



Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

FRYBERG J

No 996 of 2002

A B C LEARNING CENTRES LTD

Applicant

and

F J PEACH, DIRECTOR-GENERAL,
DEPARTMENT OF FAMILIES

Respondent

BRISBANE

..DATE 31/10/2002

ORDER

[2002] QSC 349

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The applicant is a company which conducts a number of child care centres in Queensland. It is a licensee for that purpose under the Child Care Act 1991.

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The respondent is the Director-General of the Department of Families and has the administration of the Act. A dispute has arisen between the parties regarding the proper interpretation of subsection 16(3) of the Child Care (Child Care Centres) Regulation 1991.

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The dispute first arose some years ago and at that time the Association of Child Care Centres obtained a legal opinion on the meaning of the subsection and sent it to the Department. It seems from the evidence that since that time until recently the Department has, if not agreed in the interpretation, at least acquiesced in it.

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However, earlier this year the respondent wrote to the applicant and propounded an interpretation of the subsection which is at odds with the view held by the applicant and more importantly was at odds with the manner in which the applicant wished to conduct its child care centres. Consequently the applicant has sought declaratory relief, no doubt in order to ensure that it does not in the future run the risk of committing a breach of the Act or the Regulations.

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Section 16 occurs in part 3 of the regulation which is part concerned with the functions of licensees. Various matters are dealt with in the part and not all of them are happily

described as functions. The sections of immediate concern to the present application are those dealing with staff levels. Section 15 sets out the minimum requirements for staff levels. Subsection (1) of that section provides that subject to subsection (5), the licensee of three types of child care centre, which I take it are the major three types, must ensure that at least two contact staff members are directly engaged in the care of children in attendance at the centre at all times when children are present. The exception referred to in the opening words is not material for present purposes.

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Section 16 is concerned with the level of provision of staff for groups of children. It is a difficult section to understand. It provides :

"Group sizes and contact staff levels - general

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16. (1) In an age group that is not a mixed age group, the maximum number of children in the age group-
- (a) 0 to 2 years is 8; or
 - (b) 15 months to 2 and one-half years is 10; or
 - (c) 2 to 3 years is 12; or
 - (d) 2 and one-half to 3 and one-half years is 16; or
 - (e) 3 to 5 years is 24.
- (2) Despite subsection (1), a kindergarten may have not more than 25 children in the age group 4 to 5 years.
- (3) There must be a group leader in charge of each group.

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(4) If the number of children in an age group (other than the age group 4 to 5 years at a kindergarten) is more than half the maximum number, the group leader must have an assistant.

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(5) If the number of children in the age group 4 to 5 years at a kindergarten is more than 12, the group leader must have an assistant."

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"Age group" is not a defined term although "mixed age group" is. It is defined to mean "a group of children that consists of children of more than one age group." The difficulty stems from whether or not "age group" refers to a group of children in the physical sense or to the more abstract idea of children in an age group, that is, to a bracket of years, an abstract concept.

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The latter is the ordinary meaning of the terms but the context tends to suggest that the section has a group of children in mind. Another problem with the section is that it suggests on its wording that the numerical limitations which it imposes are imposed on each licensee. That would preclude a licensee from taking care of more than the specified numbers within a particular age bracket if the abstract meaning were to be applied. That in turn is an unlikely outcome and suggests that that meaning is not the correct meaning.

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The section at the heart of the dispute between the parties is subsection (3) and the dispute revolves around the meaning of the words "in charge of".

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The dispute has arisen because the respondent has espoused the view that the words "in charge of" mean in the physical presence of the group and that therefore when a group leader is temporarily absent for whatever reason an alternative group leader must take over. Obviously that has considerable importance for licensees in terms of the number of employees which they must have.

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Group leader is a defined term. It means a person engaged by a licensee to be in charge of children within a day care centre. That is not a particularly helpful definition but some assistance is gained from section 34 of the regulation which prescribes the functions of a group leader. They are:

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"(4) The functions of a group leader are-

- (a) to ensure that a developmentally appropriate program is planned and implemented for each child; and
- (b) to assess the needs of each child and monitor the child's progress; and
- (c) to maintain effective communication with a parent of each child in the group that the person leads."

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It will be seen that none of those functions requires the physical presence of the group leader with the children. For the respondent, Mr Hinson SC, submitted that subsection 34(4) was not an exclusive categorisation of the functions of a group leader. That may well be so; however one would expect that the major functions would be set out there and it seems to me that they are. That being so the section is, I think,

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some indication that the words "in charge of" in section 16(3) do not connote the idea of continuous physical presence with the group.

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Mr Hinson next submitted that the words could be looked at simply in their ordinary meaning and that by that meaning they connoted the requirement for physical presence. He submitted that one must construe the words in this particular context and that it was not of assistance to go to other statutory contexts where the words might take on a different meaning.

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To some extent I accept that submission. It does not seem to me that usages in such places as the motor vehicle legislation, the WorkCover legislation or a dog Act, for example, are likely to be of assistance in the present context. However usages within this same Act, particularly in close proximity to section 16 are, I think, of some assistance.

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A group leader is one of a class of person who is within the definition of contact staff member, that is, a person who provides direct care to children at a day care centre. A contact staff member may include the director or an assistant director. So much is clear from subsection 15(1) of the Act.

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That is of course of limited assistance because it is quite arguable that when a director or assistant director are acting as a contact staff member they must be in the physical presence of the children. It does not in the end, I think,

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assist in interpreting the words "in charge of", to go back to that section.

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It is however noteworthy that it is the section which deals with minimum requirements and that it uses a different phraseology from the phraseology in section 16. Another section which, in my view, gives some assistance is section 21. It provides that if swimming is conducted as an activity at the centre the person "in charge of" the activity must have certain qualifications.

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It further provides that when children are engaged in swimming activities there must be one contact staff member or other adult "present at all times" for each child in certain age groups. The use of the expression "present at all times" is in contradistinction to the term "in charge of". It is true that in section 21 and for that matter section 22, the expression "in charge of" relates to an activity or an excursion rather than to a group of children but that does not matter in the present context. What is important is the contrast between that expression in section 21 and the expression "present at all times".

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If the latter was what was meant in section 16(3) it would have been very easy to say so. To my mind, the natural meaning of the words "in charge of" does not connote the necessity for the group leader to be present "at all times" and the usage in section 21 supports that prima facie view.

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It follows that the approach taken by the applicant to the construction of the section is correct. A declaration ought to issue. I will hear the parties on the terms of the declaration.

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HIS HONOUR: I declare that it is not a requirement of subsection 16(3) of the Child Care (Child Care Centres) Regulation 1991 that a group leader be present with the children in the group at all times.

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HIS HONOUR: I order that the respondent pay the applicant's costs of the application to be assessed.

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