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IN THE INDUSTRIAL RELATIONS COMMISSION
OF NEW SOUTH WALES

BACKMAN J

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TUESDAY 6 NOVEMBER 2012

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**IRC12/829 - NOTIFICATION UNDER SECTION 130 BY FIRE BRIGADE
EMPLOYEES' UNION OF NEW SOUTH WALES OF A DISPUTE WITH NSW
FIRE BRIGADES RE MINIMUM CREWING**

Mr J W Nolan for the Fire Brigade Employees' Union of New South Wales
Mr R Reitano for Fire and Rescue New South Wales

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NOLAN: My client approached the registrar and orally made a request for this matter to be re-listed in the light of certain events that have taken place late last night. It was our understanding, and this was an understanding we thought was shared by your Honour, but no doubt your Honour will make your position clear, that notice was to be given to the union if this issue of TOLing was to be revived and that there was an intention expressed to implement TOLing at certain stations on the part of Fire and Rescue New South Wales.

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Notwithstanding a number of discussions about a range of matters, including discussions as recently as yesterday afternoon between senior officers of the union and senior management people from Fire and Rescue New South Wales, not a peep had been issued to the union that there was an intention to peripherally implement TOLing in respect of a number of stations, and notwithstanding what was communicated to us, namely, that there would be proper notice given to us, and if a decision on the matter was taken that would be a matter before your Honour, the secretary of the union was apparently rung up last night by Commissioner Mullens and told that a decision was made at 5.30 p.m. last night. So, on any view, it could not be thought for that decision to be given in the spirit of things---

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HER HONOUR: Has TOLing already been implemented?

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NOLAN: Yes, last night at 5.30 p.m. What made matters even more disturbing, notwithstanding the impression created by the discussions between the parties about the range of issues, including the joint consultation committee yesterday, and notwithstanding what was said by Fire and Rescue New South Wales about what had been intended, or otherwise proposed to do, it transpires that last night there was a You Tube video on the Internet by Fire and Rescue New South Wales that consisted of what might be described as a wholesale attack on the union which was very contentious and made a range of claims effectively attacking the union, as if none of these discussions had taken place.

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Now, that would have been serious enough on its own, but it turns out, and

5 one can make enquiries of You Tube about this, but our enquiries indicate that the video by the Commissioner was actually uploaded on 25 October last. So, in fact it was uploaded back then and went live last night about 5.30 p.m. to 6 p.m. As I said, it was a wholesale attack on the union and, plainly, it had to be made well before 25 October if it were to be produced in a professional way and uploaded to You Tube. This indicates to us an extraordinary exercise in bad faith on the part of Fire and Rescue New South Wales, in the light of discussions with the union who engaged in good faith believing that these discussions were productively advancing various issues between the parties.

10 Now, if the union's view was wrong about that, if Fire and Rescue New South Wales were dissatisfied as to the progress which was being made, they could easily have revived this very matter and come back to your Honour and said, all right, we have got to the point where we believe discussions that we have been having have not borne fruit and we want to go ahead with this and we are giving people notice so that the matter can come back to the Commission and, if necessary, the Commission can deal with all the issues flowing from it.

20 That has not been the case. In fact, what has happened is that there has been obviously a calculated plan to mislead the union, to encourage it to engage in good faith discussions for a period, and only last night to strike this premature blow of issuing an instruction about the issue of TOLing. As I say, it is contrary to our understanding because, as we understood the position, notice was to be given, liberty to apply was granted and the matter was due to come back late next week.

30 So we are in a very awkward predicament where it has been just extraordinary that an employer could conduct itself in this way. We are left in this position where everything we thought was dealt with in good faith has simply ceased. So for that reason we rang up and asked the registrar to re-list the matter. We would have thought as a matter of urgency the status quo that existed before 5.30 p.m. last night should be reinstated pending further discussions and further developments in terms of discussions on the particular issue, and that that be the starting point of any further movement on any of these issues.

35 Frankly, we are absolutely flabbergasted that this turn of events should have taken place, and no doubt we will be making our feelings known about the way Fire and Rescue New South Wales has conducted itself, but the immediate concern is one of bringing the TOLing situation back to a level playing field, restoring the status quo, so that if there is a decision to be made about the TOLing, it can be done under the auspices of the Commission.

