

**TASMANIAN INDUSTRIAL COMMISSION**

**Industrial Relations Act 1984**

s29 application for hearing of an industrial dispute

**Imre Marc Toldi**

(T13629 of 2009)

and

**Y L Keane and H Tas, proprietors of Yvette's Café and Restaurant trading as  
Coffee on Main**

DEPUTY PRESIDENT TIM ABEY

HOBART, 30 April 2010

**Industrial dispute - termination of employment - breach of award - order issued**

**REASONS FOR DECISION**

**[1]** On 23 December 2009, Imre Marc Toldi, (the applicant), applied to the President, pursuant to s.29(1A) of the *Industrial Relations Act 1984* (the Act) for a hearing before a Commissioner in respect of an industrial dispute with Y L Keane and H Tas, proprietors of Yvette's Café and Restaurant trading as Coffee on Main (the employer) arising out of a dispute in relation to termination of employment and the alleged breach of the Restaurant Keepers Award.

**[2]** There are two aspects to this application. Firstly, Mr Toldi alleges that he was paid less than the Award entitlement throughout the duration of his employment. Secondly, he alleges that his employment contract was unfairly terminated.

**[3]** The matter proceeded by way of conciliation conference in Sheffield on 20 January 2010. M Toldi represented himself and Mr H Tas represented the employer. A further hearing was convened for 23 February 2010 at Ulverstone. It became apparent that there was no possibility of settling the matter through the conciliation process. As a consequence Mr Toldi proceeded to outline his case and tendered a number of documents into evidence.

**[4]** At the request of Mr Tas, the respondent was permitted to file written submissions, which were received on 31 March. Final written submissions from Mr Toldi were filed on 9 April 2010. As foreshadowed in the hearing, I now determine the matters in dispute on the basis of the material before me.

**[5]** The respondent operates a business which clearly is covered by the *Scope* of the *Restaurant Keepers Award* (the Award). I find accordingly. The business operates 5–6 months a year during the peak tourist season, usually commencing in October.

**[6]** Mr Toldi commenced employment in March 2007. His employment came to an end on 18 December 2009. Mr Toldi asserts that he was unfairly terminated. The respondent maintains that Mr Toldi abandoned his employment.

**[7]** I deal firstly with the alleged underpayment of wages.

**Appropriate Classification Level.**

[8] The parties are in dispute as to the appropriate classification level.

[9] The Award contains the following classification definitions.

*"Food And Beverage Service Grade 2' shall mean an employee who has the appropriate level of training, undertaking functions at a level of complexity greater than Grade 1 and as applicable has completed the required service at Food and Beverage Service Grade 1.*

*Shall competently undertake any or all of the below listed duties under routine supervision and shall be responsible for ensuring the quality and accuracy of their own work but may be still training in aspects of the duties.*

*Duties include any of the following:*

- heating prepared meals and/or preparing simple food items, such as sandwiches and salads;*
- cooking of breakfasts and snacks, baking pastry, cooking or butchering;*
- undertaking general waiting duties of both food and/or beverages, including cleaning of restaurant equipment, preparing tables and sideboards, taking customer orders, serving food and/or beverages and clearing tables, and under general supervision the greeting and seating of guests;*
- supplying, dispensing or mixing of liquor, including cleaning of bar area and equipment, preparing the bar for service, taking orders and serving drinks;*
- assisting in the cellar;*
- receipt of monies;*
- receiving, storing and distributing goods;*
- engaged in delivery duties*

*'Food And Beverage Service Grade 3' shall mean an employee who has the appropriate level of training undertaking functions at a level of complexity greater than Grade 2;*

*shall competently undertake any or all of the below duties with little or no supervision.*

*Duties include any of the following:*

- undertaking general waiting duties of both food and liquor service including supplying, dispensing or mixing of liquor;*
- non-cooking kitchen duties of a specialised nature;*

- *cooking duties including baking, pastry cooking or butchery;*
- *as Food and Beverage Attendant Grade 2 who is involved in the operation of mechanical lifting device or attending TAB terminal;*
- *taking reservations, greeting and seating guests;*
- *full control of a cellar or liquor store (including the receipt, delivery and recording of goods within such an area);*
- *mixing a range of sophisticated drinks;*
- *may provide guidance, supervision and training to employees at this or lower grades."*

