



TASMANIA

*Tasmanian Industrial Commission*

Industrial Relations Act 1984

T No. **9527 of 2001**

**IN THE MATTER OF** an application by the Health Services Union of Australia, Tasmania No. 1 Branch to vary the Dentists Award, Medical Practitioners (Private Sector) Award, Medical Diagnostic Services (Private Sector) Award, Nursing Homes Award and Hospitals Award

Re: Compassionate Leave

**FULL BENCH:**  
PRESIDENT LEARY  
COMMISSIONER SHELLEY  
COMMISSIONER ABHEY

HOBART, 27 July 2001

**TRANSCRIPT OF PROCEEDINGS**

Unedited

(WOULD PARTIES PLEASE READ THIS TRANSCRIPT CAREFULLY)  
(ANY QUERIES SHOULD BE DIRECTED TO THE COMMISSION WITHIN 14 DAYS)

**HEARING COMMENCED 9.32am**

PRESIDENT: Could I take appearances, please.

**MR T. KLEYN:** If the commission pleases, TOM KLEYN, appearing for the Health Services Union of Australia, Tasmania No. 1 Branch.

5 PRESIDENT: Thank you. Could I just record that we've had a message from Pam Wright that she is in bed with the dreaded lurgi, whoever he may be and won't be here today but consents to the application, I should add, that's important. Sorry, Mr Watson.

10 **MR M. WATSON:** I was nearly there with her, president, but I'm here. May it please the commission, MARK WATSON. I appear on behalf of the Tasmanian Chamber of Commerce and Industry.

PRESIDENT: Thank you. Mr Kleyn?

15 MR KLEYN: President, members of the bench, before I start my submission, I seek leave to amend the application and I have amended draft orders here. The amendment is simply to change the title of the clause from Compassionate Leave to Bereavement Leave, which I think is more accurate and I think is more consistent with the commission's formatting principles.

PRESIDENT: Thank you. There's no objection to the amendment?

20 MR WATSON: No, president.

PRESIDENT: The application will be amended to show Bereavement Leave will be the title rather than Compassionate Leave.

25 MR KLEYN: Thank you. President, members of the bench, I seek to vary the clauses of bereavement leave, as it's now called, in the awards listed on the basis that - the first thing I'd like to say is, this application is now a consent matter, so I don't intend to go into a great deal of detail and chapter and verse and provide you with lots of exhibits as I would probably have done if it had been a contested one so, pleasing, that it is a consent matter.

30 I would like to raise a few points and put a few things on the record and I'm also conscious of the need to address the Wage Fixing Principles and the public interest test.

35 The compassionate leave, bereavement clause as currently is in the awards is now out of date and require variation to bring them into line with modern community standards. The clause proposed is consistent with the personal care's leave clauses adopted by industrial commissions in various jurisdictions including this one, and you'll have to excuse me, I'm a bit breathless as a result of the flu myself this morning.

40 PRESIDENT: As long as you keep your distance from us.

MR KLEYN: The authorities I rely upon, and it's not my intention to hand them up as exhibits, but there's a number of authorities, the decision of the full bench of the Australian Industrial Relations Commission in the *Family Leave Test Case*, which is print L6900 and was handed down on 29 November 1994; the decision of a full bench of the same commission in the *Personal Carer's Leave Test Case*, print M6700 and handed down on 28 November 1995; a decision of a full bench of the New South Wales Industrial Relations Commission in a *State Personal Carer's Leave* case, matter IRC2 of 1996 and a decision of a full bench of this commission in the *Personal Carer's Leave Test Case* which is matter T6296 and T6441 of 1996.

I don't intend to go through all of those decisions in detail but I would like to draw the commission's attention to some aspects of those decisions. In particular I refer to the *Personal Carer's Leave Test Case* of the Australian Industrial Relations Commission and on page 10 of that decision - and this is in the context of considering whether they should aggregate sick leave and bereavement leave - the full bench stated:

*The only area in which we have decided to adopt a standard approach to bereavement leave is in relation to eligibility for bereavement leave, that is, the scope of the nominated class of persons. This change will mean that an employee will be able to access bereavement leave in the event of the death of a member of an employee's immediate family or household.*

On page 11 of that same decision, the bench goes to the arguments about who should be eligible for personal and carer's leave and that is under the heading of scope of access to aggregated leave. The bench refers to the November 1994 decision in which the commission determined that an entitlement existed if the person requiring support was a member of the employee's immediate family or a member of the employee's household and on page 15, in the fifth paragraph, the full bench states:

*We have also decided to accept the submission put on behalf of the Australian Council of Lesbian and Gay Rights and the Australian Federation of Aids Organisations as to the coverage of bereavement leave. In our view, eligibility for bereavement leave should cover the same class of persons entitled to access carer's leave. It would be illogical and perhaps discriminatory to provide employees with an entitlement to care for a sick member of their household but not provide them with leave to attend that person's funeral in the event that the latter does not recover from the illness.*

