QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 163 - application for Decision about designated Award

Torres Strait Island Regional Council and Others (CA/2011/16)
Queensland Services, Industrial Union of Employees
AND Torres Strait Island Regional Council (CA/2012/4)
The Australian Workers' Union of Employees, Queensland
AND Torres Strait Island Regional Council (CA/2012/8)

DEPUTY PRESIDENT SWAN 26 April 2013

DECISION

[1] The original application before the Commission (CA/2011/16) has been made by the Torres Strait Island Regional Council (TSIRC). That application seeks the certification of a Certified Agreement between the TSIRC and its employees.

[2] The matter has been before the Commission on a prior occasion for a preliminary determination (CA/2012/4 and CA/2012/8).

[3] In that preliminary determination, the question related to whether The Australian Workers' Union of Employees, Queensland (AWU) and the Queensland Services, Industrial Union of Employees (QSU) (the unions) could, pursuant to s. 163(2) of the Industrial Relations Act 1999 (the Act), seek to determine the designated award/s to be adopted for the purpose of conducting the no-disadvantage test. The applications of both AWU and QSU were granted by the Commission.

Background to the Application

[4] The current application is to determine whether the awards nominated by TSIRC or those nominated by the unions for the purpose of considering the no-disadvantage test (s. 163(3) of the Act) are the correct industrial instruments.

Position of the Parties

TSIRC

[5] TSIRC states that the following Awards (as identified and entitled by TSIRC) are the relevant Awards to be considered in its application:

"Building Trades Public Sector Award – State 2002
Cement Products and Concrete Batching Award – State 2003
Children Services Award State – 2004
Clerical Employees Award – State 2002
Community Police (Aboriginal and Islander Communities & Local Government) Award State – 2003
Engineering Award State – 2002
Fisheries Award
Garage and Service Station Attendants' Award – State 2003 (Excluding South Eastern District)
Hotel, Motels, Resorts & Accommodation Award – State 2005 (Excluding South East Qld)
Local Government Employees Award State 2003 (Excluding Brisbane City Council)
Northern Queensland Boating Operators Employees Award State – 2003
Nursery Award – State 2003
Prawn and other Seafood Processing Award – State 2003
Quarry, Crushed Stone, Sand and Gravel Industry Award State – 2003
Retail Industry Award". [Affidavit of Rodney John Scarce - Attachment B]
TSIRC also states:

"With the exception of Health and Community Care workers who are paid from a federal grant and precluded from this agreement under the Federal Social and Community Services Award TSIRC does not employ award free employees and ensures letters of offer capture the appropriate state awards and classification to meet the requirements of section 366 of the Act. Where appropriate, personal classifications and common law contracts are provided for supervisors, managers or other senior officers". [TSIRC Outline of Submissions – point 4]

Further, TSIRC states that it has never been a respondent to the Queensland Local Government Officers' Award – 1998.

TSIRC says that Hammond Community Council (prior to amalgamation in 2008) had been a respondent to the Municipal Officers' (Aboriginal Island Community Councils) Award 2004. Notwithstanding that, there had been no employees captured under that award as the administration services were provided by a state government body known as the Island Coordinating Council or performed by the Chairperson of the Community.

While accepting that s. 124 of the Act addresses the question of a 'successor' to a stated employer being bound by an applicable former award, TSIRC said it must be firstly shown that the stated employer was the 'employer' as referenced in s. 744 of Part 7 to Chapter 20 of the Act before the succession could have occurred in 2008.

AWU and QSU

The awards which the Unions say are appropriate are as follows:

Queensland Local Government Officers' Award 1998.

Municipal Officers' (Aboriginal and Islander Community Councils) Award 2004. (MOAICC)

Legislation

Section 124 of the Act states:

"s. 124    Persons bound by award

(1) An award binds-

(b) subject to paragraphs (d) to (f)-all employees who are engaged in the calling to which the award applies; and

(d) if the award applies only in a stated locality-all employers and employees in the locality who are engaged in the calling to which the award applies; and

(e) if the award applies only to a stated employer-

(i) the employer and any successor of the employer; and

(ii) all employees of the employer and any successor; and

(f) if the award applies only to a stated establishment or operation of a stated employer-

(i) the employer and any successor of the employer; and

(ii) all employees of the employer in the establishment or operation.

