

Mr D.R. BIRCH,
Mr H.G.A. PEEBLES,
Mr J.E. McDONNELL,
Commissioners

Industrial Conciliation and Arbitration Act 1961-1987

In the matter of the Conditions of Employment relating to the -

Termination, Change and Redundancy of Employees as expressed in Awards and Industrial Agreements of the Commission; and

In the matter of an application by

- (i) The Industrial Unions affiliated with the Trades and Labor Council of Queensland;
- (ii) The Australian Workers' Union of Employees, Queensland; and
- (iii) The Industrial Unions affiliated with the Combined Industrial Unions Committee,

for Declarations of Policy and/or General Ruling by the Commission in connection therewith.

DECISION

By decision published in 123 QGIG 1234-41 this Bench dealt with preliminary points and questions of law raised by respondents in relation to the Commissions' jurisdiction in relation to the claim under consideration. No appeal has been instituted against that decision.

In that earlier decision we referred to the magnitude of the submissions and documentary exhibits tendered at the hearings. Because of the magnitude of the submissions and the evidence called by respondents, we record that we have taken all those aspects into consideration, but make no effort to logically summarise the submissions in this decision.

It can be said that the applicants generally relied upon the material adduced before the Australian Commission in the Termination, Change and Redundancy cases (1984 AILR 256 and 1985 AILR 1). The respondents opposed the application on somewhat similar bases to that adopted by Employers in those cases, but presented specific arguments based on local conditions and Queensland Statutory provisions. The matter was made more complex by reason of the fact that the applicants sought provisions which were not the same as those that flowed from the decisions above referred to.

In effect, the application seeks a Declaration of Policy that the minimum standards of the Commission in relation to the Termination, Change and Redundancy of all employees should be in terms set out in the amended notice of motion and that a Declaration by way of a General Ruling be issued importing those standards into all Awards and Industrial Agreements.

Over a number of years this Commission has dealt with redundancies on a case by case basis. Alternatively a number of Employers have entered into agreements with Unions relating to redundancies or other aspects of the claim.

Over recent times the Commission has had matters referred to it concerning redundancies in an industry in which some employees work under Federal Awards and others under State Awards. The Employer has made redundancy payments to employees under the Federal Award, but resisted to the

utmost any suggestion that like treatment should be applied to those employees working under the State Award.

Again we have had disputes wherein Employers have been aware in advance that staff are to be retrenched, but have relied upon existing award provisions to terminate employment with one weeks' pay in lieu of notice. One Employer did not hesitate to advise the Commission that his company believed it best to sever the relationship with one clean cut rather than to give notice to the employees of what lay ahead.

Employees working under Awards of this Commission face the same traumas associated with terminations of employment, changes in employment and redundancies as employees working under Federal Awards and Awards of other State Tribunals. There can be no suggestion that legislative provisions or existing award provisions provide adequate provisions.

The Commission is aware that since the Federal decisions were handed down there have been developments in most other States and that in some areas the State Tribunals have granted claims which, in some respects, may be seen to be more favourable to employees than those applying Federally.

We have reached the firm conclusion that so far as our jurisdictional limitations permit, and subject to specific provisions which may be necessary to meet the exigencies of any particular industry or calling, this Commission should now adopt the reasons for decisions and the decisions of the Federal Tribunal in the TCR Case.

Having so concluded, we have considered whether it would be appropriate to flow any decision into all Awards and Industrial Agreements, by way of General Ruling.

We have concluded that the difficulties associated with this course would be insurmountable. To merely superimpose some lengthy provision into an award irrespective of the provisions currently contained therein would lead to absurdity in many cases. Notwithstanding the foregoing, we are satisfied that it would not be possible to formulate a provision which would be equitable in application without considering the existing provisions and the circumstances of the industry in question. Again we are aware that various statutory provisions would have to be taken into consideration in relation to employees working under a number of Awards.

