QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 – s. 287 – application for declaration of general ruling about a minimum wage for all employees

Gordon Nuttall, Minister for Industrial Relations AND Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employers and Others (No. B1106 of 2002)

PRESIDENT HALL
VICE PRESIDENT LINNANE
COMMISSIONER EDWARDS

18 December 2002

DECLARATION OF A GENERAL RULING

On 11 July 2002 Gordon Nuttall, Minister for Industrial Relations, made application under s. 287(1)(c) of the *Industrial Relations Act 1999* for a declaration of a general ruling about a Queensland minimum wage. Pursuant to a directions order issued by the Industrial Registrar the application was advertised in diverse newspapers circulating within the State of Queensland.

By an application filed on 12 November 2002 the application of 11 July 2002 was substantially amended. The applicant summarised the changes as follows:

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- The application is seeking a general ruling about a QMW for all employees, including those employees covered by industrial instruments and those who are not – the original application sought a QMW only for employees not covered by industrial instruments.
- The amended application seeks that the full bench establish equivalent hourly minimum rates of pay also by way of a general ruling – the original application sought these rates be established by way of a statement of policy.
- The equivalent minimum hourly rates should apply to hours that are worked in excess of 40 hours a week – the original application is silent on what rates apply beyond 40 hours a week.".

The changes were so significant that the Industrial Registrar issued a further directions order requiring re-advertising and the Bench issued directions for the filing of additional written submissions by the applicant and all interested parties. The matter was heard on 5 and 17 December 2002. Because of the novelty of the application and because some claims advanced at the hearing trespassed beyond the ambit of the amended application we reproduce its terms (formal parts omitted):

"1. On 30 May 2001, the Report of the Pay Equity Inquiry, conducted by Commissioner Glenys Fisher, was handed to the Government. The Report included a recommendation to amend **section 287 of the *Industrial Relations Act 1999* to provide that at least once each calendar year a full bench of the Commission make a general ruling about a Queensland minimum wage for all employees, including those not covered by industrial instruments.** ~~the *Industrial Relations Act 1999* to provide for a minimum wage for all employees, including those not covered by industrial instruments~~.

2. On 3 December 2001, the *Industrial Relations Act 1999* (Section 287 (2)) was amended to give effect to the recommendation of the Pay Equity Inquiry **by requiring the** ~~to require a~~ full bench to ensure ~~of the Queensland Industrial Relations Commission (QIRC) to make~~ a general ruling about a Queensland Minimum Wage for all employees **is made** at least once each calendar year.

3. The Commission may bring on a hearing on this matter on its own initiative, or hear an application by an industrial party.

~~4. To date, applications by unions for a general ruling for the flow on of wage increases arising from the National Wage Case decisions have only applied to employees covered by awards.~~

5. **There is no general ruling currently operating in respect of a Queensland Minimum Wage for all employees. The current Queensland Minimum Wage of $431.40 established by the state wage case decision 2002 (170 QGIG 436) applies only in respect of employees covered by awards and operates as a statement of policy to be inserted into awards on application.**

6. **In order for the bench to discharge its obligation under section 287 (2) of the *Industrial Relations Act 1999,*** this application seeks a general ruling of the QIRC to establish the Queensland Minimum Wage at $431.40 per week for full-time adult employees **working a 40 hour week, including those who are covered by industrial instruments and those** who are not covered by industrial instruments.