"

Section 163(2) of the Act states as follows:

"s. 163    Deciding designated awards

(1) This section applies if –

(a) an employer or organisation of employees proposes to make a certified agreement; and

(b) there is no relevant award for some or all of the persons to whom the agreement will apply.

(2) The employer or organisation must apply to the commission for a decision under subsection (3).

(3) On application, the commission must decide that an award (regulating employment conditions of employees engaged in a similar kind of work as the person under the proposed agreement) is appropriate for deciding whether the agreement passes the no-disadvantage test.
(4) The commission must inform the employer or organisation in writing of its decision.

[13] Section 366 of the Act is as follows:

"s. 366  Time and wages record-industrial instrument employees
...".

[14] Section 744 of the Part 7 to Chapter 20 of the Act states as follows:

"s. 744  Application of pt 7

(1) This part applies in relation to-

(a) a local government that, immediately before the commencement of the Local Government and Industrial Relations Amendment Act 2008, section 10, was an employer within the meaning of the Commonwealth Act, section 6(1); and
(b) an employee of a local government mentioned in paragraph (a) who, immediately before the commencement of the Local Government and Industrial Relations Amendment Act 2008, section 10, was an employee within the meaning of the Commonwealth Act, section 5(1).

(2) In this section-

Local government does not include the Brisbane City Council.".

Current hearing

Submissions made by AWU

[15] The TSIRC local government area is constituted by fifteen "outer" island communities. These communities are:

- Badu
- Boigu
- Dauan
- Erub (Darnley)
- Hammond
- Iama (Yam)
- Kubin
- Mabuiag
- Masig (Yorke)
- Mer (Murray)
- Poruma (Coconut)
- Saibai
- St Pauls
- Ugar (Stephen)
- Warraber (Sue)

[16] Prior to the local government amalgamation process in March 2008, which resulted in the formation of the TSIRC, the islands that make up the now TSIRC existed as individual and independent Island Councils governed by the Community Services (Torres Strait) Act 1984 (now under the jurisdiction of the Local Government Act 2009).

[17] In the enactment of the Local Government and Industrial Relations Amendment Bill 2008, two Federal Awards (referred to as "Local Government Awards") covering Queensland Local Government Councils (with the exception of the Brisbane City Council) were deemed to be State Awards. As from 13 March 2008, these Local Government Awards fell within the Queensland Industrial Relations Commission (QIRC) jurisdiction.

[18] The transferred Awards were the Queensland Local Government Officers’ Award 1998 and MOAICCA.

[19] The former Hammond Community Council is a named respondent to the MOAICCA.

[20] None of the remaining Island Councils are named in the Queensland Local Government Officers’ Award 1998.
TSIRC asserts that the Clerical Employees Award – State 202 (the Clerical Award) is the appropriate award (for the purposes of s. 163 of the Act) to regulate the terms and conditions of employees engaged in a similar type of work as that performed by employees under the proposed Certified Agreement.

The unions believe that the Queensland Local Government Officers’ Award 1998 is the appropriate award.

Reliance by TSIRC upon the Clerical Award to regulate terms and conditions of employment of employees whose work is essentially that of Local Government Officers, puts those employees at a disadvantage when comparing them to employees of other local government authorities.

It is submitted that the Clerical Award is a "generic, common rule award" of the State. It is restricted by classifications which are non-specific vis a vis local authority works, whereas the Queensland Local Government Officers' Award 1998 is a specialised award which is written exclusively for the type of industry and occupations applicable to the TSIRC workforce and other local government authorities.

The AWU submits that the applicability of the Clerical Award is further limited in that it has no scope to cover Supervisors or Managers. Those positions are common and integral to the local government function and these roles exist within the scope of the proposed Certified Agreement.

