and/or geographical factors such as seasonal climatic extremes, etc. to work employees in the civil construction Etc. or Crown streams outside the span of ordinary working hours, such work may be done outside the span of ordinary working hours without payment of overtime provided the ordinary number of working hours determined in any one day is not exceeded and work is performed only during daylight hours.

(i) Cooks - Department of Main Roads - The ordinary hours of Cooks shall be between 5.00 a.m. to 8.00 p.m.".

Clause 6.1.2 of the Award states:

"6.1.2 *Hours for shift workers*

(a) The ordinary working hours of continuous shift workers and shift workers whose work is connected with or incidental to any continuous process shall average 38 hours per week inclusive of crib time and shall not exceed 152 hours in 28 consecutive days:

Provided that, where the employer and the majority of employees concerned agree, a roster system may operate on the basis that the weekly average of 38 hours is achieved over a period which exceeds 28 consecutive days. Subject to the following conditions, such shift workers shall work at such times as the employer may require.

For the purposes of clause 6.1.2:

(i) "Day shift" shall commence at or after 6.00 a.m. and before 12 noon;

(ii) "Afternoon shift" shall commence at or after 12 noon and before 6.00 p.m.;

(iii) "Night shift" shall commence at or after 6.00 p.m. and before 6.00 a.m.

(iv) "Continuous shift work" means work that is continuous for 24 hours per day for an unbroken period of one lunar month, or 28 days, except in the case of floods or breakdowns or shutting down for holidays:

Provided that by mutual consent provision may be made for the rotation of shifts.

(b) A shift shall consist of not more than 10 hours inclusive of crib time:

Provided that:

(i) in any arrangement of ordinary working hours where the ordinary working hours are to exceed 8 on any shift the arrangement of hours shall be subject to agreement between the employer and the majority of employees in the work section or sections concerned; and

(ii) by agreement between an employer, the Union concerned and the majority of employees in the plant, work section or sections concerned, ordinary hours not exceeding 12 on any day may be worked subject to:

(A) the employer and the employees concerned being guided by the occupational health and safety provisions of the ACTU Code of Conduct on 12 hour shifts;

(B) proper health and monitoring procedures being introduced;

(C) suitable roster arrangements being made; and

(D) proper supervision being provided.

(iii) except at the regular changeover of shifts an employee shall not be required to work more than one shift in each 24 hours.".

Clause 6.4.2 of the Award states:

"**6.4 Overtime**

…

6.4.2 Except as hereinafter provided all authorised work performed outside the normal starting and ceasing times as prescribed by roster established pursuant to clause 6.1, on any one day, shall be deemed to be overtime and shall be paid for at the rate of time and a-half for the first 3 hours and double time thereafter:

Provided that all authorised overtime performed on a Saturday or its equivalent shall be paid for at the rate of time and a-half for the first 3 hours and double time thereafter with a minimum of 3 hours' payment at overtime rates:

Provided further that all authorised overtime performed on a Sunday or its equivalent shall be paid for at the rate of double time with a minimum of 3 hours' pay at overtime rates.".

Overview of the Department's claim

The original complaint was made by a former employee of Peace Lutheran Church Gatton Incorporated trading as Anuha Services (the employer), Mr Maurice Arthur Hennessy (the employee). The employee was represented by the Department.

The employer has a contract with the Lockyer Valley Regional Council (formerly the Gatton Shire Council) (the Council) for the supervision of its transfer stations and the collection of kerbside recycling.

The employee was engaged to work as a transfer station operator at the Heildon Transfer Station on at least 3 days per week. These days were usually Friday, Saturday and Sunday. The employee worked on his own each day from 9.00 a.m. to 5.00 p.m.

The employee was not a client of the employer, although he was sometimes employed as a Disability Support Worker on days when he was not working at the transfer station.

The Department stated that the employee was a "day worker" (clause 6.1.1 of the Award) and as such was entitled to the overtime rates pursuant to clause 6.4.2 of the Award for time worked on Saturdays and Sundays. The time being worked on these days was time worked outside of the ordinary hours prescribed for day workers in clause 6.1.1(b) of the Award.

The Department asserted that of the 3 categories of employees covered by the Award (i.e. day workers, shift workers, other than continuous shift workers), the applicable category for this employee was that of "day worker".

Clause 6.1.2 of the Award ("shift workers") could not apply to this employee because it refers to "continuous shift workers" and "shift workers whose work is connected with or incidental to any continuous process". Continuous shift work is defined as "work that is continuous for 24 hours per day for an unbroken period of one lunar month, or 28 days, except in the case of floods or breakdowns or shutting down for holidays.". [Clause 6.1.2(a)(iv) of the Award.] This provision clearly does not relate to this employee.

