Industrial Relations Commission of Australia

1076/1989 (22nd December, 1989)

Industrial Relations Commission Decision 1076/1989; [1989] 1076 IRCommA

Dec 1076/89 S Print J0916

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988
s.99 notification of industrial dispute

The Australasian Meat Industry Employees Union

and

Meat and Allied Trades Federation of Australia
(C No. 25580 of 1989)

s.113 applications to vary

The Australasian Meat Industry Employees Union
(C No. 25799 of 1989)

F.J. WALKER QUEENSLAND MEATWORKS INDUSTRIAL AGREEMENT - AWARD, 1976(1)
(ODN C No. 03004 of 1972)

The Australasian Meat Industry Employees Union
(C No. 45086 of 1989)

MEAT INDUSTRY - J.C. HUTTON PTY LTD INDUSTRIAL AGREEMENT-AWARD, 1974(2)
(ODN C No. 00241 of 1974)

Meat workers Meat
industry

DEPUTY PRESIDENT RIORDAN SYDNEY, 22 DECEMBER
1989

Conditions of employment - termination, change and redundancy - date of
operation - retrospectivity - outstanding issue related to operative date -
whether it would be fair, just and reasonable to deny the benefits of the
TCR
case decisions to employees who have been retrenched during the proceedings
and prior to a decision being given - principles of granting
retrospectivity

examined - benefits prescribed represented a standard of this Commission and
were enjoyed by a great majority of persons in the Australian workforce - employer had full knowledge of the existence of the standard and would have been aware of the prospect of an award being made - exercise of the discretion
to award retrospective operation was justified.

DECISION

This decision is in respect of two separate matters which relate to the same
question of principle with similar, although not identical, facts. It was felt
desirable, and in accordance with one of the principal objects of the Industrial Relations Act 1988 (the Act) "to promote industrial harmony and co-operation among the parties involved in industrial relations in Australia"
to await the finalisation of both matters before issuing a decision in respect
of either.

The Australasian Meat Industry Employees Union (AMIEU) on the one hand
and J.C. Hutton Pty Ltd (Hutton) and F.J. Walker Pty Ltd (F.J. Walker) on the
other have reached a measure of agreement on the form of a variation to the Meat Industry - J.C. Hutton Pty Ltd Industrial Agreement-Award, 1974 (the Hutton Award) and the F.J. Walker Queensland Meatworks Industrial Agreement-
Award, 1976 (the F.J. Walker Award) to give effect to the decision in respect
of provisions relating to termination, change and redundancy (TCR).(3)
Although that decision related specifically to the provisions of the Federal

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(1)Print D0809 [F013] (2)Print C3760 [M030]; (1975) 166 CAR 216
(3)Print H8683

Meat Industry Award 1981(4) the evidence and debate in that case covered the
various awards of this Commission regulating conditions of employment in the
meat industry. It was regarded and treated by the parties as a test case about
the application of the TCR principles in the industry.

The employers appealed against the order made to vary the Federal Meat
Industry Award which gave effect to the decision to provide an appropriate clause covering situations of termination, change and redundancy in the section of the industry covered by that award.

On 13 November 1989, a Full Bench of the Commission dismissed the employers' appeal. The central issue in that appeal related to whether "regular daily employees" should receive the benefits of the Commission's two
decisions on termination, change and redundancy.(5)

In their decision the Full Bench in Federal Meat Industry Award appeal said:

"We note that the Deputy President dealt with the position of regular daily employees who may serve less than twelve months with a particular employer: the order, subclause 11(j). Termination of engagement of such persons by the employer at the end of a season of less than twelve months duration ensures that employees will not receive redundancy payments where the term of their employment, by generally accepted standards, is too short.

The grounds of appeal also challenged Riordan DP's decision that a period of eight months should be taken as determining the time after which a meatworks shall be deemed permanently closed down. In the court below this issue was the subject of lengthy evidence which is referred to in the decision. After reviewing the material before him, the Deputy President said:

'It cannot be fair that an employee who has been retrenched should wait for years before being paid redundancy payments while attempts are made to sell off the plant to a new proprietor. There simply must, as a matter of equity, be a point where the employee who has been stood down is paid proper compensation. This finality of the employment prospect with the particular employer will allow the employees concerned the opportunity to seek employment in some other meatworks which may involve moving residence or seeking to follow a new career in some other enterprise.'

