



TASMANIA

Tasmanian Industrial Commission

Industrial Relations Act 1984

T No. 7740 of 1998

IN THE MATTER OF an application by the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union to vary the Fish, Aquaculture and Marine Products Award

Re: Clause 17 - Holiday with Pay

PRESIDENT WESTWOOD

HOBART, 2 July 1998

TRANSCRIPT OF PROCEEDINGS

Unedited

[Would parties please read this transcript carefully.]
[Any queries should be directed to the Commission within 14 days.]

HEARING COMMENCED 10.40am

PRESIDENT: Appearances, please.

5 **MR P. BAKER:** Sir, I appear on behalf of the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, P. BAKER.

PRESIDENT: Thank you, Mr Baker.

MR R. FLANAGAN: If it pleases the commission, FLANAGAN, R., for the Australian Workers' Union, Tasmania Branch.

PRESIDENT: Thanks, Mr Flanagan.

10 **MR W.J. FITZGERALD:** If it pleases, I appear on behalf of the Tasmanian Chamber of Commerce and Industry Limited, FITZGERALD, W.J.

PRESIDENT: Very good. Thanks, Mr Fitzgerald. Mr Baker?

15 MR BAKER: Thank you, sir. This matter arose some time ago - I say, some time ago, it arose on Anzac Day this year, or shortly after Anzac Day, when the office received a phone call from an employer concerning the appropriate penalty to be paid for working the Anzac Day holiday, which you may recall fell on a Saturday of this year.

PRESIDENT: Thanks for reminding me.

20 MR BAKER: I advised the employer that it was - the penalty was double time and one half. One of my colleagues pointed out to me later on that in fact perhaps that information that I had provided to the employer was somewhat incorrect.

MR FITZGERALD: Was that to the employer or employee?

25 MR BAKER: To the employer.

MR FITZGERALD: Thank you.

MR BAKER: Upon reading the clause, and I take your attention to Clause 17 - Holidays With Pay, clause 17(a):

30 *All full time employees shall be allowed the following days as paid holidays:*

And it lists them there. And the second line makes reference to Anzac Day and then it says:

. . . (where it falls Monday to Friday inclusive) -

Which means of course that if Anzac Day falls on a Saturday or Sunday, it is not considered to be a paid public holiday. Now, if you then turn down to - take your attention down to paragraph (c) of clause 17, the award then goes on to say:

5 *Where any of the aforementioned holidays, excluding Anzac Day, fall on a Saturday, Sunday or Rostered Day Off and are observed on the Saturday, Sunday or Rostered Day Off respectively, then the following ordinary working day shall be regarded as a holiday for the purposes of this award.*

10 So that is the second paragraph. Under normal circumstances and under reading awards of this commission - this commission, sir, and indeed the federal jurisdiction, the intent of the provision is to provide a nominated amount of public holidays. Those holidays are to be observed on a weekly basis, Monday to Friday, but where they fall on a
15 weekend the day is observed on the following day.

In circumstances pertaining to Anzac Day, it has become an accepted practice that when it falls on a Saturday or Sunday, the public holiday is in fact observed on that day and there is no additional day prescribed. However, this provision removes the public holiday for
20 employees when it falls on a Saturday or a Sunday and the application before you today is to restore the right of employees to a public holiday when it falls on a Saturday or Sunday, insofar as it relates to Anzac Day.

We would submit to you that it was never the intent of the parties who
25 wrote this award that in fact employees should in fact only have 10 public holidays, Monday to Friday, and if and when Anzac Day - sorry, 11 public holidays from Monday to Friday and if and when Anzac Day falls on a Saturday or Sunday, that in fact that public holiday should be removed from them.

30 PRESIDENT: Well, why did they write that provision in the award if it wasn't their intention?

MR BAKER: Having spoken to one of the parties, sir, who wrote this award - and I won't -

MR FITZGERALD: You'd better not, you'll defame them.

35 MR BAKER: I think the least said, the better. But, clearly, it is consistent - as far as all the other awards of the commission are concerned the provision as it's indicated there is unique in its operation. I'm unaware that there is any other award of this
40 commission that actually removes the public holiday for people if it falls on a Saturday or a Sunday.