45 We would be asking your Honour, subject to what emanates from Fire and Rescue New South Wales, but our present inclination is to ask for a strong recommendation from your Honour that the pre-existing discussions apply pending further discussions under the auspices of the Commission, but at least until the end of next week.

50 HER HONOUR: Before you sit down, I suppose you are aware at this stage that this matter has been before the Commission for some months now. At

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this stage no formal recommendation has ever been issued.

NOLAN: I understand that.

5 HER HONOUR: The reason for that, I can say, is it was certainly the Commission's understanding that there had been productive discussions and cooperation between parties.

10 NOLAN: We are not minded to ask for anything because of that very fact but now we are driven to the position where we think it is appropriate that the Commission should intervene.

REITANO: Could I preface what I am going to say by saying this matter---

15 HER HONOUR: I referred to TOLing, it is really the initiative of TOLing that has been the main subject of this particular proceeding.

20 REITANO: I had a look at the transcript and other matters have been raised but TOLing is the substantial matter. It has been in one form or another before the Commission for about nine weeks, perhaps longer. During that time the one thing that has been made very clear, if nothing else, is that a decision would be made by the employer whether to introduce temporary off-line arrangements in respect of appliances at one stage or another. It was as recently as last Friday. It was at all times before the Commission and before
25 the union that the employer was considering making such a decision. At all times in the last nine weeks the union has made it very clear that it would oppose the introduction of TOLing under any circumstances.

30 HER HONOUR: There were a number of discussions between the parties, as I said, productive discussions, looking at alternative proposals to TOLing.

REITANO: Other cost saving measures. When I say "this matter", it was not confined to TOLing.

35 HER HONOUR: Can I just say in relation to those productive discussions, I don't know whether you are aware, as I say, a proposal was issued by the union on 31 August 2012 to Fire and Rescue, which set out a number of alternative proposals with a view to making required budgetary cuts, if you like. Now that proposal went to the Fire and Rescue and I understood that there
40 were some in principle agreements, if you like, and the next step was to take it to the members which was done and rejected. Although, I understand from the transcript, that some 2000 members attended the meeting and, I stand to be corrected, but it was not a huge margin. It was somewhere between 800 and 1200 members who rejected the proposal. I only bring that to your attention
45 because it seems to me that perhaps all avenues of discussions have not at this stage been exhausted?

50 REITANO: With respect, my instructions are that matters have come to a head and there is a need to take action.

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HER HONOUR: I understand that.

5 REITANO: Can I tell your Honour why. Last night a decision was made to TOL two stations, sorry, some appliances at two stations. That decision was made against the background of a weekend where there were 111 overtime shifts worked, and where there was a review of the overtime budget.

10 A recent review of the overtime budget revealed that 70% of this year's overtime had already been used, against a background of when the usual amount of overtime sheets is somewhere between five and 25 overtime sheets. Bearing that in mind, it was necessary to make a decision whether to TOL or not to TOL, and a decision was made in respect of two stations. The decision compares to decisions made regularly or routinely to TOLing stations where there are training requirements, where there is a need to have people attend forums, and need to have appliances made available for bushfires and the like.

15 The decision to TOL two stations was a decision that was taken. That was telegraphed, that is, that we would TOL up to 8 stations, but it was a very minor one. The effect of the bans being imposed means we have had to triple the number because of the bans. The discussions that were had over nine weeks have only led to the conclusion that the parties are at an impasse. The only cost savings available to us are ones depending upon us taking a management decision upon the way in which stations will be taken off-line, or otherwise. We have taken what we regard as the minimum action available to us in all the circumstances.

20 There is nothing that has been proposed or put forward by the union at any time during the negotiation in respect of TOLing that can deliver the types of savings that we are looking at. Nor has there been any application made by the union to the Commission over the time that this notification has been on foot, that would in any way affect our ability to TOL or otherwise. There has been no attempt made, and nothing telegraphed to us, that we are aware of, that would indicate that the union intended, absent anything else, to make an application that would in some way involve the Commission in our decision to TOL or otherwise.