We consider that on the evidence and other materials before him, this view, and his decision on this issue, were reasonably open and should not be disturbed.

We are of opinion that the word 'seasonal' in the termination, change and redundancy cases was used by the Full Bench in its widest sense. This is evident from the sections of the supplementary decision which we have set out above. It is arguable that regular daily employees in this award are not 'seasonal employees' even though they are employed in an industry which bears seasonal features; if this were so, there would be no need to consider whether they should be excluded from the benefits the Commission has approved in relation to termination, change

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(4)Print E9006 [F002]; (1982) 278 CAR 174   (5)Prints F6230 and F7262

and redundancy. In any event, Deputy President Riordan examined the conditions of their employment under the award with the high degree of care which the Full Bench stipulated should be adopted when considering the extension of the benefits to seasonal employees.

We have concluded that his decision in relation to this class of employee was supported by the evidence and should not be disturbed." (Ludeke and Peterson JJ and Commissioner Palmer)(6)

In the light of the Appeal Full Bench decision there is no justification for any further delay in the application of the Commission's standard to the employees covered by these awards.

In the proceedings on 18 December 1989 concerned with the F.J. Walker Award the Meat and Allied Trades Federation of Australia (MATFA) on behalf of the employer concerned consented to the insertion of an appropriate clause covering employees engaged on a regular daily basis subject to the following:

"Parties have agreed that the variation to the award to be made will contain the following notation namely that the parties acknowledge that it has always been and remains open to the employer to make proper application to vary the award in the future in relation to clause 42 seasonal allowance. This includes the capacity of the parties to discuss clause 42 seasonal allowance in the context of the existing structural efficiency principle."

The outstanding issue of substance to be decided relates to the operative date to be included in the variation. The AMIEU seeks a date of operation in respect of the Hutton Award on and from 22 December 1988 and on and from 1 January 1989 in respect of the Queensland Meatworks of F.J. Walker Pty Ltd. The employer opposes any retrospective operation beyond the date of the decision in respect of the Federal Meat Industry Award, namely 23 June 1989.

On 23 December 1988, the services of seventy employees in the boning room of Huttons Oxley meatworks were terminated following the expiration of seven days notice. These employees had all been employed on the basis of regular daily hire. Twelve of the dismissed employees, however, were re-employed as labourers elsewhere in the meatworks.

In the slaughter section fifteen employees were dismissed on 21 January 1989 and a further 25 employees were dismissed on 26 May 1989. Of these, ten

were employed as labourers elsewhere in the meatworks as labourers.

According to the employer the boning room and the slaughter section at
its Oxley meatworks had ceased to be viable on account of the high cost of livestock.

From 1 July 1989, the employer's cannery section has operated in "a sporadic manner". This follows the termination of some twenty to 25 regular daily employees on 30 June 1989. Since 1 July 1989, the cannery has operated
to process particular quantities of meat from time to time and casual employees have been engaged for the purpose. When the quantities required are
completed the cannery is closed and subsequently re-opened to process another
order when it is required.

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(6)Print J0216

According to a statement tendered in the proceedings, in respect of the
application to vary the F.J. Walker Award, the Queensland meat industry has a
cyclical pattern of production which is related to seasonal conditions and market price movements. These seasonal conditions and expected price movements
have a major influence on the decisions made by cattle producers in respect of
the size of herds to be kept on properties or the number of cattle to be sold
for slaughter. This in turn affects the potential production at the particular
meatworks.

The Queerah meatworks operated by F.J. Walker Pty Ltd which was situated
at Cairns, North Queensland, was an establishment which had over the years had
its production capacity varied in accordance with the vagaries of seasonal conditions and price movements in the market place.

The position which arises in respect of the former employees of the Queerah meatworks is quite unusual in the sense of the normal industrial relationship between employers and their employees but it is not unusual in this industry.

The relevant employees had their "employment" terminated on 8 August 1988 but their "engagement" continued in anticipation of their employment being continued in the future when cattle stock was available. This procedure
was not unusual and accrued long service leave credits were maintained and payment in respect of them was not made to the employees at that time.

On 2 February 1989, employees were advised as follows:

> "Since your termination on 8th August 1988, circumstances beyond the company's control have regrettably led to the decision not to operate Cairns in the forseeable future.