I would say to you, sir, that that is not consistent with the wage fixation principles as adopted by this authority in matter T7702 of '98,

in June of this year, when it varied all private and public sector awards and in the principles itself there is reference to the award system and the award system is to provide a safety net of wages and conditions which underpins enterprise bargaining and protects the employees who may be unable to reach an enterprise agreement while
5 maintaining an incentive to bargain in such an agreement.

We would submit to the commission that part of the safety net for employees is 11 public holidays.

MR FITZGERALD: Well, Mr President, I'm sorry to - and I'm not
10 being objectionable, but I think it is timely that I do rise because -

PRESIDENT: I'll just hear you for a second, Mr Fitzgerald, because I'm interested as to what your objection is specifically and I don't want to hear a submission at this stage.

MR FITZGERALD: No. It's not an objection. I think it's timely that I
15 rise at this point and I was happy for Mr Baker to go on but he has touched on the point which I think I want to raise in terms of preliminary issue and I suppose we didn't get to there until the last statement he made in respect of the safety net and that is, in our submission, in terms of - we submit that there's no safety net of public
20 holidays and I'll make further submissions on that later if necessary but what we say is, because the application seeks to amend the award in excess of the safety net of conditions - of wage rates and conditions as prescribed by clause 13 of the commission's own principles, we submit that this matter should be considered as a special case and
25 indeed should be referred to a full bench.

So, clearly, - I'm not sure what the laughter is in the background there. I'm sure I'll discover it. But clearly, and I think it was appropriate that I did stand up now - and I think your questions go, quite clearly, to the intent of the award and why were the parties
30 expressly stating their intent as clearly as they did, not only in the initial clause but also subclause (c), which further reinforces that it's not meant to include Anzac Day on a Saturday or Sunday.

We see that what the application is in fact effectively doing, is varying - or an attempt by the union, supported by the AWU in this instance I
35 understand, because I have had some brief discussions, to vary the award above the safety net in terms of wage rates and conditions. Now, that being the case, the principle of clause 13 says:

*An application to make or vary a minimum or paid rates award for wages and/or conditions [I'd just emphasise that] above or
40 below the award safety net shall be referred to the President for consideration as a special case.*

Now, what we're talking about in my submission, in terms of what the award safety net is, is this particular award. Now, this award states

that in respect to Saturday and Sunday where Anzac Day falls, it's not regarded as a public holiday, quite clearly, and quite clearly, reinforced by subclause (c) which again states, the exclusion of Anzac Day.

Now, further - if I can further quote:

5 [It] *shall be referred to the President for consideration as a special case.*

Now, quite clearly, it's before you now, Mr President, in any event. We seek that there be - this case has special case status attached to it and, further, as you'll see, the president has - you have the discretion
10 if you do in fact agree with our submission that it is a special case, that the matter should be referred to a full bench.

Now, in our submission, it's not a simple matter of correcting the intent, as Mr Baker has indicated. The intent is quite clear, in our view. The award provides that intent. It is in fact an attempt to
15 increase the conditions of the award and to do that you must comply with principle 13. It must, in that instance, have special case status as conferred by you and indeed, further, if you feel that it should be dealt with by a full bench, then you must determine it that way.

So rather than let it linger on painfully, I'd submit, we would suggest
20 that this case be adjourned at this point. Firstly, for you to confer the special case status and secondly, in our submission, to refer the matter to a full bench because it is of such importance that the matter should be referred to a full bench. If it pleases.

PRESIDENT: Yes. Thanks, Mr Fitzgerald. That was a mini
25 submission objection.

MR FLANAGAN: I wonder at this stage, Mr President, if it might be appropriate for the AWU to put its position. This is an historic occasion for me personally. I'm here to support the position of the AMWU but perhaps not on the same basis.

30 To our way of thinking, within the state jurisdiction, there is a position where employees have nominated public holidays and the provision in this award appears to be a unique one, one which departs from the community standard that exists between employers and employees in the Tasmanian jurisdiction.

35 It is on the basis that this provision represents an anomaly that the AWU supports the application which is before the commission. Now just briefly, in terms of the TCCI's proposition that the commission is bound by principle 13 of the State Wage Case, the AWU would oppose that.