25 We vehemently deny that we have misled anyone. We told the union we would give notice, and that was the correct position as of last Friday to tell your Honour that no decision had been made. Commissioner Mullens rang the union at five o'clock last night and explained the decision he had made to TOL.

30 In relation to the two stations in question, we are well aware that this management decision is not a popular one in some quarters, but it is a necessary one. It is one that seeks to achieve cost savings that need to be achieved over time and at the same time it seeks to ensure the safety of the community at large.

35 As I have said to your Honour, TOLing is not something new. It is something done in many other stations and I have outlined some of those to your Honour

5 in respect of training forums, bushfires and the like. The minimum action we have taken is the minimum action required and we are entitled to take it. We are entitled to run the Fire and Rescue service in the way we think fit. It is a decision about how we managed that service. It is not a decision relevant in any other sense. It is not an appropriate response to in some way suggest that we have misled the union or, alternatively, the Commission, in circumstances where we have said all along that this decision may be made. There was no promise that we would not make the decision we ultimately did. We made the decision as foreshadowed.

10 Nor is it appropriate to say that we created the impression we did if there was a real prospect we would introduce this, as we did. That is what happened. It is in those circumstances we seek the dispute orders.

15 HER HONOUR: What about the fact the Commission has not issued any formal recommendation, which you would be aware would be the normal procedure, and the appropriate way to approach matters such as this would be surely to issue a direction under the section?

20 REITANO: When we were saying continually to the union and your Honour we have not made a final decision on TOLing, that must have been understood by the union to mean we may make a decision, that is, we may decide to TOL. No application was made by anyone for a recommendation of any kind.

25 HER HONOUR: I understand that but my view is because, I repeat myself, there had been this level of cooperation between the parties, nobody asked the Commission to make any formal recommendation. Indeed, there was no necessity for it.

30 REITANO: The necessity arose in circumstances where the dispute notice was on foot. There are two aspects - the first is if the union had sought to engage the processes of the Commission in some way it had every opportunity to say we want you to make a recommendation. We were saying we might do this at the very least. The second thing is this relates to our capacity to
35 manage our Fire and Rescue services. This is a question of management.

HER HONOUR: Yes, yes, I understand that.

40 REITANO: There is an imperative about all of this and it relates to the cost savings that need to be achieved. Could I hand this to your Honour. It is a copy of a letter sent to the union on 5 September 2012 because it is important in respect of the matter that your Honour has raised.

45 HER HONOUR: This is a reference to the letter that I brought up which was a covering letter of 31 August 2012 in relation to the draft proposals that had been identified by the union.

50 REITANO: It refers to that. Your Honour, it says in the first paragraph (Read). That is two months ago (Read). Now, this was being telegraphed to the union in September "We will have no alternative", and over many, many weeks after

5 September. No application was made to the Commission. They were on notice that the Fire and Rescue's position is there will be no alternative but to introduce TOLing and they did nothing, other than last night when the TOLing was put in place they put bans on in respect of the duties and alternative duties work. It is in those circumstances that we seek the Commission make dispute orders requiring the bans be lifted.

10 I should make one further thing very clear, the effect of the union's ban means we need to TOL more and more stations. We only wanted to TOL two stations but because of the bans we were required to TOL six stations. That has had, no doubt, some financial cost as well.

15 NOLAN: Just a couple of things in reply. The complaint about overtime, I am told, is to be seen against the background of the fact that there is nothing inconsistent with what has been a decade long trend in overtime. The only agreement is that the budget cuts have been slashed.

20 HER HONOUR: Savings have got to be made somewhere. For weeks I have been saying that it is obvious that compromises have to be made.

25 NOLAN: We understand that, but we could perhaps be excused for believing that when we were in discussions which concluded at 4.15 p.m. yesterday afternoon, that we would have been given the benefit of some proper notice, given that is what was really suggested.

30 The whole tenor of the discussions between the parties beggars belief to think that Fire and Rescue were acting in good faith when they planned this. The evidence of this is that the You Tube video was uploaded on 25 October. The discussions can only come to be seen to lead the union on and create a false climate, all the while saying we have not made a decision.