We thank you for your support in the past and enclose any outstanding monies (including pro-rata long service payments)."

This Commission does not usually order retrospective dates of operation in respect of variations of awards or the making of new awards.

It is well established that it is only in exceptional and unusual circumstances that an order will be made with retrospective effect. But where such circumstances have existed retrospective adjustments have been ordered in accordance with the requirements of justice and equity.

Several decisions of industrial tribunals relating to the retrospective operation of award were referred to in an appeal decision in re the Ships Painters and Dockers Award Case.

The decision contained the following passage:

"The principles applicable to retrospective payments are to be gathered from a number of cases of which the following passages are illustrations:

'The Court does not make awards or variations retrospective unless it is necessary to do so in the interests of justice and fair play' (per Powers J. - Amalgamated Society of Engineers v. Adelaide Steamship Company Limited and others. [(1923) 18 CAR 851 at 854])

'I have always decided that point on the principle that if the fixing of the new rates has been delayed by the respondents, or if the Court has notified during the hearing an intention to raise rates to a specified amount or if the union has offered to accept rates - which the Court later on awards - the respondents will be required to pay rates retrospectively. If not they will not have to do so' (per Powers J. - Amalgamated Engineering Union v. Adams and others [(1924) 20 CAR 1135 at 1205])

'There is a just ground for the disinclination on the part of the Court to give retroactive force and operations to its orders unless some very special reason exists for doing so' (per Kelly J. - Builders and Traders (Defence Works) N.S.W. Award [(1941) 45 CAR 719 at 721])

'It is in my opinion a sound principle to avoid retroactivity of awards unless exceptional and strong reasons exist to the contrary and generally speaking such reasons must be based on some action

by a party of which the Court does not approve' (per Piper CJ - Federated Gas Employees v. A.G.L. [(1942) 48 CAR 85 at 137])

'In view of the extra strain being put on many of the employees and of other circumstances I think some concession from the Court's usual practice should be made in favour of the employees, and therefore determine that the qualifying periods of 12 and 6 months shall commence from 1.7.43' (per Piper CJ, Saddlery Leather and Canvas Workers [(1943) 50 CAR 829 at 866])

'The reluctance of Federal industrial tribunals to make retrospective awards are fairly well known . . . But to visit on the officers all effects of the delay would be as unfair as it would be to charge the employer with the whole of them' (per M.M. Stewart C.C. - In the W.A. Railway Professional Officers Award [(1949) 64 CAR 54 at 57])

'The well established and firmly entrenched principle is that retrospective application will not be approved except where there is agreement between the parties; where there is no agreement between the parties the principle is to make the order prospective and not retrospective unless there have been some delays by the Tribunal or the Commissioner dealing with the matter' - (per Galvin CC, Railway Metal Trades Grades Award [(1955) 81 CAR 625 at 626])

'The rule applied, prima facie, by the Commission (the Industrial Commission of New South Wales), is that awards shall take effect 14 days after gazetted and shall not be given a retrospective effect unless circumstances exist justifying the adoption of that course' - (per Cantor J - in re Crown Employees (Clerical) Award - [1930 29 AR (NSW) 585 at 597])

After careful consideration of what we accept as 'the well established and firmly entrenched principles' accepted and applied by the old Arbitration Court, by former Conciliation Commissioners, and by members of the present Commission, we feel driven to the conclusion that the Commissioner's retrospective order was not justified in the circumstances of this case". (Wright and Gallagher JJ and Commissioner Apsey)(7)

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(7)(1960) 94 CAR 579 at 619

In the Saddlery Leather and Canvas Workers Case which was cited in the Ships Painters and Dockers Appeal referred to above, Piper CJ made the

following important observation earlier in his reasons for decision as to the principle to be applied:

> "The reasons which normally disincline the Court to give retro-active effect to awards are now strengthened by price control regulations which add to the difficulties of employers in allowing for increased costs which may be imposed in the future with respect to goods manufactured and sold in the past. On the other hand it has no doubt been - or should have been - obvious to the employers since April, 1943, at the latest that the annual leave provisions of the award were coming into effect in the future and I am not satisfied that, if some retro-active effect be given, the employers will not be able to reimburse themselves to such an extent as may be proper taking their transactions as a whole over the full period of twelve months. In view of the extra strain being put on many of the employees and of other circumstances I think some concession from the Court's usual practice should be made in favour of the employees . . ."(8)