In our view, principle 13 is very clearly directed towards the safety net concept which is presently embraced by the industrial relations system and it very clearly says:

5 *An application to make or vary a minimum or paid rates award for wages and/or conditions above or below the award safety net, shall be referred to the President for consideration as a special case.*

10 Now, it refers to the safety net. We are not looking here at an application to vary the safety net. What we are looking here at is an application to bring the public holidays provision in this award into conformity with the provisions of other awards in this state jurisdiction. In fact, all of the AWU's awards in the state jurisdiction have a public holiday provision which would be the same as this, if the application was granted.

15 So this is not an issue which needs consideration by a special case, as proposed by Mr Fitzgerald. Principle 13, in our view, has no relevance. This application stands on its own, on its merits and it should be dealt with in that manner by a single member of this commission. So, that would be our view.

20 PRESIDENT: So, are you arguing then that the award doesn't represent the safety net?

MR FLANAGAN: No. What we're saying is that this is not a safety net issue. This is an issue -

PRESIDENT: It's a condition of employment.

25 MR FLANAGAN: Yes, it is a condition of employment. There's no doubt about that. But in fact, what you're looking at is an application, no different to any other application which is made to this commission, which is not bound by principle 13. It's an application which stands or falls on its own merit and it doesn't require a special case to bring this award into conformity with the other awards of the state jurisdiction.

30 PRESIDENT: All right. Do you want to add anything to that, Mr Baker?

35 MR BAKER: No. And I thank Bill for his timely interjection, which is, I must admit, becoming part and parcel of the way in which he seems to be able to conduct presentations to this commission.

MR FITZGERALD: It depends on the issues.

MR BAKER: Well, it's becoming more consistent, Bill.

MR FITZGERALD: If you raise them, we'll respond to them.

MR BAKER: Insofar as the matter is concerned, I suppose there is one issue which I should have noted to you from the outset, in that I did write to the TCCI on the 20th May, outlining our position and our concern with the award and in fact I did speak to Mr Fitzgerald at the time, briefly, and we did have a brief conversation the other day when another matter was before the commission.

MR FITZGERALD: I'd concede that, Mr President.

MR BAKER: I would say to the commission, consistent with the comments of Mr Flanagan that this is an application which should not be considered in light of principle 13.2 because it does not seek to amend the award either up or below the safety net. There is a safety net of public holidays and in the most recent decision of the Australian Industrial Relations Commission in the Metal Industry Award Part I, in the review of the award, under 7.5, which I'll make available to the commission, under public holidays, there is a comment:

Summary of Decision

Full-time employees are generally entitled to 11 specified public holidays per year without loss of pay.

and all we are saying to you, sir, is that this award should be consistent with that in order that employees generally have a minimum number of public holidays consistent with what is considered to be the safety net, and that is, 11 public holidays. And I would submit to the bench that that was the intent of the parties some years ago when this award was drafted, and as you are well aware, sir, we have had discussions previously about the intent of other clauses of this award and their intent and perhaps the review of this award perhaps should be brought on a little sooner than later about fixing -

PRESIDENT: Well, that's in the hands of the parties.

MR BAKER: I left myself open for that one. But it does need an adjustment and in conclusion, sir, I just reiterate, there's 10 days for some employees, 11 for others, depending upon the time of the year and all we're seeking to do is to rectify the imbalance so that all employees, whenever the public holiday falls due are entitled to 11 paid public holidays consistent with the safety net of conditions as re-emphasised by the recent decision in both the hospitality and metal industry decisions of the full bench - sorry - of the federal jurisdiction.

MR FITZGERALD: Could I respond to those submissions - ..[inaudible]..

MR BAKER: Hang on - hang on -

MR FITZGERALD: - I thought you'd finished, I'm sorry.

MR BAKER: I've finished but - just - just take it easy.

MR FITZGERALD: I see - they get a second go.

MR FLANAGAN: Mr President, in terms of the way forward, Mr Baker has referred to the award review process. We don't see that, the AWU doesn't see that, as the mechanism for addressing this issue. We believe this issue should be addressed through this application. In terms of the award review process, indeed the AWU has taken the disk, we've done all that we can do and we're waiting on correspondence from the TCCI so that we can move forward but we believe that -

MR BAKER: We've waited for some time.

MR FLANAGAN: - that should stand aside as a separate issue. So what we would put to the commission is that as we've already indicated there's a community standard in both the state - particularly the state jurisdiction -

MR FITZGERALD: Well these are repeated comments. These submissions have already been made, Mr President.