The Department pointed out that clause 6.4.2 of the Award provides that for all authorised overtime worked on a Saturday and/or a Sunday, the penalty rates of time and a-half for the first 3 hours on Saturday and double time on Sunday apply. There is little question that the overtime was "authorised".

The Department stated that the Award did not have a provision for part-time employment, other than what was prescribed in clause 4.2 of the Award which reads as follows:

"Part-time work can be performed by agreement in the circumstances specified in the Family Leave Award and the Family Leave Award - Queensland Public Sector.".

This clause was not applicable to the employee.

The only other categories are full-time and casual employment. The employee was not a casual employee. The employee was paid annual leave and sick leave. There was no series of engagements which might indicate casual employment. Rather, the employee's contract of employment stated that he was to be employed at the transfer station on at least 3 days per week, Friday to Sunday in addition to any other employment as required.

The Department submits:

"Notwithstanding the use of the word 'part-time' by the employer, the employee was by default a full time employee on day work and entitled to the provision of work for the ordinary hours as set out in sub clause 6.1.1. The fact that the employer did not provide a full 38 hours of work per week (apart from when the employee relieved other staff between Mondays and Thursdays), or did not count the hours worked under a different award, does not alter this entitlement.". [Department's submissions, p. 5.]

Further, the Department added:

> "Weekend penalty rates provide for time and a half from midnight Friday to midnight Sunday whereas overtime rates provide for time and a half for the first 3 hours on Saturday and double time thereafter and all double time on Sunday. If the Department's interpretation of the relevant clauses of the award is correct, the employee has been underpaid throughout the period of his employment.". [Department's Submissions, p. 1.]

The employer's position

The employer's submission was that the Award did not apply to its workers. In fact, it was put that this employee was award-free. The contradiction between this submission and the Statement of Agreed Facts is dealt with in the conclusion to this decision.

The employer's decision to pay the employee the rates which it did on a Saturday and Sunday came from the use of a "standard that we were using in some of the other awards that we used for our support workers within our organisation". [Transcript, Day 2, p. 2-12.]

The employer referred to clause 1.3.12 of the Award. That clause is as follows:

> "Employees of contractors and sub-contractors to Joint Boards and Local Authorities within the meaning of the *Local Government Act 1993* who carry out works other than construction and/or maintenance of roads which is normally carried out by employees of Joint Boards or Local Authorities under the provisions of the Local Government Employees' (Excluding Brisbane City Council) Award - State.".

The employer says that the use of the word "works" precludes its work from being caught by the Award. The employer said it did not conduct any "works" for local authorities. The work performed by the employee was supervising vehicles when they came to the transfer station and directing people to either recycle their waste or to place it into a receptacle. A different contractor then moved the receptacle away. This type of work was more akin to "road works" which was excluded from the Award.

There are 3 categories of workers envisaged within this Award. Those categories are "day workers", "continuous shift workers" and "other than continuous shift workers". The employer contends that none of those categories fit the employee in question.

The employer said that overtime is not payable unless an employee works beyond 38 hours per week. The employee does not fit into that category. The employee worked part-time and that category is not permitted within the Award. Also, while acknowledging that there is "no continuous shift work that's done" [Transcript, Day 2, p. 2-15], the employer stated that "our intent is that the work done is in fact classed as a shift of an eight hour duration … We do have a continuous shift process, not necessarily directly related to the employment, but the organisation certainly does operate on that basis.". [Transcript, Day 2, p. 2-15.]

The employer said that he employed the employee for 24 hours per week and at no time did the employee ask to work a full 38 hour week.

The employer maintained that the employee was engaged on a part-time basis but not according to clause 4.2 of the Award. The Award did not contemplate part-time work of the nature performed by the employee and consequently, the employee was award-free.

The contract between the employer and the Council did not allow for the working of a 38 hour week by the employee. The employer said that there was no question of further working hours being offered to the employee because he was only ever offered 24 hours per week according to the contract.

The AWU's position

The AWU supported the Department's claim. Reference was made to the objects of the Act, and specifically section 3(j):

> "**3 Principal object of this Act**
>
> The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by -
> …

(j) promoting and facilitating the regulation of employment by awards and agreements; and …".

Clause 2 of the Agreed Statement of Facts shows that the employer has a contract with the Council "for the supervision of its transfer stations and the collection of kerbside recycling". The AWU states that this is work usually performed by a local authority and in this instance, it is work being performed by a contractor for the relevant local authority. In this case, clause 1.3.12 of the Award is applicable.

Clause 7 of the Statement of Agreed Facts says:

> "His duties were to supervise the activities of the recycling transfer station including directing and supervising customers in the recycling and dumping of waste and ensuring all activities on site were in accordance with contract requirements.".

Within the Award, a specific reference is made to a "refuse tip supervisor". This was the type of work being performed by the employee and therefore, the Award applies.

The AWU viewed the stance taken by the employer as one where an employer had structured its working arrangements in an attempt to have its employees sit outside of the applicable Award.