In a decision concerned with the South Australian Nurses etc. Award the South Australia Industrial Commission in appeal session said:

> "To achieve retrospectivity it must usually be shown that -
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> . . .
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> (3) That the matter before the tribunal is of general application (stemming for example from a National Wage Case decision of the Commonwealth tribunal) and, as a matter of industrial equity, it is desired to give effect to the general adjustment as nearly as may be as of a common commencement date. This is particularly so where it is clearly understood by the commerical community at large that a particular type of decision emanating from the Commonwealth tribunal is inevitably given effect to throughout the general spectrum of State awards." (Bleby J President, Olsson J Deputy President and Commissioner Marron)(9)

In the August 1988 National Wage Case the Commission when considering wage increases which were likely to flow from the decision in that case said:

> "The Commission will not award retrospectivity in any arbitrated case."

But this decision is about adjustment of wages in the circumstances of the 1988 national wage principles and is not necessarily applicable to other circumstances.

A Full Bench of the Commission in dismissing an appeal in respect of an order made against Dundee Fashions which had a substantial period of retrospective operation said:

> "Further, in our opinion, the specific order appealed against granted no more than the employees are now entitled to in accordance with the provisions of clause 51 of the Clothing Trades Award. In our view, an examination of the decision and the substance of the order of the Deputy President reveal no error in principle and no misunderstanding of the facts." (10)

(8)(1943) 50 CAR 864 (9)1972 AILR para 523

The facts in Dundee are certainly different to those in this case but the reasons indicate that, consistent with well established principles, if the circumstances justify such an action, retrospective operation will be awarded, albeit in only exceptional and unusual circumstances.

It is clear enough that industrial tribunals have generally taken the view that the matter of retrospective operation of awards is a matter to be decided in the circumstances of the particular case.

In Operative Painters and Decorators Union of Australia and Hydro Electric Commission (Tas) a Full Bench of this Commission said:

> "There remains the question whether the commissioner should have awarded the degree of retrospectivity which he did. It was acknowledged by both sides that this course was open to him but the union added that 'it would be a very rare case where one would award retrospective operation to, in effect, deprive people of their legal rights'. While we recognise the arguments against retrospectivity in the present case, we again consider that he was entitled to reach the conclusion which he did on what was before him". (McKenzie DP, Keogh DP and Griffin C)(11)

The principal consideration in the reasoning in all of these cases is the fairness of the date of effect proposed.

Retrospective operation will not be awarded except in circumstances where the requirements of fairness and equity require it. These principles have been carefully considered and applied in this case.

It is equally clear that in circumstances where the principles of fairness and equity require it, retrospective variations to awards will be made.

The disinclination to award retrospective adjustments was qualified in the clearest possible terms by the President of the Commonwealth Court of Conciliation and Arbitration (Powers J) in Amalgamated Society of Engineers

and Adelaide Steamship Company Limited and others. In his reasons for decision
his Honour said:

> "The Court does not make awards or variations retrospective unless it is
> necessary to do so in the interests of justice and fair play." (emphasis
> added)(12)

The circumstances of this case warrant special consideration. To refuse
to make the variations retrospective in their operation would result in a
denial of justice and fair play to those employees who lost their
employment.

The first decision of the Full Bench in the Termination, Change and
Redundancy Case was given on 2 August 1984. (Moore J - President, Maddern J
and Commissioner Brown)(13)

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(10)(1986-1988) 23 IR 1 at 2 (11)(1982) 3 IR 116 at 120
(12)(1923) 18 CAR 852 at 854 (13)Print F6230

The supplementary decision by the same Full Bench of the Commission was
delivered on 14 December 1984.(14)

The AMIEU served a log of claims in 1985. Partial agreement was reached
with the Meat and Allied Trades Federation of Australia (MATFA) which was
expressed in a variation to the Federal Meat Industry Award on 17 October
1988.(15) This variation did not apply to Part III of the Federal Meat
Industry Award or to the class of employees covered by the awards involved in
this case.

A detailed case with extensive evidence covering employment in the
various States was presented and final argument was concluded in December 1988
with a short written response being received by mid January 1989.