It is accepted that the Clerical Award contains a reference to Local Authorities but only with regard to the definitions of "Clerk". AWU submits that this reference was "done at a time when the Queensland Local Government Officers' Award 1998 was a creature of federal jurisdiction".

Primarily, the AWU states that in the interest of fairness, equity and upholding the principle objects of the Act, the terms and conditions of employment of employees of the TSIRC should not be measured against a differing instrument to those employees performing the same duties within other Local Authorities throughout the State of Queensland.

When comparisons were made with similarly small Councils (e.g. Balonne, Cook, Longreach, Murweh and TSIRC) only the TSIRC relies upon the Clerical Award.

Hammond Island Council is a named respondent to the MOAICCA. Pursuant to s. 124(1), s. 124(1)(f)(i) and s. 124(1)(f)(ii), the TSIRC is bound by the MOAICCA. Within this context, the Clerical Award has an express exclusion in relation to employees covered by any other award covering duties of a clerical nature.

Submissions made by the QSU

QSU supported the submissions made by the AWU.

QSU states that the federal modern Social, Community, Home Care and Disability Services Industry Award 2010 does not apply to employees engaged by Local Authorities in the state jurisdiction.

The Community Services Stream of the Queensland Local Government Officers' Award 1998 contains specific classification descriptors applicable to employees engaged in Social and Community Services functions within local government. Additionally MOAICCA contains classifications appropriate to social and community services employees engaged by TSIRC.

Because Hammond Island Community Council is listed as a respondent to the MOAICCA, the successor local government remains bound by this Award following amalgamation.

QSU states that the awards listed by TSIRC do not operate to the exclusion of the Queensland Local Government Officers' Award 1998 and MOAICCA.

Finally, QSU states that "Clerical Employees Award- State 2002 contains an exemption at clause 1.4(a) and does not cover "Any person who is a proprietor, director or manager of a company, business or undertaking, or a person to whom, has been delegated the right to engage and terminate the employment of employees. Council is currently employing staff with management and supervisory responsibility and incorrectly classifying these employees under the Clerical Award which has no application. These employees will be left Award free if an appropriate award is not designated."

By way of example, QSU identified a Position Description which had been compiled by TSIRC for the position of "Divisional Manager" – a relevant position within the TSIRC. Inter alia, that Position Description described inherent duties of the position as encompassing:
"To act as a link between the Divisional Councillor, the Divisional Employees (excluding Community Police, the Executive Managers and Managers, Executive Officer and the Chief Executive Officer).

- Provide assistance to the Divisional Councillor to facilitate their responsibilities to the Community and Council.
- Ensure the smooth operation of divisional services for the benefit of the Community residents.
- Perform the function of Community Forum Convenor.
  - To facilitate the meetings of the Community forum;
  - To report the decisions of the forum to the CEO; and
  - To provide necessary administrative support to the Community Forum."

The "Experience and Qualifications" required were as follows:

- "Management Experience;
- Degree qualification in public sector administration, business, commerce, other qualification relevant to Local Government or equivalent experience gained in a similar position;
- Workplace Health and Safety Qualifications; and
- An understanding of Legislation impacting on Torres Strait Island Regional Council."

Key Responsibilities included:

- "Provided the conduit between the Community and the Chief Executive Officer;
- Advise the appropriate Manager or Human Resource section of any breaches in Council Policy, Procedure and Legislation;
- Liaise with the Divisional Councillor to enable them to carry out their duties as Councillor and to ensure they are provided with appropriate resources available;
- Undertake the duties of Community Forum Convenor;
- Exercise general management functions of the division, including the exercise of the procurement delegation in accordance with Council's delegation register;
- Assist with grant management and acquittals;
- Assist with the development of Policies, Procedures, Corporate Plans, Operational Plans and Budgeting;
- Promote teamwork and develop and maintain positive work relations and appropriate organisation culture;
- Provide the Community and Staff with Council policies as required; and
- Carry out duties as it relates to Workplace Health and Safety Legislation."

Under the heading of Selection Criteria, the following was listed.

