

QUEENSLAND INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1999 - s. 130 - Review of awards

**Together Queensland, Industrial Union of Employees and Others
AND State of Queensland (Chief Executive of the Public Service Commission) (AR/2013/4)**

VICE PRESIDENT LINNANE
DEPUTY PRESIDENT O'CONNOR
COMMISSIONER FISHER

14 November 2013

DECISION

- [1] During the course of the 2010 Award Review, Together Queensland, Industrial Union of Employees (Together Queensland) sought to have Directives issued by the Chief Executive of the Public Service Commission and/or Minister for Industrial Relations under s. 53(baa) and s. 54(1)(a) of the *Public Service Act 2008* included in awards of the Queensland Industrial Relations Commission (Commission) either by text, by summary or by express reference. Together Queensland's request was supported by a number of industrial organisations of employees.
- [2] The Chief Executive of the Public Service Commission (the Public Service Commission) resisted Together Queensland's request contending that the Award Review Full Bench did not have the capacity to deal with the question of Directives being referred to, or inserted into, awards of the Commission. Whilst written submissions had been filed by a number of organisations in late 2012/early 2013 the issue was not determined by the 2010 Award Review Full Bench prior to the expiration of its three year term.
- [3] When the 2013 Award Review Full Bench was established on 14 March 2013 this matter was one of the issues to be determined by the Full Bench as currently constituted. The matter was listed for hearing on 19 July 2013. On this date the Full Bench heard from Together Queensland and those industrial organisations of employees supporting the application. The Full Bench also heard from the Public Service Commission who, in addition to resisting Together Queensland's application also raised, for the first time, the removal of all references to Directives in awards and certified agreements. Together Queensland and those industrial organisations of employees supporting Together Queensland's position had not, as at 19 July 2013, been given prior warning of the position adopted by the Public Service Commission. Thus the Full Bench extended Together Queensland (and the other industrial organisations of employees) an opportunity to respond to that submission of the Public Service Commission. As a result the matter was re-listed for a further hearing on 4 November 2013.
- [4] It should be noted that the Public Service Commission sought to have the Full Bench refrain from further hearing Together Queensland's application given the provisions of the *Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill 2013*, which, if enacted in its current form would make any positive outcome of Together Queensland's primary application null and void. Together Queensland and many of the industrial organisations supporting the application opposed this course of action and the Full Bench decided to hear the application on the scheduled hearing date i.e. 4 November 2013.
- [5] The following submissions were received in support of Together Queensland's application:
 - Together Queensland, Industrial Union of Employees submissions filed on 13 December 2012 and 17 October 2013 (documents marked "A" and "K" for identification);
 - Association of Professional Engineers, Scientists and Managers of Australia submissions filed on 13 November 2012 and 10 October 2013 (documents marked "B" and "Q" for identification);
 - Queensland Services, Industrial Union of Employees submissions filed on 13 November 2012 and 16 October 2013 (documents marked "C" and "M" for identification);
 - United Voice, Industrial Union of Employees, Queensland submissions filed on 13 November 2012 and 18 October 2013 (documents marked "D" and "O" for identification);
 - The Australian Workers' Union of Employees, Queensland submissions filed on 13 November 2012 and 18 October 2013 (documents marked "E" and "P" for identification);

- Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland submission filed on 13 November 2012 (document marked "F" for identification);
 - Queensland Teachers Union of Employees submissions filed 13 November 2012 and 14 October 2013 (documents marked "G" and "S" for identification);
 - The Electrical Trades Union of Employees Queensland submission filed 13 November 2012 (document marked "H" for identification);
 - Queensland Nurses' Union of Employees submission filed 18 October 2013 (document marked "L" for identification); and
 - United Firefighters Union of Australia Union of Employees Queensland submission filed 14 October 2013 (document marked "N" for identification).
- [6] The Public Service Commission filed the following submissions in support of its opposition to Together Queensland's position on both 30 January 2013 and 15 October 2013 (documents marked "J" and "R" for identification).
- [7] Each of the other industrial organisations of employees who filed written and/or provided oral submissions supported the submissions of Together Queensland. Thus we intend to substantially rely upon the submissions, both written and oral, made by Together Queensland. It should also be noted that the Queensland Council of Unions appeared and made oral submissions in support of Together Queensland submissions.
- [8] Together Queensland contended that many public sector conditions were currently established under Directives issued pursuant to the *Public Service Act 2008* and that awards of this Commission simply referenced these Directives rather than capturing the entitlements they provided to public sector employees. It was submitted that awards of the Commission should reflect these entitlements if the awards are to serve as "fair and just employment conditions" as required by s. 125(1) of the *Industrial Relations Act 1999* (Act).
- [9] Directives are issued under s. 53 and s. 54 of the *Public Service Act 2008*. Section 53 provides as follows:

"53 Rulings by commission chief executive

The commission chief executive may make a ruling about -

- (a) a matter relating to any of the commission's or the commission chief executive's functions; or

Examples of what a ruling by the commission chief executive may be about -

- recruitment and selection, deployment, training and development of public service employees
- the transfer or redeployment of public service employees surplus to the needs of a department
- overall performance management standards for the public service

- (b) the overall employment conditions for persons employed or to be employed as -

- (i) chief executives or senior executives; or
- (ii) public service officers on contract whose remuneration is equal to, or higher than, the remuneration payable to a senior executive; or

- (baa) the remuneration and conditions of employment of public service employees other than persons mentioned in paragraph (b)(i) or (ii); or

- (ba) a matter relating to the application of chapter 6 or 7 to a former public service employee; or

- (c) other specific matters that, under this Act, the commission chief executive may make a ruling about."

[10] Section 54 of the *Public Service Act 2008* provides as follows:

"54 Rulings by industrial relations Minister

- (1) The industrial relations Minister may make rulings about -
 - (a) the remuneration and conditions of employment of non-executive employees; or
 - (b) other matters under this Act that the Minister may make a ruling about.
- (2) However, a ruling under subsection (1)(b) may only be made for non-executive employees.
- (3) In this section—

non-executive employees means public service employees other than -

- (a) chief executives or senior executives; or
- (b) public service officers on contract whose remuneration is equal to, or higher than, the remuneration payable to a senior executive."

[11] Together Queensland referred the Full Bench to a statement of the Full Bench in the initial Award Review dated 19 September 2001¹ where model clauses were being considered. Together Queensland submitted that the Full Bench was of the view that model clauses that were "non prescriptive" would be a bland clause of limited effect when it stated:

"The employers expressed the concern that a model clause will become the accepted norm and will not, in practice, be moulded to meet the needs of particular enterprises, industries or workplaces.

That concern does not appear to extend to those model clauses already agreed, but seems to be limited to model clauses yet to be determined.

It seems to us, from our understanding of submissions heard so far that there is some conflict or inconsistency in the foregoing proposals. On a consideration of the material put to us, a non-prescriptive model clause would be a bland clause of limited effect."

[12] Together Queensland then submitted that this comment from the Full Bench could be applied to the following comments made in a further statement of the same Full Bench dated 7 November 2001:²

"However, as a matter of general application in determining the abovementioned issues, we hold the view that to replicate within Awards, *in toto*, Legislative provisions contained within the *Industrial Relations Act 1999* (the Act) which have a direct relevance upon an Award would be a cumbersome approach to modernising Awards of this Commissions."

[13] From those two decisions Together Queensland submitted that awards should not contain "cumbersome" clauses however clauses should not be "bland". In the later decision the Full Bench, in dealing with the *Teachers' Award - State 2012* commented as follows:

"The Directives referred to set certain entitlements of those covered by the awards. It may be of some assistance in the capacity of those covered by the award to better understand the contents of Directives to have a summary in simple form included in the award rather than a bald reference to the Directive itself."

[14] It was conceded by Together Queensland that the outcome as espoused by that Full Bench as it related to the *Teachers Award - State 2012* did not come to fruition.

[15] In its decision dated 10 May 2002,³ the 2001 Award Review Full Bench stated as follows:

"It is not the intent of the award review process under s. 130, nor of decisions made by the Commission as constituted, to establish outcomes that result in enhancement of existing award provisions. There are other

¹ Matters Following the State Wage Cases B882 of 1999 and B888 of 1999 in Relation to Principle 12 - Award Review (Case B1733 of 1999) (19 September 2001).

² Matters Following the State Wage Cases B882 of 1999 and B888 of 1999 in Relation to Principle 12 – Award Review (Case B1733 of 1999) (7 November 2001).

³ Review of Awards (2002) 170 QGIG 58 at [59].

avenues available to parties to amend awards where a party believes that changes under the review process have resulted in an enhancement of existing award provisions."