The AWU does not quarrel with the employer's right to have its employees work prescribed hours but what the AWU does say is that those employees must be paid correctly. In this employee's case, he could only fit into 3 possible categories: i.e. "day worker" (clause 6.1.1 of the Award), "continuous shift worker" (clause 6.1.2 of the Award) and/or "other than continuous shift worker" (clause 6.1.3 of the Award).

Against that background, the only logical conclusion to be drawn is that clause 6.1.1 of the Award applies. This clause relates to "day workers".

The employee was only offered 3 days work per week but was available to work for the employer in a different capacity as and when required. This extra work, as a matter of fact, was performed as required by the employer.

The Department's submissions

Clause 6.1.3 of the Award prescribes the hours for "other than continuous shift workers". While there is no definition of shift worker, clause 6.1.3(e) of the Award makes reference to the "regular changeover of shifts" and employees not being required to "work more than one shift in each 24 hours". This provision does not relate to the employee in question.

Consequently, as "subclause 6.1.2 applies to shift workers involved in a continuous roster or process over 24 hours, and subclause 6.1.3 applies to shift workers where there is more than one shift per day but the roster is not continuous over 24 hours" [Department's submissions, p. 2] the Department says that the employee can only be a day worker pursuant to clause 6.1.1 of the Award.

Clause 6.4.2 of the Award provides that all authorised overtime worked on Saturday and/or Sunday should be paid at time and a-half for the first 3 hours on Saturday and double time thereafter and double time on a Sunday.

When an employee is a day worker, time worked on a Saturday or Sunday is not worked at ordinary time (clause 6.1.1(b) of the Award). The time worked on a Saturday and/or Sunday must be overtime. There was no question that the work was authorised.

In considering the employer's submission that the employee was not a day worker (and consequently not covered by the Award), the Department believed that this would create an "unfair, unjust, or absurd situation in that none of the provisions of clause 6.1 covering hours of work applied to the employee and he would have had no entitlement to overtime (apart from that prescribed in the Act) irrespective of what time of the day or night he worked, or which days he worked.". [Department's submissions, p. 4.]

The Department submits that even though the employer has used the words "part-time employee", the employee was by default a full-time employee on day work and entitled to the provision of work for the ordinary hours as per clause 6.1.1 of the Award. The fact that the employer did not offer the employee 38 hours of work per week does not alter the employee's entitlement.

In *T.J. Metcalfe v B.P. Dance, Executor of the Will of A.A.A. Dance, Deceased* (42 QGIG 708), the President and one other Member of the Industrial Court of Queensland held that an employee was entitled to the minimum weekly wage (plus overtime) in this situation only if the employee was available to work the ordinary working hours. The dissenting Member of the Court held that:

> "It seems to me that in this case the employer arranged hours of work other than those provided in the Award and that he forfeited voluntarily a privilege granted him by the Award, viz. requiring the employee to work ordinary hours. However by this voluntary action he should not in my opinion be entitled to deprive the employee of his weekly rate of pay.". [See also *re Sugar Industry Award - State* - Payment of Overtime to Shift Workers, who worked Overtime on Saturday, but Lost time during the Week on Account of Wet Weather. Case stated for the opinion of the Court. (23 QGIG 692); *re Sugar Industry Award - State - Overtime* (23 QGIG 827); and *re Sugar Industry Award - State* - Interpretation (50 QGIG 9).]

The Department related the history of the Award from 1920 when the Local Authorities Award - State (Local Authorities Award) was introduced as a consolidated award to replace a number of local authority awards. In 1990, Crown and local authority employees were provided with the 38 hour week average cycles. The current Local Authorities Award was made on April 2003.

In that Award, a new definition of "refuse tip supervisor" was made and this was included under the wage classification of "Construction, Maintenance and General Workers Grade IV". The Department states that the definition of "refuse tip supervisor" covered exactly the type of duties and nature of work being performed by the employee in this matter.

During 1992, a new subclause was inserted into clause 1.2 of the Award covering employees of contractors and subcontractors to local authorities who were carrying out works other than construction and/or maintenance of roads which is normally carried out by employees of local authorities.

The hours clause at 4.1 of the 1992 Award provided for day workers, continuous shift workers and other than continuous shift workers and this did not change in the updated 1999 Award and the current 2003 Award.

From that history of the Award, "examination of the precedent awards offers little assistance other than to confirm that there was no suggestion or intention to alter the generally accepted concept of day workers and shift workers, nor does there appear to be any intention to allow employees (other than shift workers) to work on a Saturday or Sunday without the payment of prescribed overtime rates.". [Department's submissions, p. 8.] There has been no part-time provisions in either the Local Authorities Award or the Award. Employees under both Awards were either full-time or casual.