J.C. Hutton Pty Ltd was a member of MATFA at the time agreement was
reached to provide the benefits of the TCR decision to a very substantial
proportion of employees in the meat industry. F.J. Walker Pty Ltd is and was
at the material time a member of MATFA.

Due to several unavoidable circumstances the decision in respect of the
application of the TCR principles to the balance of employees in the industry
was regrettably delayed for several months.(16) This delay was unavoidable and
was not caused by the employees covered by this award. This decision was
delayed further awaiting the resolution of the appeal proceedings concerning
the applicability of the TCR decision to this class of employee.

The question to be answered is whether it would be fair, just and reasonable, in the light of principles which have been maintained for more than 60 years, to deny the benefits of the TCR case decisions to employees who have been retrenched during the proceedings and prior to a decision being given.

The employees who have been retrenched by Huttons and F.J. Walker during this period have not had the benefit of the Commission's standards which were established in 1984. There has been some degree of uncertainty in respect of the entitlement of this benefit to this class of employee. That has now been settled and it is now a question of what is required to be done as a matter of fairness and equity in relation to those employees whose services have been terminated during the period of negotiation and arbitration.

The closure of the Queerah Meatworks in August 1988 was on account of a shortage of cattle stock in North Queensland at the time with no prospect of improvement apparent. It had been stated that it was intended to reopen should the availability of stock improve sufficiently.

In a statement of evidence tendered, but in the event not sworn, Mr Hughes, a meatworks supervisor employed by Australian Meat Holdings, of which F.J. Walker Pty Ltd is a part, referred to the decision to close the Queerah Meatworks as follows:

> "The main reason for the decision to close the plant on a permanent basis occurred because of indications of dwindling stock numbers in the north of Queensland and this did not improve during 1989.
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> The impact of the Trade Practices Commission matter also had an influence. Had the decision been in Australian Meat Holdings favour, it was intended that Cairns would remain seasonal and Bowen would be

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(14)Print F7262 (15)Print H5094
(16)Print H8683

> discontinued. However, given the financial situation following the Trade Practices Commission decision, it was decided that Cairns would be permanently closed and the real estate sold.
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> At the time of the closure, there was a redundancy case proceeding before the Australian Industrial Relations Commission (Deputy President Riordan) and I understand that the AMIEU has asserted that that case and

predictions of some possible adverse result was a factor which moved the company to permanently close the plant. As far as I am concerned, that matter was never even considered in arriving at any decision to close the plant." (exhibit G2)

This statement indicates that the decision to terminate the services of the employees was not related to the AMIEU claims for the payment of TCR benefits but it is also clear that F.J. Walker was aware of those claims. In fact there can be no doubt that every company who was a member of MATFA would be aware or should have been aware of the claims and the very extended nature of the hearings before this Commission and the negotiations between the AMIEU and MATFA about this issue.

It is difficult to imagine that managers in an industry which is subject to such variations in trade as the meat industry would not have been following very closely all of the developments in respect of TCR payments as a result of decisions of this Commission. It would be equally difficult to imagine that prudent financial management would not require appropriate provision to be made for its future payment.

Reference was made to a decision of a Full Bench in Seagel v. Clothing and Allied Trades Union of Australia which contains the following passage:

> "We do not propose to refer to what has been said in general terms as to the prima facie unacceptability of retrospective provisions in Federal awards. It is of greater relevance to this appeal to refer to the supplementary decision in the TCR case itself where it is said:
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> > 'We would make it clear that we do not intend that the date of operation in the Metal Industry Award should apply in other awards. It may be that the position that occurred in the metal industry that no industrial dispute had formally been created which would give us jurisdiction would also apply in other industries. The date of operation of each variation will also depend on the facts of each case, and it must be borne in mind that any order will, in part, create award provisions, the breach of which could lead to prosecution.' [Print F7262]
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> We see this passage as setting itself against retrospective operation of the standards which it expounded. The reasons for this attitude are understandable and are alluded to in the abovementioned passage. Moreover, the TCR case did not itself prescribe retrospective operation notwithstanding the period between the two decisions." (Coldham, Cohen JJ and Commissioner Merriman)(17)

There are two aspects of this case to which reference should be made.