7. The application further seeks ~~to~~ **that the bench** establish, **by way of general ruling,** equivalent hourly minimum rates of pay for ~~other~~ **employees** ~~not covered by industrial instruments~~, who are not adults or who are not working on a permanent or full-time basis (such as juniors, casuals and part-time employees) ~~by way of statement of policy~~. **The application seeks that the equivalent hourly minimum rates be based on a 40 hour week.**

8. **The application seeks also that the minimum hourly rate apply to hours that are worked in excess of 40 hours a week.**

9. In **making a general ruling** ~~issuing a statement of policy~~, the Commission is requested to consider the range of possible provisions for exemptions for groups of employees or for other special factors, **including incapacity to pay.** ~~Provisions such as Economic Incapacity to Pay will be submitted.~~

10. **The applicant seeks to have the matter listed for hearing as soon as practicable so that further directions may be issued.** ~~The applicant seeks to have the matter of the establishment of the Queensland Minimum Wage joined with the State Wage Case hearings, which have been set down for 22 July 2002. However, in making this application there is no intention to delay the State Wage Case. In the event that it is not possible to have the matters joined without causing a delay, the Commission is requested to set down dates for formal hearings as soon as practical.~~

~~11. The Commission is requested to issue the relevant notice as provided for in section 287(2) of the *Industrial Relations Act 1999* advising parties of the potential of a General Ruling occurring in regard to the establishment of a Queensland Minimum Wage~~.

12. The applicant is of the view that directions regarding dates for the filing of submissions and future hearing dates should not be substantially different from the directions that were issued from the bench on 31 October 2002.".

Section 287(1) provides:

"The full bench may make general rulings about –

(a) for employees bound by an industrial instrument – an industrial matter, to avoid a multiplication of inquiries into the same matter; or

(b) a review of a general employment condition under chapter 2;[76] or

(c) a Queensland minimum wage for all employees.".

It is unnecessary in these proceedings to consider the extent to which the discretion at s. 287(1)(c) – or for that matter at s. 287(5) – is controlled by the duty at s. 287(2). It is sufficient to record that there is a duty to make a general ruling of the type at s. 287(1)(c) in each calendar year.

The submissions about grant of the relief sought to workers in award free areas and the arguments about the extension of the relief or any part of it to workers engaged under industrial instruments were so different that we propose to deal separately with workers in award free areas and workers whose engagement is governed by an industrial instrument.

Award Free Areas

The proposal that by way of a general ruling the Commission should declare a minimum wage of $431.40 per week for workers in award free areas has overwhelming support. The support is in no way surprising. $431.40 per week is the existing minimum wage for workers whose engagement is regulated by an industrial award, see 170 QGIG 438. The existing minimum wage has its basis in the need to protect and enhance the dignity of the poorest and most vulnerable workers in the economy. Extension of the minimum wage to the award free sector will further contribute to attainment of that goal. We note that the rate sought is consistent with the Western Australian minimum rate and the minimum rate operating under the Federal system of workplace relations. We consider that a minimum weekly wage of $431.40 should be set by way of a declaration of general ruling in the award free sector.

There was agreement that an hourly rate should be set. We share the view of the parties. Though little is known of the award free sector, the suspicion is that it is redolent with other than full-time employment.

Whilst the parties are agreed that an hourly rate should be set, there is disagreement as to the rate. The parties representative of union interests seek to derive an hourly rate by applying a divisor of 38 to the weekly rate of $431.40. The applicant and those representing employer interests contend for a divisor of 40. We consider the correct divisor is 40. We accept the submission of the applicant that some awards of the Commission continue to provide for a 40 hour week and that in a case conducted largely without evidence and on a "fairness" basis it would be inappropriate to treat a 38 hour week as a notional minimum in the award free sector. We add for ourselves that using 38 as the divisor may well cause employees who were required to volunteer cost offsets as the price of a reduction of the working week from 40 to 38 hours to feel that they were hard done by.