The Commission has therefore determined that it will not make a General Ruling, but we are satisfied that we should declare a policy establishing standards which may be transposed into Awards and Industrial Agreements upon application; but only after the parties have had the right to be heard as to whether there is good reason to modify the provisions to meet the particular Award (Industrial Agreement) requirements.

In the absence of a further decision by a Full Bench of this Commission, it is our intention that conditions more favourable than set out in the declaration of policy should not be awarded.

We have previously ruled on the jurisdiction of this Commission to deal with the matters under consideration. However, there are numerous specific statutory provisions which will have to be taken into consideration in determining whether it is appropriate to apply in whole or in part the general policy statement to a number of Awards-principally in the public sector.

In formulating our policy statement, we have generally sought to follow the variation to the Federal Metal Industry Award 1984.

As we have declined to issue a General Ruling, we have included clause A(5) within our policy statement. The clause will only be transposed into Awards and Agreements where respondents consent.

As the claim was first filed on 28 November 1984, we believe that Employers have had ample opportunity to appreciate the possible ramifications. As we are presently advised, we believe there is no reason why the variations to individual Awards and Agreements should not operate from the date of variation.

We state as a matter of policy that the Termination of Employment, Introduction of Changes and Redundancy provisions set out hereunder, or of a like nature as may be appropriate to meet the circumstances, are appropriate to be inserted upon application into those Awards and Industrial Agreements for which the need can be shown to exist. The method of variation to finalise the policy herein expressed is a matter for the parties. It may be sufficient to insert a simple clause which transposes the provisions of the declaration of policy which follows:

"TERMINATION OF EMPLOYMENT, INTRODUCTION OF CHANGES, REDUNDANCY

CLAUSE A-TERMINATION OF EMPLOYMENT

1. Except where a distinction, exclusion or preference is based on the inherent requirements of a particular position, race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction and social origin, termination of employment based on any of those factors may form the basis for a finding by the Commission that the dismissal was harsh, unjust or unreasonable.

Statement of Employment

2. The Employer shall, in the event of termination of employment, provide upon request to the employee who has been terminated a written statement specifying the period of his/her employment and the classification or type of work performed by the employee.

Termination by Employer

3(a) In order to terminate the employment of an employee the Employer shall give the following notice:

Period of Continuous Service	Period of Notice
1 year or less	1 week
1 year and up to the completion of 3 years	2 weeks
3 years and up to the completion of 5 years	3 weeks
5 years and over	4 weeks

(b) In addition to the notice in (a) above, employees over 45 years of age at the time of giving of notice and with not less than two years continuous service, shall be entitled to an additional weeks notice.

(c) Payment in lieu of notice shall be made if the appropriate notice is not given. Provided that employment may be terminated by part of the period of notice specified and part payment in lieu thereof.

(d) In calculating any payment in lieu of notice the ordinary time rate of pay for the employee concerned shall be used.

(e) The period of notice in this subclause shall not apply in the case of dismissal for misconduct or other grounds that justified instant dismissal, or in the case of casual, part-time or seasonal employees, or to employees on daily or hourly hire, or employees engaged for a specific period of time or for a specific task or tasks.

Notice of Termination by Employee

4. The notice of termination required to be given by an employee shall be the same as that required of an Employer, save and except that there shall be no additional notice based on the age of the employee concerned.

If an employee fails to give notice the Employer shall have the right to withhold monies due to the employee with a maximum amount equal to the ordinary time rate for the period of notice.

Disputes and Claims Settlement Procedure

5. Any dispute or claim arising under this clause should be dealt with in the following manner:

(a) As soon as is practicable after the dispute or claim has arisen, the employee concerned will take the matter up with his/her immediate supervisor, affording him the opportunity to remedy the cause of the dispute or claim;

(b) Where any such attempt at settlement has failed or where the dispute or claim is of such a nature that a direct discussion between the employee and the immediate supervisor would be inappropriate, the employee shall notify a duly authorised representative of his/her union who, if he/ she considers that there is some substance in the dispute or claim shall forthwith take the matter up with the Employer or his representative;

(c) If the matter is not settled it shall be submitted to the Industrial Conciliation and Arbitration Commission which will conciliate with the parties to resolve the issue, or failing settlement by conciliation, shall arbitrate to resolve the issue.