Firstly the Full Bench after considering the award made decided to "review it
with reluctance". The second aspect is that the circumstances are entirely
different. The case being reviewed related to the termination of two
employees, in accordance with the relevant award provisions applying, on
account of the closure of a business which had been undertaken by two persons
in partnership.

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(17)Print G5842

There is no valid comparison between that case and the facts which
relate to these two awards and the terminations which occurred.

It would, of course, be absolutely wrong to make an award with
retrospective effect with the result that the employers concerned were to be
exposed to proceedings for a breach during the earlier period when no such
obligation existed. The order in this case will, therefore, provide that no
breach will have occurred if the appropriate payments are made within 28 days
of the date of the issue of an order giving effect to this decision.

It was argued that as the employment relationship had been terminated
the Commission had no jurisdiction to deal with the matter. If this matter
concerned the service of a new log of claims covering new matters there could
be merit in this proposition. But in this case the issue does not concern the
creation of a new relationship but involves the resolution of an industrial
dispute which was in existence prior to the employees' services being
terminated by each of the companies concerned. This decision relates to
relationships that were regulated by awards of this Commission as a result of
industrial disputes.

It was submitted on behalf of F.J. Walker that there could be no
justification "for a variation to take effect some six months prior to the
date on which it was lodged." It was further argued that:

> "It would be . . . an extraordinary position for an award variation,
> which was a flow-on of an earlier award variation, to apply from a point
> of time earlier than the original award variation and, in the context of
> this case, to have an operative date some six months prior to the
> original award variation. It was claimed that this 'would be . . .
> unprecedented in the Australian industrial scene'".

There is a great deal of force in these arguments. To say the least the
claim is unusual. At the same time it must be stated that the circumstances of
this case are also very unusual, if not unique. It should be observed also
that in reality these applications are about the implementation of a new
standard adopted by this Commission in 1984.

When all of the circumstances are considered it becomes clear that it
would be unjust and unfair to the persons concerned who have lost their jobs

during the conciliation processes and later the hearing of the case about the correct principle to be applied.

Of course, there must be a cut off provision in respect of every reform. In this case it would not be reasonable to extend the benefit to a date earlier than that prescribed in this decision.

The delay in finalising the proper application of the Commission's new standard benefit in respect of termination of employment on account of redundancy should not result in the denial of benefits that would otherwise be payable to the employees concerned.

It is now five years since the Commission's standards to be applied in respect of termination, change and redundancy were established. Since that time although many awards have been varied to give effect to the principles involved no case was cited in which an award of substantial retrospectivity has been made. But that fact on its own is not sufficient to justify a refusal to award retrospective operation of the provisions in the circumstances of this case.

The overriding consideration in respect of all decisions to be made by this Commission must be that which is dictated by the requirements of fairness and justice. This does not mean that one group can be singled out for special treatment which is not available to others. In other words it would not be fair or just to grant this benefit with retrospective effect to the employees covered by these awards and to deny it to others in the same circumstances. But where the circumstances require retrospective operation to ensure fair and just treatment to displaced employees it would be unfair and unjust to refuse to prescribe the benefit from the appropriate date.

When the Full Bench introduced this industrial relations reform into Federal awards, which followed legislation in New South Wales, it determined that the award variations should not be retrospective, as referred to above. At the time of the introduction of the legislation in New South Wales there had been widespread terminations of employment and it was clear that Australian industrial regulation was deficient in respect of provisions to be found in various European countries. Obviously there could not reasonably have been an award of retrospective effect with obligations being imposed on employers of a kind that would not have been reasonably anticipated.

This is no longer the case. No employer in this industry could not reasonably claim to have expected that there would never be an application of the new standards to awards regulating industrial relations in the meat processing industry.

In all of the circumstances of this case, which are highly unusual, and
having regard to the fact that the benefits prescribed represent a standard of
this Commission and are enjoyed by the great majority of persons in the Australian workforce, the exercise of the discretion to award retrospective operation is justified. The employer had full knowledge of the existence of the standard and would have been aware of the prospect of an award being made.

The variation will, therefore, be operative on and from 22 December 1988
in respect of the Hutton Award and on and from 1 January 1989 in respect of the F.J. Walker Award and will remain in force for a period of two years from
the respective dates.