**[10]** Mr Toldi asserts that he performed the duties of a grade 3. In support of this contention he said:<sup>1</sup>

*"Those being undertaking general waiting duties of both food and liquor service, including supplying, dispensing or mixing of liquor; taking reservations, greeting and seating of guests; providing guidance, supervision and training to employees at this or lower grades. I also at times was asked to balance the till, provide verbal information on specials boards, and also setting up the house, front of house. I was also in receipt of moneys, receiving, storing, distributing of goods, heating prepared meals, or preparing simple food items, such as sandwiches or salads, and undertaking general waiting and cleaning duties. So in my understanding of what's dictated in here I should have been a food and beverage grade 3."*

**[11]** Mr Toldi holds a *Responsible Serving of Alcohol* certificate issued by the AHA in NSW.

**[12]** Mr Toldi said that he provided training and guidance to other employees.

**[13]** Mr Tas submitted that the appropriate classification was grade 2.

**[14]** Mr Tas said that Mr Toldi did not mix liquor and sophisticated drinks, did not operate a mechanical lifting device or a TAB terminal, did not have full control over a cellar or liquor store, and did not train or supervise other employees.

**[15]** There is considerable overlap between grade 2 and grade 3 definitions. For example, *general waiting duties, including supplying, dispensing and mixing of liquor* is common to both. The *greeting and seating of guests* is in the same category.

**[16]** Apart from specific tasks found only at grade 3 (eg attending a TAB terminal, full control of a cellar), the key difference between grade 2 and 3 is that the latter requires that duties are performed *at a level of complexity greater than grade 2 and with little or no supervision*.

**[17]** Mr Toldi did not assert that he performed his duties with little or no supervision, and whilst the evidence on this aspect is scant, I formed the impression that either

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<sup>1</sup> Transcript p 2

Hussein Tas and/or Yvette Keane were invariably present in the business during the time Mr Toldi was working.

[18] Mr Tas denies that Mr Toldi was responsible for the *guidance, supervision and training* of other employees. In the absence of evidence, as distinct from assertions, I am unable to determine this question one way or the other.

[19] Apart from the training of other employees (see above), I accept that Mr Toldi largely performed the duties he asserts. I am not however convinced that he performed such duties at a level of complexity greater than that required at grade 2, with little or no supervision.

[20] Accordingly I conclude that the appropriate classification is *Food and Beverage Service Grade 2*. I so find.

### **Alleged Underpayment of Wages.**

[21] It would seem that Mr Toldi typically worked a roster across Thursday, Friday, Saturday and Sunday in each week.

[22] It is common ground that Mr Toldi was paid a flat hourly rate for all hours worked, without penalty addition for weekends and public holidays.

[23] The rate of pay was as follows:

- From March 2007 to December 2007 \$16.59 ph
- From January 2008 to June 2008 \$18.00 ph
- From December 2008 to December 2009 \$20.00 ph

[24] According to the Award, the hourly rate for a casual Food and Beverage Service grade 2 working Monday to Friday was:

- 1/1/07 to 1/08/07 \$17.96 ph
- 1/08/07 to 1/08/08 \$18.70 ph
- 1/09/08 to 1/08/09 \$19.35 ph
- 1/08/09 to Dec 09 \$19.75 ph

[25] The above rates include a 25% loading for casual employees.

[26] Clause 14 of the Award prescribes that casual employees are paid a loading for work on weekends and public holidays as follows:

- Saturday 50%
- Sunday 75%
- Public holidays 150%

[27] Section 85 of the Act reads:

#### ***“85.Awards and registered agreements prevail***

**(1)** *Any provision of an award or a registered agreement that is inconsistent with a provision of a contract of service prevails over the latter provision to the extent of that inconsistency.*

*(2) Any provision of a contract of service that is inconsistent with a provision of an award or a registered agreement is to be construed and has effect as if it were modified to conform to the provision of that award or registered agreement.*

*(3) Any provision of a contract of service that provides for any conditions of employment that are more favourable than those provided by an award or a registered agreement is not inconsistent only because of that fact."*

**[28]** Put simply, this means that it is not possible to enter into an agreement or contract which is less favourable than the award prescription.

**[29]** The Commission has no knowledge of the circumstances or terms of any agreement that applicant and respondent may have entered into. It is simply not relevant in that it is not legally possible to contract outside an award provision on less favourable terms.