Conclusion

Despite the Statement of Agreed Facts stating that the employee was, at all relevant times, employed pursuant to the Award, the employer has submitted that the employee was award-free. Notwithstanding that, I have duly considered the employer's submissions given at this hearing.

I have accepted that the Award applied to the employee.

The nature and type of work being undertaken by the employee falls under the Award. The agreed Statement of Facts at point 7 says that the employee's duties were to "supervise the activities of the recycling transfer station including directing and supervising customers in the recycling and dumping of waste and ensuring all activities on site were in accordance with contract requirements.". Point 6 of the Agreed Statement of Facts says that the employee "worked alone at the site every work day but received supervision by the recycling supervisor on a regular basis.". While these statements appear slightly contradictory, there is no confusion around the type of work performed. Work of this nature is covered by this Award.

I have accepted the submissions which show that the employee could not be classified as a "shift worker" or "other than continuous shift worker". Whilst the employee worked less than full-time hours, he was not a part-time employee within the meaning of the Award. He was not and could not be a part-time employee and he was also not a casual employee.

The question is more whether the hours worked qualify the employee to be considered as a day worker.

It does not matter that the employer only wanted to or only could employ the employee for 24 hours per week. That reasoning does not provide an excuse for not adhering to the Award provisions. Were that reasoning to be correct, it would permit any employer to alter an employee's working hours to ensure that the employee may be deemed to be award-free.

The employee could only work 24 hours per week because that was all that was offered to him. The employee was available to work at other times when requested by the employer in a different capacity and did so. The employee's availability to work extra hours was apparent.

The employer's submission that clause 1.3.12 of the Award placed the type of work being performed by the employee outside the ambit of the Award, holds no merit. The type of work performed by the employee was not akin to "road works". The work being performed by the employee fell squarely under the type of work covered by the Award.

In response to the questions posed in the application:

Question (a): "Does subclause 6.1.1 of the award for Day Workers apply to the employee?".
Answer: Yes.

Question (b): "Do overtime rates as per clause 6.4.2 of the award apply to work the employee performed on Saturdays and Sundays, as this work was outside the conditions set in clause 6.1.1 and in particular, outside the ordinary hours of work prescribed at subclause 6.1.1(b)?".
Answer: Yes.

Order accordingly.

D.A. SWAN, Deputy President.

Hearing Details:
2008 20 August
1 October

Released: 17 November 2008

Appearances:
Mr E.J. Carfrae, of the Department of Employment and Industrial Relations, the applicant.
Mr R. Evelyn, of Peace Lutheran Church Gatton Inc t/as Anuha Services, the respondent.
Mr D. Broanda, of The Australian Workers' Union of Employees, Queensland.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 474
Industrial Relations Regulation 2000 – s. 20

(Matter No. RIO/2008/177)

NOTICE OF APPLICATION FOR AMENDMENT OF ELIGIBILITY RULE OF AN INDUSTRIAL ORGANISATION

NOTICE is hereby given that an application has been made for an amendment to the Eligibility Rules of the Building Service Contractors' Association of Australia – Queensland Division, Industrial Organisation of Employers.

Interested persons may obtain a copy of the application from the Applicant.

All Notices of Objection to such amendment must be lodged in the Registry within thirty-five days from the date of publication of this Notice.

Dated 17 November 2008.

G.D. SAVILL,
Industrial Registrar.

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QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 427
Industrial Relations Regulation 2000 – s. 20

(Matter No. RIO/2008/178)

NOTICE OF APPLICATION FOR ALTERATION OF LIST OF CALLINGS OF AN INDUSTRIAL ORGANISATION

NOTICE is hereby given that application has been made to register an amendment to the List of Callings of the Building Service Contractors' Association of Australia – Queensland Division, Industrial Organisation of Employers.

Interested persons may obtain a copy of the application from the Applicant.

All Notices of Objection to such registration must be lodged in the Registry within thirty-five days from the date of publication of this Notice.

Dated 17 November 2008.

G.D. SAVILL,
Industrial Registrar.

QUEENSLAND GOVERNMENT GAZETTE NOTICE

Notification of Approval of Forms under the
Workers' Compensation and Rehabilitation Act 2003

1. Approval of Forms

The form mentioned in the following table was approved by the Chief Executive Officer, Q-COMP on the date listed:

TABLE

Item	Approval Date	Form Heading	Form Number	Version Number
1	12 November 2008	Claim Form	FM200	3

2. Availability of forms

(a) Copies of this form are available from WorkCover Queensland at 280 Adelaide Street Brisbane Queensland 4000 or GPO Box 2459, Brisbane Qld 4001, or telephone 1300 651 387.

(b) Copies of this form are available from Q-COMP at 347 Ann Street Brisbane Queensland 4000 or PO Box 10119 Brisbane Adelaide Street, Brisbane Queensland 4000, or telephone 1300 361 235.

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