Time Off During Notice Period

6. During the period of notice of termination given by the Employer, an employee shall be allowed up to one day's time off without loss of pay for the purpose of seeking other employment. The time off shall be taken at times that are convenient to the employee after consultation with the Employer.

CLAUSE B-INTRODUCTION OF CHANGES

Employers Duty to Notify

1.(a) Where an Employer has made a definite decision to introduce major changes in production, program, organisation, structure or technology that are likely to have significant effects on employees, the Employer shall notify the employees who may be affected by the proposed changes and their Union or Unions.

(b) 'Significant effects' include termination of employment, major changes in the composition, operation or size of the Employers workforce or in the skills required; the elimination or diminution of job opportunities or job tenure; the alteration of hours of work; the need for retraining or transfer of employees to other work or locations and the restructuring of jobs:

Provided that where the Award makes provision for alteration of any of the matters referred to herein an alteration shall be deemed not to have significant effect.

Employer's Duty to Discuss Change

2.(a) The Employer shall discuss with the employees affected and their Union or Unions, inter alia, the introduction of the changes referred to in subclause 1 hereof, the effects the changes are likely to have on employees and measures to avert or mitigate the adverse effects of such changes on employees.

(b) The discussions shall commence as early as practicable after a definite decision has been made by the Employer to make the changes referred to in subclause 1 hereof.

(c) For the purpose of such discussion, the Employer shall provide in writing to the employees concerned and their Union or Unions, all relevant information about the changes including the nature of the changes proposed; the expected effects of the changes on employees, and any other matters likely to affect employees, provided that any Employer shall not be required to disclose confidential information. the disclosure of which would be inimical to his/her interests.

CLAUSE C-REDUNDANCY

Discussions Before Terminations

1.(a) Where an Employer has made a definite decision that he/she no longer wishes the job the employee has been doing to be done by anyone, and this is not due to the ordinary and customary turnover of labour, and that decision may lead to termination of employment, the Employer shall hold discussions with the employees directly affected and where relevant, their Union or Unions.

(b) The discussions shall take place as soon as it is practicable after the Employer has made a definite decision which will invoke the provisions of paragraph (a) hereof, and shall cover inter alia, the reasons for the proposed terminations, measures to avoid or minimise the terminations and measures to mitigate the adverse effects of any terminations of the employees concerned.

(c) For the purpose of the discussion the Employer shall, as soon as practicable, provide in writing to the employees concerned and their Union or Unions, all relevant information about the proposed terminations including the reasons for the proposed terminations, the number and categories of employees likely to be affected, the number of workers normally employed and the period over which the terminations are likely to be carried out. Provided that any Employer shall not be required to disclose confidential information, the disclosure of which would be inimical to its interests.

Transfer to Lower Paid Duties

2. Where an employee is transferred to other duties for reasons set out in subclause 1 hereof, the employee shall be entitled to the same period of notice of transfer as he/she would have been entitled to if his/her employment had been terminated, and the Employer may, at the Employers option, make payment in lieu thereof of an amount equal to the difference between the former ordinary time rate of pay and the new lower ordinary time rates for the number of weeks of notice still owing.

Transmission of Business

3. (a) Where a business is, whether before or after the date of this Award/Agreement, transmitted from an Employer (in this clause called the 'transmittor') to another Employer (in this clause called the 'transmittee'), and an employee who at the time of such transmission was an employee of the transmittor the business, becomes an employee of the transmittee:

(i) The continuity of the employment of the employee shall be deemed not to have been broken by reason of such transmission; and

(ii) The period of employment which the employee has had with the transmitter or any prior transmitter shall be deemed to be service of the employee with the transmittee.