President, members of the bench, this is the crux of the issue, as we see it. If awards provide for carer's leave and eligibility for such leave is

85 based on the person requiring care being a member of the employee's  
immediate family or household, it is only reasonable that in the event  
the person being cared for dies, the employee caring for them should  
be able to access bereavement leave to attend the funeral. The full  
90 bench of the Australian Industrial Relations Commission clearly has  
determined that access to bereavement leave should be on the same  
basis as access to carer's leave and the variation we are seeking today  
reflects that decision.

The New South Wales Industrial Relations Commission took a similar  
view in the *State Personal Carer's Leave* case and on page 14 of their  
95 decision, about the third paragraph, the commission states:

*The parties also reported their agreement concerning the  
extension of bereavement leave to all classes of persons  
comprehended in the November 1995 [decision and that was  
referring to the federal decision].*

100 In the New South Wales jurisdiction, they identified the need for  
eligibility for bereavement leave to be the same as eligibility for carer's  
leave. They also recognised that there were a number of awards that  
didn't include bereavement leave and it was determined by both the  
employers and employee organisations to look at those awards and  
105 insert bereavement leave clauses into them with the same eligibility  
criteria as the personal and carer's leave.

It's also interesting to note that in New South Wales, they chose not to  
aggregate bereavement leave and sick leave for the purposes of carer's  
leave but still determined that access to bereavement leave should be  
110 on the same basis as access to carer's leave.

In broad terms, the Tasmanian jurisdiction flowed on the federal  
decision in similar terms to that decision with some minor  
amendments and again, like its New South Wales counterpart, decided  
not to aggregate bereavement leave and sick leave and I think that was  
115 primarily because of the unnecessary complexity of such an  
aggregation and the different modes of accessing it.

I refer the bench to page 4 of that decision, the Tasmanian decision,  
and the commission notes:

120 *The proposed models differ from the federal model clause by  
adding to the definition of family member, foster child, foster  
parent and legal guardian and from the New South Wales  
decision by adding, step-parent.*

So the point I make, I suppose, is that while most jurisdictions  
regarded the access to bereavement leave and carer's leave as being  
125 similar, some of the definitional aspects of the clause is different from  
jurisdiction to jurisdiction but all included the provision of a member

of an employee's immediate family and a member of an employee's household.

130 New South Wales went to some lengths to define what a member of an employee's household is and I can assure you that the TCCI and HSUA have had a number of discussions about this and Mr Watson will address the bench on that matter later on.

135 The draft model provisions determined by this commission also included that entitlement to carer's leave would be on the basis of the person being cared for, being a member of the employee's immediate family or a member of the employee's household. So there was that consistency throughout the jurisdictions.

140 The eligibility criteria we have included in the clause we seek to have included in the awards is identical to the carer's leave clause determined by this commission. For consistency sake, we have looked at the bereavement leave clause and taken the view that it should have the same accessibility, the same eligibility criteria for entitlement to leave as does the carer's leave.

145 I now address the Wage Fixing Principles and the public interest test. President, members of the bench, I believe the relevant principle in this regard is principle 4, the award safety net. This principle states that:

150 *Existing wages and conditions in the relevant award or awards of the Commission shall constitute the safety net underpinning workplace bargaining.*

155 *The award safety net may, on application be reviewed and adjusted from time to time to ensure its relevance. Generally the detailed nature and timing of any adjustments will be determined in the context of specific applications and in the light of prevailing economic, social and industrial circumstances.*

The application we make today is consistent with this principle in that the variations sought are to ensure the continued relevance of the award.

160 As I've said in my submissions today, the Australian Industrial Relations Commission, the New South Wales Industrial Relations Commission and this commission have all recognised the need for more appropriate definitions of 'family' and have all included it in their decision relating to carer's leave the provision of a member of the employee's household.

165 The AIRC went as far to say that bereavement leave should have the same eligibility criteria as carer's leave and that it is unreasonable and perhaps discriminatory to provide leave for an employee to care for a member of their immediate family or household but to deny the same

170 employee leave to attend the funeral of the person for whom they have cared.

I might also add that principle 12 - Award Review Process, may have some relevance in that this application is consistent with paragraphs 2 and 3, that is, removal of discriminatory provisions and removal of obsolete or amendment of inaccurate award provisions.

175 I submit that this application is consistent with the Wage Fixing Principles of this commission and in particular, principle 4.

180 In terms of the public interest test, section 36 of the *Industrial Relations Act* which is, in essence, the economic position of any industry likely to be affected, the economy of Tasmania with particular reference to the level of employment, and any other matter the commission considers to be relevant.