The applicant and the parties representing union interests contended that casual employees in the award free sector should enjoy a 23 per cent loading on the hourly rate. At least some of the parties representing employer interests were prepared to acquiesce to a loading albeit at a lower level than 23 per cent. In our view the short answer to the debate about recognition of the casual loading is that it is about a matter outside the ambit of both the original and the amended claim. Whilst the Commission is authorised to act of its own motion, the Commission is not authorised to deny natural justice. The Commission must take into account that the burden of the proposed general ruling will fall upon persons who have not actively participated in the proceedings. All that such persons could know about the proceedings is what they glean from the advertisements and perusal of the application (as amended) at the office of the Industrial Registrar. The claim for recognition of the casual loading must be rejected. Given the likelihood that the matter of a loading for casual workers in the award free sector will be revisited, we take the liberty of adding that in the sector regulated by industrial instruments the casual loading compensates casual employees for the circumstance that they are not entitled to benefits, e.g. annual leave and sick leave, which are available to employees on indefinite engagements. Save as to long service leave, employees other than casuals in the award free sector do not enjoy such benefits.

We accept the applicant's submission that a full-time employee in the award free sector who works more than 40 hours a week should be paid at the hourly rate for the additional hours. Having explicitly made the assumption that a working week in the award free sector is 40 hours of work, we could scarcely do anything else. However, we reject the submission that hours in excess of 40 hours a week should attract penalty rates. On the arguments which have been put we are yet to be persuaded that hours in excess of normal hours should notionally be treated as overtime hours.

Plainly enough the declaration sought might be shortened and simplified to a ruling that employees in the award free sector are to be paid $431.40 divided by 40 per hour. However, simplicity can create complexity. There is room for concern that such a declaration might be read as applicable only to hourly engagements. We have decided to make a declaration in repetitious form.

The parties are not *ad idem* as to the hourly rate for workers in the award free sector who are not adults. We are not disposed to accept the submission that workers who are not adults should receive the rate of $431.40 divided by 40 per hour. Whilst awards of the Commission continue to distinguish between adult rates and junior rates, it would be inappropriate to make no such distinction in the award free sector. Any industrial organisation which wishes to mount a "junior rates case" is at liberty to do so.

Selecting appropriate junior rates is a difficult task. We have to accept that whilst Queensland awards set junior rates as a proportion of the adult rate, the proportion nominated for a particular age group is not constant from one award to another. Part of the difficulty (no doubt) is that because the award rate is not the proposed minimum rate the money outcome produced by the application of particular proportions will vary from award to award. The applicant submits that a table of proportionate amounts derived from what appear to be relatively standardised proportionate amounts for juniors developed in Western Australian awards should be applied in the award free sector. The problem is that the table is very much more generous than a large number of Queensland awards – many of them significant. Adoption of the table in the award free sector would create expectations of a "flow-on" which it might be difficult to deny. We adjourn the application insofar as it relates to junior rates. We shall list it early in 2003.

The general ruling is to apply to all employees as defined in s. 5 of the *Industrial Relations Act 1999*. Educating the employers of such persons about the making of the general ruling will inevitably take some time. For reasons subsequently to be developed it is appropriate to give the general ruling an operative date of the beginning of the first pay period after 1 April 2003 in its application to the award regulated sector. We consider that the same date of operation should apply in the award free sector. Hopefully, the issue of junior rates will be resolved by that time.

Workers Governed by Industrial Instruments

The applicant urges that the Commission should abandon the system of regulating the minimum wage for award employees by way of a Declaration of Policy pursuant to s. 288 followed by an award by award application of the policy by Commissioners sitting alone. We are satisfied that the Declaration of Policy has not flowed into all awards of the Commission. Doubtless, many of the awards which have been drawn to our attention will

be rescinded in the course of the Award Review Process. In other cases, because all employees are in fact working pursuant to certified agreements or (perhaps) Federal awards, the omission to flow the declared minimum wage into the award is of no practical consequence. However, we think that awards should be modernised and that there is merit in dealing with the matter of the minimum wage in the area regulated by industrial instruments by way of a declaration of general ruling in order that the process of "updating" becomes a mere ministerial task for the Industrial Registrar. The concern is with areas of employment where the declared minimum wage has been flowed into the award. Where that process has been undertaken, consistently with the Commission's Declaration of Policy and Statement of Principles, adjustments will have been made to such matters as hourly rates and junior rates. In our view those who have taken the initiative to develop a tailor made response to the Declaration of Policy should not have "one size fits all" draft clauses imposed upon the award by the Commission. In our view awards which have been modified in accordance with the Declaration of Policy should be exempted from any general ruling declared in these proceedings. We also consider that those in industries where the Declaration of Policy has not been flowed into the award should be given a reasonable period of time to bring themselves within the exemption. For that reason we propose to delay the date of operation of the Declaration of General Ruling in the area regulated by industrial instruments. In that area the Declaration will operate from the beginning of the first pay period commencing after 1 April 2003.