(b) In this subclause, 'business' includes trade, process, business or occupation and includes part of any such business and 'transmission' includes transfer, conveyance, assignment or succession whether by agreement or by operation of law and 'transmitted' has a corresponding meaning.

Time Off During Notice Period

4.(a) Where a decision has been made to terminate an employee in the circumstances outlined in subclause (1) hereof, the employee shall be allowed up to one day's time off without loss of pay during each week of notice for the purpose of seeking other employment.

(b) If the employee has been allowed paid leave for more than one day during the notice period for the purpose of seeking other employment, the employee shall, at the request of the Employer, be required to produce proof of attendance at an interview or he or she shall not receive payment for the time absent. For this purpose a statutory declaration will be sufficient.

Notice to Commonwealth Employment Service

5. Where a decision has been made to terminate employees in the circumstances outlined in subclause (1) hereof the Employer shall notify the C.E.S. thereof as soon as possible giving relevant information including a written statement of the reasons for the terminations, the number and categories of the employees likely to be affected and the period over which the terminations are intended to be carried out,

Severance Pay

6. In addition to the period of notice prescribed for ordinary termination in subclause 3 of clause A, and subject to further order of the Commission, an employee whose employment is terminated for reasons set out in subclause 1 hereof shall be entitled to the following amounts of severance pay:

Period of Continuous Service	Severance Pay
1 year or less	nil
1 year and up to the completion of 2 years	4 weeks pay
2 years and up to the completion of 3 years	6 weeks pay
3 years and up to the completion of 4 years	7 weeks pay
4 years and over	8 weeks pay

'Weeks Pay' means the ordinary time rate of pay for the employee concerned.

Provided that the severance payments shall not exceed the amount which the employee would have earned if employment with the Employer had proceeded to the employee's normal retirement date.

Superannuation Benefits

7. Subject to further order of the Commission where an employee who is terminated receives a benefit from a superannuation scheme, he or she shall only receive under subclause 6 hereof the difference between the severance pay specified in that subclause and the amount of the superannuation benefit he or she receives which is attributable to Employer contributions only. If this superannuation benefit is greater than the amount due under subclause 6 then he or she shall receive no payment under that subclause.

Employee Leaving During Notice

8. An employee whose employment is terminated for reasons set out in subclause 1(a) of this clause may terminate his or her employment during the period of notice, and, if so, shall be entitled to the same benefits and payments under this clause had he or she remained with the Employer until the expiry of such notice. Provided that in such circumstances the employee shall not be entitled to payment in lieu of notice.

Alternative Employment

9. An Employer, in a particular case, may make application to the Commission to have the general severance pay prescription varied if the Employer obtains acceptable alternative employment for an employee.

Employees With Less Than One Year's Service

10. This clause shall not apply to employees with less than one year's continuous service and the general obligation on Employers should be no more than to give relevant employees an indication of the impending redundancy at the first reasonable opportunity, and to take such steps as may be reasonable to facilitate the obtaining by the employees of suitable alternative employment.

Employees Exempted

11. This clause shall not apply:

- (a) Where employment is terminated as a consequence of misconduct on the part of the employee;
- (b) To employees engaged for a specific period of time or for a specified task or tasks; or
- (c) To casual employees, seasonal employees or employees engaged by the day or hour.

Employers Exempted

12. Subject to an order of the Commission, in a particular redundancy case, this clause shall not apply to Employers who employ less than 15 employees.

Incapacity to Pay

13. An Employer in a particular redundancy case may make application to the Commission to have the general severance pay prescription varied on the basis of the Employer's incapacity to pay."

We order accordingly.

D.R. BIRCH, Commissioner.
H.G.A. PEEBLES, Commissioner.
JE. McDONNELL, Commissioner.

16 June 1987.