**[30]** It follows that Mr Toldi was entitled to be paid the relevant penalty rate, calculated on the relevant ordinary time award rate, for all time worked on weekends and public holidays.

**[31]** Partial documentation in the nature of times sheets and wages records, was provided by both parties. This documentation, however, fell a long way short of providing a complete picture.

**[32]** Mr Toldi tendered time sheets covering the period 30 December 2008 to 17 December 2009.<sup>2</sup>

**[33]** In addition Mr Toldi tendered a journal he had prepared covering the total period of his employment.<sup>3</sup> He said that where time sheets were available, the journal accurately recorded the hours worked on each day, the wages he was paid and the wages he maintains he should have been paid, had the award been applied.

**[34]** For the balance of the employment period Mr Toldi relied on pay slips, which showed the total hours worked in each week, and which Mr Toldi distributed evenly over Thursday, Friday, Saturday and Sunday.

**[35]** Mr Tas provided an *excel* document showing time worked each week for the entire period of employment. When this is compared with Mr Toldi's journal, the total hours worked each week coincide. Hence there is no disagreement as to the total hours worked in each week.

**[36]** Mr Toldi calculated that the wages shortfall for the period covered by the time sheets and including penalty rates, as \$2098.

**[37]** For the period prior to the availability of time sheets Mr Toldi calculated the difference between the amount actually paid and the award rate, for all hours worked without any penalty addition. This amounted to \$1075.

**[38]** The total of the two components above is \$3173. Mr Toldi referred to this as the *verifiable* shortfall. These calculations were not contested by the respondent. They have been checked by the Commission and appear to be accurate.

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<sup>2</sup> Exhibit A3

<sup>3</sup> Exhibit A1

[39] Mr Toldi provided an estimate of the shortfall if penalty rates in the pre timesheets period were applied. This amounted to \$6391 assuming his hours of work were spread evenly over the four days on his normal roster.

[40] There can be no doubt that the *verifiable* amount of \$3173 is owed by the respondent to Mr Toldi.

[41] There is little doubt that there is a further shortfall relating to penalty rates which should have been paid in the pre timesheets period. However the role of the Commission is to settle industrial disputes. It does not adopt an inspectorial role, but rather, decides matters on the basis of material before it.

[42] Through no fault of his own Mr Toldi was unable to identify with sufficient precision the hours actually worked on weekends. The Commission is in a similar position. I conclude that it would not be appropriate to issue an order based on an estimate. I will, however issue an order requiring payment of the *verifiable* amount (\$3173). It must be emphasized that payment of minimum award entitlements is not something which is negotiable.

### **Alleged Unfair Termination**

[43] Neither party gave sworn evidence which could be tested under cross-examination. The following summary has been compiled from both written and verbal submissions from Mr Toldi and Mr Tas, together with an unsworn statement from a witness, Mr Reilly.

[44] On Friday 18 December 2009 Mr Toldi arrived at work and proceeded to set up the café for trading. At approx 10 am Mr Toldi approached Mr Tas with a request to discuss his wages. Specifically Mr Toldi asked for payment of award rates including penalty rates on weekends. The ensuing conversation was along the following lines.

*"Mr Tas. You know we can't afford to do that at the moment.*

*Mr Toldi I heard you say to Doug that you have a \$1500 day coming up, you can afford it. (denied by Mr Toldi).*

*Mr Tas. Not this shit again. You know we barely break even most days. And the busy days make up for the quiet times."*

[45] Mr Tas then left the immediate area and moved to the kitchen. He was heard to be making a considerable noise including the breaking of glass.

[46] Yvette Keane who had witnessed the above altercation, told Mr Toldi to "*leave*" or in the alternative, to "*go*".

[47] Yvette Keane and Mr Toldi exchanged insults and Mr Toldi left the premises.

[48] Approx two hours later Centrelink telephoned the respondent seeking a separation certificate for Mr Toldi. Mr Tas said that he was still employed. Later that day Mr Tas called "*Business and Employment*" and was allegedly told that Mr Toldi had been in the day before inquiring about contract cancellation.

[49] Mr Toldi agreed that he had been to see *Business and Employment* seeking further information. In particular he was concerned that the certificate 3 was in tourism, not hospitality.