The distinction between award free employment and award regulated employment is not entirely sharp. Some workers are award free because they have been expressly excluded from the operation of an otherwise applicable award. Indeed, it would not surprise if in the case of "inclusive" awards, e.g. awards which apply to the classifications in the award wages clause, particular categories of employee have been deliberately omitted. It would in our view be wrong simply to override consciously made decisions. We accept that some of the omissions may be accidents of history or founded in facts or social values of doubtful present relevance. However, the proper course is to allow such matters to be tested. The delay in the date of operation until the beginning of the first pay period commencing after 1 April 2003 has the advantage that those interested in preserving such exclusions may make application for exemption from the proposed general ruling and to bring the matter on for hearing before the existing exclusion is overridden. The anticipation is that once the teething problems are dealt with, General Rulings about a minimum wage will issue at the same time as State Wage decisions.

It has been drawn to our attention, and we accept, that some awards currently fix an introductory wage lower than $431.40. Once again it would not surprise if, in the case of some of the awards fixing a rate lower than $431.40 per week, the parties are using the rate as an "introductory wage" though that phrase is not used and it was not the original purpose of the rate to serve as an introductory wage. The delay until April 2003 will enable those interested to make a case for exemption.

The applicant presses for an exemption in terms of principle 13 of the Declaration of Policy and Statement of Principles 2000 about the matter of incapacity to pay. The proposal has little appeal. The consequence of such an approach would be that in any particular case the issue whether a particular employee is entitled to exemption will be determined by the exercise of judicial rather than arbitral power. It seems to us that if the concepts at principle 13 are to operate equitably and flexibly it should be given effect as an exercise of arbitral power bearing in mind that any genuine applicant will be in straitened circumstances. Given the delayed date of operation we propose to deal with such applications pursuant to s. 287(5). There is absolutely no reason, particularly in the case of employers in remote areas, why the evidence might not be taken by one member of the Commission and considered by the Full Bench.

It is we think common ground that the following should be denied the benefit of the general ruling –

(i) disabled persons or other persons working in supported employment service;

(ii) persons whose services are paid wholly by Commission or percentage rewards;

(iii) piece rate workers;

(iv) volunteers; and

(v) apprentices and trainees registered under the *Training and Employment Act 2000.*

Consistently with the decision in the Shift Allowance Case and the Casual Loading Case we have decided that the general ruling shall not be applicable to an engagement regulated by a certified agreement at the date of release of this decision during the currency of that certified agreement.

Dated 18 December 2002.

D.R. HALL, President.

D.M. LINNANE, Vice President.

K.L. EDWARDS, Commissioner.

Released: 18 December 2002

Appearances:

Mr T. Shipstone for the applicant.

Mr C. Simpson, and later Mr J. Sharpe, for The Australian Workers' Union of Employees, Queensland.

Mr M. Brady for the Queensland Council of Unions.

Mr J. Dwyer, and later Ms S. Lindsay, for Queensland Chamber of Commerce and Industry Limited, Industrial Organisation of Employees.

Mr B. Petley for the Retailers' Association of Queensland Limited, Union of Employers.

Mr K. Law for The Restaurant and Caterers Employers Association of Queensland Industrial Organisation of Employers.

Mr G. Muir of Employer Services for Fast Food Chains Association Inc.