- [16] We support the view expressed by the 2001 Award Review Full Bench when it stated that the award review process is not to be an avenue for the enhancement of existing award provisions. However Together Queensland contends that their application does not seek the enhancement of award conditions but rather it seeks the reflection of the award condition in greater detail than that which is currently provided for in awards via the reference to a particular Directive as being applicable.
- [17] In its submission Together Queensland dealt in detail with the referencing of Directives in the *Legal Aid Queensland Employees' Award - State 2012* and then proposed terminology for certain award provisions that met its objective in this application. Together Queensland did acknowledge that where awards applied to both public sector and local government employees then the fact that local government employees would not be entitled to the Directive provision would need to be considered in drafting the award clause e.g. the *Engineering Award - State 2012*. In such an instance, it was suggested that the award clause should have two subsections (one applying to public sector employees and one applying to local government employees).
- [18] As previously mentioned, the Public Service Commission opposed Together Queensland's application contending, in the first instance, that the Full Bench did not have the power or authority under the *Industrial Relations Act 1999* to replicate Directives in awards applying to public sector employees. It was submitted that Directives are relevant and applicable conditions of employment prescribed by the Minister for Industrial Relations and/or the Chief Executive of the Public Service Commission and issued under the *Public Service Act 2008*. Such Directives are not conditions of employment prescribed by the Commission under the *Industrial Relations Act 1999*. Even if the Full Bench did have the legal capacity to amend awards to include applicable Directive provisions, the Public Service Commission contended that it was not appropriate for the Full Bench to do so.
- [19] The Public Service Commission submitted that a Directive issued under either s. 53 or s. 54 of the *Public Service Act 2008* was not the opinion of the Commission. Rather, Directives are the determination of the relevant authority which operates under differing legal and regulatory frameworks to the Commission and are subject to different constraints and considerations. It was thus contended that a Directive under s. 53 or s. 54 of the *Public Service Act 2008* could not be included in an award of the Commission unless the Directive precisely coincided with the opinion of the Commission or the Commission adopted a Directive as its own view. Whilst the Public Service Commission concedes that it would be theoretically possible for the Commission to replicate applicable Directive provisions in relevant awards there are substantial obstacles in the Commission's way which would prevent the Commission from amending awards to encompass Directive provisions.
- [20] To do so would, in the overwhelming majority of cases, enhance award provisions i.e. it would increase conditions to a level higher and more beneficial than that which had previously been decided by the Commission. In this regard the Public Service Commission referred the Full Bench to clause 7.3 of the *Queensland Public Service Award - State 2012* which is the sick leave clause. The clause currently does not provide for a public service employee's entitlement to meritorious service sick leave (i.e. an additional 13 weeks sick leave on full pay for an officer or employee who has completed 26 years meritorious service within the Queensland public sector). Clause 11 of the then *Sick Leave Directive 18/10* prescribed such an entitlement. For the Commission to replicate that Directive in relevant awards for no reason other than the Directive is in existence, would result in the enhancement of existing award provisions.
- [21] The Full Bench was also referred to s. 52 of the *Public Service Act 2008* and s. 687 of the Act which relevantly provide as follows:

"52 Relationship between directives and industrial instruments

- (1) This section applies if a directive deals with a matter all or part of which is dealt with under an industrial instrument of the IRC.
- (2) A directive of the commission chief executive prevails over an industrial instrument, unless a regulation provides otherwise.

Note -

See however, the *Industrial Relations Act 1999*, section 687 (Conflict between industrial instruments etc. and statutory decision).

- (3) An industrial instrument prevails over a directive of the industrial relations Minister, unless the directive provides otherwise.

- (4) In this section -

directive includes a decision made in the exercise of a discretion under a directive."

"687 Conflict between industrial instruments etc. and statutory decision

- (1) This section applies if there is an inconsistency between -

- (a) any of the following directives -

- (i) a directive under the *Public Service Act 2008* made by the chief executive of the Public Service Commission that is the subject of a regulation under section 52(2) of that Act;
- (ii) a directive under the *Public Service Act 2008* made by the Minister administering this Act;
- (iii) a directive under the *Ministerial and Other Office Holder Staff Act 2010* that is the subject of a regulation under section 28(2) of that Act; and

- (b) an award, industrial agreement, certified agreement or decision of the commission (the *industrial instrument*).