PRESIDENT: Please don't get so excited, Mr Fitzgerald.

MR FITZGERALD: Well it's a second go.

PRESIDENT: If I can just say something further.

MR FITZGERALD: I'm sorry.

PRESIDENT: Mr Fitzgerald, please don't accuse other people of repeating themselves.

MR FITZGERALD: Okay.

PRESIDENT: Okay.

MR FLANAGAN: Yes, it does touch on common ground there in terms of we have put our position there. It's probably not necessary to go any further with that but the reality is that there is a community standard out there and it's on that basis we believe the commission, as presently constituted, has the authority to deal with this application.

PRESIDENT: Yes, thank you. Now Mr Fitzgerald.

MR FITZGERALD: Thank you, I'm sorry for the interjection and I just felt that there was a second or third go but - and I'll try to confine myself to comments made in response to both Mr Baker and Mr Flanagan. But Mr Baker mentioned about the intent of the parties; well I think I'm probably the only privileged person to say what the intent of the parties were at that time because I'm the only one who

was there with the employer and other union parties so I know what the intent was and it's reflected in the award. And you must take into account, Mr President, the award was negotiated as a package and there were certain trade-offs within the conditions and this is one of
5 them. And the intent is very clearly expressed. So just in answer to that point I can recall quite clearly what the intent was and it was within the package of conditions.

But I think the submissions in respect to whether it should be referred to a full bench or not is a classic case by both Mr Flanagan -
10 particularly Mr Flanagan - of shooting yourself in the foot because in this instance he refers to a community standard which we would deny and Mr Baker says that the full bench of the federal commission says there's 11 public holidays. Well, I just did a quick count and full-time
15 employees in this instance in this award in fact don't get 11 public holidays if Anzac Day falls on a Saturday or a Sunday, they simply get 10.

Now if there is a community standard -

PRESIDENT: But isn't that the argument that Mr Baker was putting; that everybody else gets 11 apart from those employed under this
20 particular award.

MR FITZGERALD: Well, no, look that's not the - if you count the public holidays in other awards where Anzac Day - where full-timers who work Monday to Friday, if a public holiday - if Anzac Day falls on a Saturday or Sunday they get 10 days not 11. So if we're talking
25 about what is a standard, then the only body - with complete respect to you, Mr President - then the only - the appropriate body or appropriate level within the commission which should determine that is in fact a full bench.

PRESIDENT: Is anybody going to address the previous full bench
30 decision in relation to public holidays at any stage?

MR FITZGERALD: I wasn't going to. The application is not my application and I believe that it should be referred to a full bench in accordance with that principle; it's not incumbent upon me to do so. But if I could say in terms of - and this is where - to cast aside and say
35 that principle 13 is not relevant makes absolute mockery of the commission's principles. But we have, as you know, a safety net of awards, and we're talking not about a general safety net, we're talking about this award. This is the point that the unions have missed. We're talking about this particular - this award which creates a safety net.

40 Now the safety net created by - in respect to public holidays is the provision as stated. You can't go and refer to some other award. But if there's some allegation that there is a community standard of 11 days which I've just shown you doesn't apply, then it's a full bench who determine that.

So I think what the - for the unions to say that principle 13 has no relevance whatsoever casts considerable doubt on the integrity of the commission's principles.

5 What do we do? Do we just simply just ignore principle 13? Clearly if you want to make an application which increases wage rates or conditions above what the award states - and that's in simple terms what the safety net means - then you must refer as a special case or have it referred to a full bench to determine that. Now in the
10 circumstances, given there's been some reference to a general community standard, it further reinforces my argument that this - you must, in my submission - in my respectful submission - refer it to a full bench for determination. If it pleases.

PRESIDENT: Yes, all right. Well, thank you for those preliminary
15 submissions. I need to consider them. I'm not prepared at this stage to rule one way or another as to whether or not the matter should be adjourned for the purposes of being referred to a full bench as a special case or as to whether or not I should continue to hear the matter to its conclusion. I'd like to think about the submissions in relation to the application of the wage fixing principles, particularly
20 principle 13 and I'll notify the parties in due course.

Is there anything any other person would like to say?

MR FLANAGAN: Yes, Mr President, I'd just like to respond to - briefly respond to the submissions put by Mr Fitzgerald.