"Essential
- Management experience in a similar position;
- Ability to liaise with Councillors, Council management and Staff within the Council;
- Demonstrated highly developed interpersonal skills with an ability to relate to all levels of an organisation;
- A good understanding of Torres Strait Islander people and their culture and the current issues affecting their Communities;
- An understanding of Legislation impacting on Torres Strait Island Regional Council, EEO, OHS, FOI;
- Degree qualification in public sector administration, business commerce, other qualification relevant to Local Government or extensive experience in similar position; and
- A commitment to undertake the training plan developed for the position to provide a greater understanding of the Organisation."

TSIRC Submissions

TSIRC relied upon submissions which it had made prior to the current hearing. TSIRC called one witness, Mr Scarce (Chief Executive Officer of TSIRC) to give evidence.

Mr Scarce's evidence was as follows:

TSIRC was not a respondent to the Queensland Local Government Officers Award 1998 and the MOAICCA. At the time of the amalgamation of the Councils, there were no employees employed pursuant to either of those awards.

Hammond Island Community Council employees who transferred under the Local Government Workforce Transition Code of Practice 2007 (which was introduced by the Queensland Government in August 2007) were employed under a Community Development Employment Program and state awards and their conditions of employment were maintained for the period of the code.
No further information was provided to the Commission on this point by Mr Scarce or TSIRC.

[42] In response to a question from QSU as to whether Hammond Island operated a library service on that island, Mr Scarce initially rejected that claim. Mr Scarce said there were no librarians employed as such on the island, but attending to the library may be one of the functions performed by a "multi-skilled administrative team".

[43] QSU believed that TSIRC advertised on its internet home page that it operated the Indigenous Knowledge Centre on that island as a library service. Mr Scarce denied this and stated that a Divisional manager was located on Hammond Island (see paragraph 31 for position description). He was unable to advise the Commission as to what level under the Clerical Award that person was employed. He also said that there was no sewerage treatment plant operated on Hammond Island.

[44] Upon later clarification from QSU, the Commission was advised that the web page identified was in fact the Queensland Government State Library of Queensland web page which referenced Hammond Island Indigenous Knowledge Centre as a library service.

[45] Mr Scarce was questioned by AWU as to its assertion that Hammond Island Council was a respondent to the MOAICCA. Reference was made by AWU to s. 124(b) of the Act, as previously cited.

[46] Mr Scarce agreed that TSIRC was a successor employer to the Hammond Island Community Council.

[47] The advocate for TSIRC stated that it funded a two hour library service on Hammond Island but the facility had been called an Indigenous Knowledge Centre [T1-19].

[48] Mr Scarce also agreed that TSIRC had sewerage treatment plants and water treatment plants on islands.

[49] Mr Scarce was unaware of submissions which had been made by the advocate for TSIRC to the extent that "where appropriate, personal classifications and common law contracts are provided for supervisors, managers or other senior officers."

[50] Mr Scarce was unable to comment upon whether one or more of the positions identified above would be covered by the proposed Certified Agreement.

[51] In response to the following question posed by AWU, "If there are indeed supervisors, managers or senior officers that aren't covered by common law contracts, would the logical line be drawn that they would be covered by the proposed certified agreement", Mr Scarce agreed with the proposition [T1-13].

[52] Mr Scarce said he would not be surprised if, in almost all other Councils that operate within Queensland, a supervisor of a water treatment plant/sewerage treatment plant would be governed by the terms and conditions contained within the Queensland Local Government Officers' Award 1998.

[53] Following those submissions, AWU claimed that in the absence of TSIRC being a named respondent to the Queensland Local Government Officers' Award 1998, then those employees would be award-free, if not on a common law contract. Mr Scarce was unable to answer the question claiming that he did not have any in-depth knowledge of that type of situation.

[54] Mr Scarce did agree that "probably less than 25 per cent" of employees of TSIRC could align with similar functions within the Queensland Local Government Officers Award 1998 [T1-15].

[55] Mr Scarce was unable to assist the Commission any further.

Final Submissions and Conclusion

[56] In final submissions, TSIRC claimed that the unions had been unable to identify specific positions within the TSIRC which would fall outside of the Clerical Award.