[50] Mr Toldi said he returned to the café on the following day in the hope of receiving an apology or perhaps a proposal of compromise to resolve the issue. He said that neither was forthcoming and that neither Hussein or Yvette Keane spoke to him. Hence Mr Toldi asked for his pay-slip and returned home. Mr Tas did not refer to this visit, stating that Mr Toldi did not report for his rostered shifts on the weekend.

[51] The picture is further complicated by the confusion as to Mr Toldi's last day of work. His application refers to *Friday the 17<sup>th</sup> of December 2009*. Friday was actually 18 December. The transcript refers firstly to *Friday 18 December*<sup>4</sup>, and then later Mr Toldi refers to Thursday.<sup>5</sup> The written submission from Mr Tas refers to Friday 18 December and the *Termination of a Training Contract under Probation* records the date of termination as 18/12/2009.

[52] Ordinarily this confusion would not be of significance. However it does call into question the accuracy of Mr Toldi's reference to his visit to the café the *following day* (being a Friday). This confusion is regrettable, as the visit, if it occurred, may have been an important consideration. In the circumstances, I am unable to attach any weight one way or the other to this aspect of the proceedings.

[53] On 22 December Mr Toldi wrote to the respondent requesting a remedy of an alleged \$7485 underpayment of wages.<sup>6</sup>

[54] On receipt of this correspondence Mr Tas contacted Mr Toldi. The substance of that conversation is disputed although it is clear that Mr Tas indicated that he wanted Mr Toldi to return to work. I am satisfied however that this offer did not include an undertaking to pay penalty rates in accordance with the award.

[55] Mr Toldi declined to return to work and proceeded to lodge an application with the Commission.

[56] An employee terminated on the grounds of seeking the benefit of an applicable award would almost certainly have an inviolable case for an unfair termination of employment. (see s 30[4][g] of the Act).

[57] The question to be determined in this case is whether the employment contract of Mr Toldi was actually terminated.

[58] There is no question that there was a heated exchange between Mr Toldi and Mr and Mrs Tas. Words were exchanged that in the cool light of day might have been regretted. Yvette Keane certainly told Mr Toldi to either "*leave*" or "*go*". But does this amount to a termination?

[59] Mr Toldi chose to interpret this instruction as a termination.

[60] The Commission does not have the benefit of evidence from Yvette Keane. However taking all the circumstances into account I am inclined to the view that Ms Keane was motivated by a desire to remove the spectacle of an altercation in full public

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<sup>4</sup> Transcript p 9 line 20

<sup>5</sup> Transcript p 10 line 15 and 30

<sup>6</sup> Exhibit A5

view of customers. To have Mr Toldi leave the premises was one way of achieving this immediately.

**[61]** If I am right on this conclusion, I fully accept that Mr Toldi might reasonably have interpreted the words used as a termination of employment. That said, there was ample opportunity to clarify the position and retrieve the employment relationship, as Mr Tas apparently sought to do on 22 December. Mr Toldi declined the opportunity to return to the workplace for reasons that are understandable. However the matter of award entitlements is a separate consideration to that of alleged unfair termination.

**[62]** On the available material I am not satisfied that Mr Toldi's employment contract was terminated and therefore the question of fairness or otherwise does not arise. I find accordingly.

### **ORDER**

The respondent did not make any specific submissions regarding capacity to pay; although on the material before me I am satisfied that Mr and Mrs Tas operate a relatively small seasonal business with modest cash flow. Accordingly I am prepared to extend the terms of payment longer than would ordinarily apply.

I hereby Order, pursuant to s.31 of the *Industrial Relations Act 1984*, in full and final settlement of the matter referred to in T13629 of 2009, that Y L Keane and H Tas, proprietors of Yvette's Café and Restaurant trading as Coffee on Main pay to Imre Marc Toldi the sum of \$3173 in accordance with the following schedule:

1. An amount of \$1173 not later than Monday 17 May 2010
2. A further amount of \$1000 not later than Monday 14 June 2010
3. A further amount of \$1000 not later than Wednesday 30 June 2010

Tim Abey  
**DEPUTY PRESIDENT**

#### **Appearances:**

Mr I Toldi representing himself  
Mr H Tas for the employer

#### **Date and place of hearing:**

2010  
January 20  
Sheffield  
February 23  
Ulverstone