- (2) If the commission decides that the subject matter of the directive is within its jurisdiction, the industrial instrument prevails to the extent of the inconsistency.

- (3) Subsection (2) applies to a directive of the Minister, unless the directive otherwise provides.

- (4) In this section -

directive includes a decision made in the exercise of a discretion given in a directive."

[22] Section 52(2) of the *Public Service Act 2008* provides that a Directive of the Chief Executive of the Public Service Commission prevails over an industrial instrument, unless a regulation provides otherwise. Section 687(1) and (2) of the Act provides that an industrial instrument may prevail over a Directive of the Chief Executive of the Public Service Commission which is subject to a regulation, if the Commission decides that the subject matter of the Directive in question is within the Commission's jurisdiction. Further, an industrial instrument prevails over a Directive of the Minister for Industrial Relations unless the Directive provides otherwise: see s. 52(3) of the *Public Service Act 2008* and s. 687(3) of the Act.

[23] According to the Public Service Commission, awards are not intended to be a current roadmap or index of all employee entitlements in the public sector and Together Queensland's application could not achieve such an outcome. Rather, employee entitlements in the public sector are found in awards, Directives, the Act, the *Public Service Act 2008* (for public sector employees), the Local Government legislation (for local government employees), the *Work Health and Safety Act 2011*, certified agreements and other legislation. It was submitted that the bringing together of only two of those sources in an Award appeared to achieve little.

Conclusion

[24] Whether or not this Full Bench has the jurisdiction to insert into awards of the Commission Directives of either the Chief Executive of the Public Service Commission or the Minister for Industrial Relations, it is the decision of this Full Bench that it is inappropriate to insert such Directives into awards whether it be by text, by summary or by express reference. Directives are not made by the Commission under the Act. Directives are made either by the Chief Executive of the Public Service Commission or the Minister for Industrial Relations under the *Public Service Act 2008*. Many of the conditions outlined in Directives far exceed the standards established by the Commission over many years.

[25] It is clear that to insert Directives into awards of the Commission, whether by text, by summary or by express reference would enhance many award conditions. As indicated earlier in this decision, we support the comments of the 2001 Award Review Full Bench that award review is not the vehicle to enhance award conditions.

[26] In our view, clauses which refer to a Directive are not "bland" clauses. Rather the detail is to be found in the Directive to which reference is made.

- [27] Summarising a Directive in an award provision would also be likely to create its own difficulties in interpretation. An interpretation of the summary of a Directive in an award provision has very real prospects of differing from an interpretation of the actual Directive itself.
- [28] In those circumstances we dismiss the application by Together Queensland which was supported by a number of industrial organisations of employees and the Queensland Council of Unions.
- [29] In the event that the *Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill* is enacted any other matter raised in the course of the hearing in AR/2013/4 will be referred to the proposed award modernisation process e.g. the proposal of the Public Service Commission for the Commission to undertake a process by which the Commission and the parties identify and make obsolete clauses which refer an employee to a Directive which relates to a particular industrial matter and does not, by virtue of the award clause alone, apply the relevant Directive to those employees. If the *Industrial Relations (Fair Work Act Harmonisation No. 2) and Other Legislation Amendment Bill*, insofar as award modernisation is concerned, is not enacted in its current form then this Full Bench will further deal with those matters.
- [30] As a result of the hearing and determination of this matter, any award of this Commission which references Directives will remain in its current form. Such awards will however be further considered in either of the abovementioned processes referred to in paragraph [29].
- [31] Order accordingly.

D.M. LINNANE, Vice President

D.L. O'CONNOR, Deputy President

G.K. FISHER, Industrial Commissioner

Hearing Details:

2013 19 July
 30 October
 4 November

Released: 14 November 2013

Appearances:

Mr A. K. Herbert, Counsel directly instructed by the Public Service Commissions and Mr G. Wallace and Ms K. Armstrong.
 Ms D. Ralston, for Together Queensland Industrial Union of Employees
 Mr J. Martin, for the Queensland Council of Unions.
 Mr N. Henderson, for the Queensland Services Industrial Union of Employees.
 Ms C. Naranja, for the Queensland Nurses Union of Employees.
 Mr P. Eldon, for the Australian Workers' Union of Employees Queensland.
 Mr T. O'Brien, for the Construction, Forestry, Mining and Energy Industrial Union of Employees.