** End of Text **

*** End of Text ***

Industrial Relations Commission of Australia

546/1990 (20th December, 1990)

Industrial Relations Commission Decision 546/1990; [1990] 546 IRCommA

Q006 Dec 546/90 M Print J2861

AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Industrial Relations Act 1988
s.45 appeal against order(1)

Australian Meat Holdings Pty Ltd
(C No. 30004 of 1990)

QUEENSLAND MEATWORKS INDUSTRIAL AGREEMENT - AWARD 1983(2)
(ODN C No. 03254 of 1979)

Meat workers Meat
industry

JUSTICE MADDERN, PRESIDENT
DEPUTY PRESIDENT KEOGH
COMMISSIONER McKENZIE MELBOURNE, 20 DECEMBER
1990

Leave - annual leave - annual close-down - appeal against order that
company
apply provisions of award in relation to annual close-down - order could
not
apply to actions in question as order could not be made to apply
retrospectively - order was also superfluous as it merely required company
to
apply clause should a situation envisaged by the clause apply - appeal
upheld
order quashed - Riordan DP to convene conference between parties to resolve
issue.

DECISION

Australian Meat Holdings Pty Ltd (the company) have appealed against an
order
of Deputy President Riordan made on 22 December 1989 in relation to the
Queensland Meatworks Industrial Agreement - Award 1983 (the award).

In the proceedings before the Deputy President, The Australasian Meat Industry Employees Union (AMIEU) sought a direction or order from the Commission against the company to observe the conditions of clause 14 of the award, in particular paragraph (o) of that clause. Paragraph (o) of clause 14 relates to annual close-down and provides that where an employer closes down his plant or section thereof for the purpose of allowing annual leave to all or the bulk of the employees, certain conditions apply.

As is indicated in the decision(3) of the Deputy President dated 22 December 1989, it was:

> ". . . asserted without dispute from the respondent employer that a company, AMH, on 14 December last terminated all of its employees at its Beaudesert meatworks, with effect from 14 December in respect of staff engaged in slaughtering work, and from 15 December in respect of those engaged in the boning room".

The Deputy President found that the employees had not been terminated in the normal sense and that what in effect had occurred was an annual close-down. He therefore made the following order:

> "1. That Australian Meat Holdings Pty Ltd do apply the provisions of subclause 14(o) of the Queensland Meatworks Industrial Agreement-Award 1983 in respect of its meatworks at Beaudesert, Queensland.

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(1) Print J0918
(2) Print E0524 [Q006]; (1979) 225 CAR 292 [title change Print F4984 [Q006 V014]]
(3) Print J0899

> 2. Australian Meat Holdings Pty Ltd shall commit a new and separate breach of this Order on each and every day that it does not apply the provisions of subclause 14(o) of the said Queensland Meatworks Industrial Agreement-Award 1983."

It was also provided that the order "shall come into force from 22 December 1989 and shall continue in force for a period of three months".

The grounds of appeal raised a number of questions of jurisdiction but those were not argued by the appellants either before Deputy President Riordan or this Full Bench. Notwithstanding this, because of the issues involved we have decided that leave to appeal should be granted.

In our view the order of 22 December 1989 cannot, for two reasons, apply
to the actions of 14 and 15 December 1989 previously referred to in this decision. The first is that the terms of clause 14(o) of the award are such that it cannot be applied retrospectively. The second is that the order made by
the Deputy President cannot, in its terms, apply to any action taken prior to
22 December 1989.

Furthermore, again given the terms of clause 14(o), it is our view that
the order of the Deputy President in its current form does no more than state
that the company shall observe the provisions of that clause if the situation
envisaged by that clause should arise. As such, the order is superfluous since
the company by virtue of its respondency to the award is bound by the provisions of clause 14(o).

In the circumstances, we uphold the appeal and quash the order made by
the Deputy President.

The matter should not end there. The situation outlined by the Deputy President in his decision of 22 December 1989 is complex and, on the information presented to him and in these appeal proceedings, requires rectification. Consequently, we direct the Deputy President to convene a conference between the parties for the purposes of resolving their problems and, if this is unsuccessful, to proceed to arbitrate the matter on the formal
application of either party.

Appearances:

G.L. Muecke Q.C. for Australian Meat Holdings Pty Ltd.

R. Meiklejohn with L. Day for The Australasian Meat Industry Employees Union.

Date and place of hearing:

1990.
Brisbane:
May 24.
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