35 Well, at 4.15 p.m. last night they had not made the decision but it had been made by 5.21 p.m. last night and the notice they gave Mr Casey at 5.21 p.m. was that they would introduce this at around 5.30 p.m. That is just laughable. No industrial regime by any civilised society would agree to this. Negotiations were done as late as 4.15 p.m. and there was not the slightest inkling that there would be a change of circumstance.

40 Frankly, that is just extraordinary, and this behaviour should not be countenanced. We would suggest it is entirely appropriate for the matter to be restored to the pre-existing arrangement. There is no reason at all why there should not be a time limit placed on it and Fire and Rescue's disgraceful behaviour should not be rewarded. This is behaviour that should be brought to an end and the parties should be directed to continue discussions, and there should be a reversion back to the previous status quo, unless there is an appropriate means to depart from it. At least there should be proper notice and an opportunity for the matter to be reviewed.

50 HER HONOUR: There have been discussions extending over a period of some months, as I pointed out earlier, as did Mr Reitano, which have not

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obviously yielded much success.

NOLAN: But if we had known we would have been presented with a fait accompli?

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HER HONOUR: I would really urge upon the parties the union proposal of 31 August 2012 which was taken to the various members. I think it should be taken to them again and I think that any developments that have been taking place since the last occasion when it was put before the members and rejected, should be outlined. Perhaps it should be sheeted home to the members the importance of making compromises in the climate of Fire and Rescue having to make these required budgetary cuts in the order of \$15 million. Reality has to set in.

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NOLAN: I think your Honour appreciates the fact that they put it to the members.

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HER HONOUR: I won't grant dispute orders but I will make them the subject of a recommendation in directions and I will make other directions in relation to the without prejudice proposal at 31 August 2012.

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In my view it is premature to talk about it at this stage. I use that word advisedly to talk about issuing dispute orders, because I do not think all avenues have been exhausted. I think it is more appropriate to make a recommendation and directions but I will make it in the terms set out in the notice of motion by Fire and Rescue and I will give the parties some time to comply with directions and recommendations and then come back here.

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I will have to have a short adjournment and I will come back and deliver a short decision. If the union takes up the Commission's recommendation, puts this 31 August proposal to its members again, in the light of recent events, assuming it still has the in principle agreement and cooperation of Fire and Rescue?

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NOLAN: We can probably do that within a fortnight but what happens in the interim?

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HER HONOUR: I will recommend that TOLing not take place within a short period of time and urge upon the parties to take steps I will recommend be taken to propose resolving the issue.

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REITANO: Could I indicate that from our point of view the position has passed well beyond 31 August 2012. We see that there is an imperative, as we notified last night, to commence active TOLing. We do not see that there is any way of going back to the 31 August 2012 proposal now, given where we are. I do not want to be accused of what I was being accused of earlier, or my client was being accused of earlier. Our position is, TOLing having been introduced last night, it must continue.

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SHORT ADJOURNMENT

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FOR DECISION SEE SEPARATE TRANSCRIPT

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IN THE INDUSTRIAL RELATIONS COMMISSION
OF NEW SOUTH WALES

BACKMAN J

TUESDAY 6 NOVEMBER 2012

**IRC2012/829 - NOTIFICATION UNDER SECTION 130 BY FIRE BRIGADE
EMPLOYEES' UNION OF NEW SOUTH WALES OF A DISPUTE WITH NSW
FIRE BRIGADES RE MINIMUM CREWING**

RECOMMENDATION

HER HONOUR: Fire and Rescue NSW on behalf of the Director of Public Employment (the applicant) today filed an application by way of Notice of Motion and an Affidavit of Urgency in relation to a dispute that arises out of the applicant's decision to commence temporarily closing permanent stations (that is taking them off line, an initiative known as TOLing). In response to the decision the Fire Brigades Employees' Union of New South Wales (the union) issued a Code Red yesterday afternoon, Monday, 5 November 2012 instructing its members to refrain from undertaking the following duties:

No out duty or relieving duty is to be performed if it will result in an appliance (including specialist appliances) falling below safe and effective minimum staffing.