[57] I have not accepted that submission. Reference has been made to positions which would fall outside of that award, and this was admitted in evidence, above, by Mr Scarce [T1-13; T1-19].

[58] The Clerical Award at clause 1.6.2 defines a clerk as "a person employed either exclusively or principally in the pursuit or vocation of writing, engrossing, typing or calculating….." The Clerical Award does not cover employees who are engaged in a management position.

[59] I have accepted the unions' submissions that employees who are engaged as supervisors/officers in water treatment plants and sewerage treatment plants are captured within the classification structure and scope of the Queensland Local Government Officers Award 1998.

[60] Those persons are classed as officers under the Queensland Local Government Officers Award 1998 and whilst the TSIRC is not a named respondent to the Queensland Local Government Officers Award 1998, these employees are currently award free and it follows logically that one must consider s.163 of the Act.
QSU’s submission is that social and community services employees are not captured by the Clerical Award or the Local Government Employees Award 2003 (Excluding Brisbane City Council).

However, QSU says that the Queensland Local Government Officers Award 1998 contains classifications that are appropriate to social and community service employees. These employees would currently be award free and once again s.163 of the Act must be considered.

While TSIRC claimed that the proposed Certified Agreement did not purport to cover social and community service employees, QSU responded that these employees are captured by the Queensland Local Government Officers Award 1998. QSU stated that when social and community service employees work in a local authority, they are deemed to exist within the State industrial relations system.

Therefore if this type of employee was not covered by the Queensland Local Government Officers’ Award 1998, then they would be award free. In organisations other than local government, these employees are classified under a separate award – the Federal Social Community Home Care and Disability Services Industry Award.

TSIRC said they pay these employees pursuant to the Federal Award because they are in receipt of Federal funding to capture those particular classifications. However, TSIRC said there remained some confusion around these employees.

In the absence of any documentation from TSIRC regarding Hammond Island and taking into consideration its own description of industrial relations arrangements on that island as "confusing" my finding in this claim will relate to Hammond Island and the applicability of MOICCA to certain employees engaged by TSIRC on that island.

However, when the matter is next heard, if I am presented with documentation from TSIRC which clearly identifies other arrangements which are in place between TSIRC and Hammond Island (and any other third party/ies) then I am prepared to reconsider the matter. Until that time, my decision is that MOICCA is a relevant award for the purposes of employees engaged by TSIRC on Hammond Island.

The decisions made in this matter have been arrived at, firstly, after considering the direct evidence of Mr Scarce and secondly, after hearing the submissions of the parties. Consideration has also been given to the various awards in use by TSIRC and the Awards to which the Unions refer.

This matter has been in progression for a lengthy period of time and finality is required to ensure that employees to be covered by the proposed Certified Agreement receive the terms and conditions to which they are entitled.

TSIRC raised the issue of QSU’s claims regarding employees at Hammond Island to the extent that those concerns had not been part of the original claim. While that may be so, this matter was clearly canvassed by QSU during the course of the on-going hearings and QSU’s claims were particularised (as early as April 2012) in its submissions to be considered at the last hearing. TSIRC not only responded to those claims in its earlier submissions but was also able to draw evidence from Mr Scarce around the point.

I have accepted the claim made by the Unions to the effect that the two named awards – i.e. Queensland Local Government Officers’ Award 1998 and MOAICC are awards which relate to some employees engaged by TSIRC. Pursuant to s.163 (3) of the Act I have determined that those awards (regulating employment conditions of employees engaged in a similar kind of work as the person under the proposed agreement) are appropriate for deciding whether the agreement passes the no-disadvantage test.

I propose to call the matter on before the Commission (as currently constituted) for the purpose of particularising the identification of all relevant employees in question.

The parties will be notified in due course

D. A. SWAN, Deputy President.

**Hearing Details:**

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**Appearsances:**

Ms S. Schinnerl for The Australian Workers’ Union of Employees, Queensland.

Ms T. Springett for Queensland Services, Industrial Union of Employees.

Mr N. Peters for Torres Strait Island Regional Council.