PRESIDENT: I thought they'd already been put and responded to.

25 MR FLANAGAN: Oh well, Mr Fitzgerald has put on the table -

PRESIDENT: Is there any new material?

MR FLANAGAN: Yes, it is.

PRESIDENT: All right.

30 MR FLANAGAN: What Mr Fitzgerald has put on the table is that there is no discretion in respect of this matter that in fact principle 13 compels that this matter should be dealt with by a full bench.

PRESIDENT: Yes.

MR FLANAGAN: That in fact is not the case.

35 PRESIDENT: I recognise the fact that discretion rests with the president.

MR FLANAGAN: That's right and there's actually an onus on the party seeking a special case to demonstrate why it should be a special case. Now certainly within a centralised wage fixing system which we

presently have and have had for a number of years that mechanism has -

PRESIDENT: Well, there are varying opinions about that at the moment.

5 MR FLANAGAN: Yes, in terms of the award system. The mechanism which is in place for a special case in our submission is designed to ensure that there are not matters which are pursued within the commission with a single member which then have the capacity to flow on to a number of other industries. The mechanism has that effect.
10 This is not such a case. The rest of Tasmania has 11 public holidays.

PRESIDENT: If I could just go back to your previous comment, there could well be a line of thought that the principle about varying above and below the award safety net has more to do with the enterprise bargaining principle than maintenance of any centralised system.

15 MR FLANAGAN: Oh, yes, certainly and I accept that. The significant point is that this is not an issue which has the capacity to flow on to other awards. This is an issue where we are attempting to catch up to other awards so principle 13 in our submission needs to be considered in that light. If it was a position whereas a consequence of this
20 application there would be a matter which the unions would pursue generally to apply to other awards of the commission then it may well be a matter which should properly be considered by a full bench. But this is not such an application. In our submission that should be taken into account when the commission exercises its jurisdiction and
25 discretion about whether or not it is a full bench matter.

PRESIDENT: Yes.

MR FLANAGAN: If it pleases the commission.

MR FITZGERALD: Could I ..(inaudible).. Mr Flanagan's third go, so if I could just briefly respond to it.

30 Again, I'd see - with respect -

PRESIDENT: I love the way these preliminary matters provoke such interesting debate.

MR FITZGERALD: Well the unions keep putting them up and they -
35 and if they recognise that they have special circumstances attached to them maybe we might be able to resolve them a bit easier. Mr President, again I think that's a classic shooting the foot, with respect to Mr Flanagan. Again, it's a classic shooting-the-foot-case argument because -

MR BAKER: Last time you ran that line you got rolled.

MR FITZGERALD: I'm not sure which one that was - because again Mr Flanagan refers to the rest of Tasmania getting 11 public holidays. I don't want to be laborious and count them but if you take out Anzac Day which is the pertinent day, in fact that is not the case, it's 10.
5 Now I would acknowledge - and I think I did in my submissions and indicate that the discretion is with you in terms of the interpretation of principle 13 - the discretion is with you in terms of whether you give this special case status and the discretion clearly is with you as to whether you refer it to a full bench.

10 Now in my submission in saying compelling, I urge you - I obviously can't compel you - that's not our position to do so - but we would urge you, given that there is quite clearly acknowledgment by the union that it has some reference to some other standard in other awards where there is allegedly 11 public holidays - maths was not my long
15 suit but I missed out by one there - where there allegedly is 11 public holidays, then clearly we're talking about a standard in other awards which can only be referred to by a full bench and in that respect I urge you to exercise your discretion in favour of the matter going to a full bench.

20 PRESIDENT: Yes. All right.

MR FITZGERALD: And the only other thing I say, more of a personal nature, is if it is possible to receive something before Friday, 10th July because that's my last day and I've had some interest in the matter prior to that so I would urge if the commission can make a quick
25 decision on it please.

PRESIDENT: Well, what - and you'd come back especially for it.

MR FITZGERALD: No, I'll just keep in touch with those at the TCCI.

PRESIDENT: Yes. We'll send you a personalised note, Mr Fitzgerald.

MR FITZGERALD: Thank you.

30 PRESIDENT: All right, well thank you for your submissions. I'll adjourn the matter *sine die*.

HEARING ADJOURNED SINE DIE 11.10am