No out duty or relieving duty is to be performed if the station in question is already on or below safe and effective minimum staffing levels for all appliances attached to that station.

The Code Red informed "This instruction shall remain in force until advised otherwise by way of further union notice." In addition, the Code Red also reminds its members of a number of matters which are set out in the document.

The issue of TOLing has been before the Commission for some months and is currently being conciliated following the notification of a dispute filed by the union on 26 July 2012.

Initially, productive discussions took place between the parties who were in the process of exploring alternative proposals to the implementation of TOLing as a means of achieving required budgetary cuts which have been imposed on the applicant, the effect of which required the applicant to reduce employee related expenditure in the 2012/2013 year by \$15.3m on the previous year, that is from \$528.5m down to \$513.2m.

The discussions resulted in a draft proposal forwarded by the union to the applicant under cover of letter on 31 August 2012. The draft proposal was

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directed to a number of initiatives aimed at achieving employee related savings as alternatives to the proposal to implement TOLing in order to achieve the required budgetary cuts.

The proposal was put to the members by the union over a series of meetings. Unfortunately it was rejected by the members. The Commission was informed of this on 14 September 2012 during a report back by the parties. During the report back the Commission was informed by the applicant that it needed time to review its position, given the rejection of the proposal by the members. In the meantime the applicant informed the Commission that before any decision was made by it in relation to its budgetary strategy it would notify the union and continue to consult with the union about "hard decisions".

The matter came before the Commission again on 17 October 2012, at which time the Commission was informed by the applicant that no decision has been made in relation to the issue of TOLing.

The position abruptly changed with the applicant's decision to implement TOLing as of yesterday afternoon, 5 November 2012. This decision provided the impetus for the issue of the Code Red by the union and, in turn, has prompted the application in the Notice of Motion for dispute orders under s 137(1)(a) and directions under s 136(1)(a) of the Act.

To restate the position, these proceedings are in conciliation. It was the Commission's firm understanding that TOLing would not be unilaterally implemented by the applicant without, at least, providing appropriate notification to the union.

This matter has not been the subject of any recommendation or directions under s 134 of the Act. The Commission considers that now is not the appropriate time to entertain an application for dispute orders under s 137, particularly given that at no stage has the Commission been requested by either party to make any recommendation or directions for the assistance of the parties with a view to resolving the matters in dispute.

The parties were informed of the Commission's intention to make a recommendation and give directions in order to assist the parties to resolve the issues which are the subject matter of the present application for dispute orders. It is the Commission's view that the union's draft proposal sent to the applicant under cover of letter on 31 August 2012 should be revisited and members urged to adopt the proposal. Whether or not this occurs will be a relevant matter the Commission will consider on the next occasion.

Taking all of those matters into account, pursuant to s 134(2) of the Act the Commission makes the following recommendation and directions:

1. That all employees of Fire and Rescue NSW within the coverage of the Fire Brigade Employees' Union of New South Wales immediately cease and refrain from the taking of any industrial action.

2. That all employees of Fire and Rescue NSW within the coverage of the Fire Brigade Employees' Union of New South Wales immediately cease and refrain from authorising, organising, supporting, encouraging or inciting industrial action, including the cessation of any bans, limitations on work or the withdrawal of labour within the period 6 November 2012 to 4 December 2012.
3. That Fire and Rescue NSW suspend its decision of 5 November 2012 to implement TOLing until 4 December 2012.
4. In the meantime, the union is to re-present its draft proposal attached to its covering letter of 31 August 2012 to its members, with a view to urging those members to adopt the proposal contained therein.

The Commission directs the union, its office holders, officials, employees and agents to take all reasonable steps to ensure that all employees of Fire and Rescue NSW within the coverage of the Fire Brigade Employees' Union of New South Wales to comply with the recommendation and to immediately notify Fire Brigade Employees' Union of New South Wales members of the said recommendation and directions by immediately publishing them using the union's normal methods for urgent communication with its members, including but not limited to the publication of a Code Red.

The matter is stood over for a further report back on 4 December 2012 at 9.30am.

I give each party liberty to apply at any reasonable time before 4 December 2012.

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