185 Again, it is our contention that the application before you today is consistent with the public interest test. The variations sought do not provide additional benefit to employees nor do they increase the amount of leave available to employees. It is conceded that the eligibility for access to bereavement leave is broadened and in that respect there may be some minor cost impact. I submit that the leave is still subject to employer scrutiny and therefore claims made for leave under the proposed clause will still need to be justified in the same way as they are currently, that is, by way of a certificate or death notice in the paper or some other evidence.

The employer has the opportunity at that time to ascertain the exact relationship the employee has with the deceased and to approve or not approve as the case may be.

195 It is our submission that the cost impact would be very minor and would have a very minimal impact on the viability of organisations affected by this variation. I also contend that if the variation is granted, it would not have any impact on the Tasmanian economy nor on the level of employment within the state.

200 In terms of the date of operation, we seek an operative date of the date of the decision and in conclusion, president, members of the bench, we believe these variations should be granted on the basis that the wording of the clause is consistent with the wording provided for by the federal and New South Wales Commissions and this commission in the personal carer's leave test cases, the full bench of the AIRC and 205 the New South Wales IRC both determined that the eligibility for bereavement leave should be the same as for carer's leave. The current award clause is confusing and may be discriminatory on the basis that it does not clearly include all relationships reasonably accepted in 210 today's society.

The clause proposed recognises the types of relationships which are generally accepted in law and in the broader society and the application is consistent with the commission's Wage Fixing Principles and the public interest test contained within section 36 of the Act. I  
215 thank you.

PRESIDENT: Thanks, Mr Kleyn. Mr Watson?

MR WATSON: Thank you, president. President and members of the bench, the application from the union today seeks to include provisions from the ..[inaudible].. from the model personal carer's leave  
220 test case decision of the Australian Industrial Relations Commission, as Mr Kleyn has told you.

One of the matters in the application that we have some concern about is that the award provisions at the moment currently exclude persons who the other person may be separated from. In other words, wife,  
225 husband, are included but it doesn't include those people if they're separated from each other. This particular application does in fact reverse that completely and will in fact allow former spouses and former de facto spouses to actually have access to bereavement leave.

We're not necessarily opposed to that but we do, I suppose, sound a  
230 cautionary note that - I suppose it's an issue that we don't believe, or we're not suggesting that this provision would be abused deliberately and in fact the carer's leave provision, which is the same, that is, the wording that Mr Kleyn has put up to you hasn't, to our knowledge, been abused in this way.

PRESIDENT: I guess it's covered by the proviso that evidence has to  
235 be furnished to the satisfaction of the employer?

MR WATSON: That's right, president. So, I guess all we would say on that particular matter is, that if there is widespread abuse of this new  
240 provision then we'd obviously come back to the commission to have the matter looked at again.

Another concern we have about the new provision and, again, we're not opposing this but it's simply the issue of the member of the employee's household. Mr Kleyn and I have had some discussions  
245 about this issue and we do have, I suppose, an understanding that we're not talking about a person or two, or three or four people who may in fact share a house simply for commercial reasons. We are talking about people who do actually have a relationship and they do actually reside together in the same household.

PRESIDENT: We're talking about same sex couples. Let's not beat  
250 about the bush.

MR WATSON: Predominantly, I guess -

PRESIDENT: Predominantly - what other relationship?

MR WATSON: For household?

255 PRESIDENT: What's the definition of an employee's household, that gets around the problem that you've just referred to?

MR WATSON: You may have, for example, a very distant cousin who may live with the family and they're all part of the same household, so those types of things would also be included but I agree, president, that we are talking about same sex couples and we don't have a  
260 problem with that.

PRESIDENT: The thing that I notice is, that there's no definition of employees' household and that's where the problems may occur, so we need some sort of indication. So, it's predominantly for same sex couples but there could be a family relationship of people in the same household on a long-term basis, almost in a carer's role as well, one  
265 would imagine?

MR WATSON: Yes, potentially, that's right. If you go to the definition of, immediate family, you will find that those people that we're talking about may be the distant type relatives who may reside, aren't  
270 necessary quoted in that immediate family definition. So, they would come into the members of the household definition.

PRESIDENT: It's not intended to pick up an employee's household which may include domestic staff, that sort of thing?

MR WATSON: No. On that basis, president, we advise that we are  
275 consenting to the variations today on the basis that we don't believe that the cost impact of this application will be huge to employers. In fact we believe that it will be minimal cost.

Secondly, and fairly importantly from our point of view, we don't actually regard this matter as being a test case and Mr Kleyn and I  
280 have discussed this and you may want to hear from him about that but we have agreed that we're not regarding this as a test case. It is a consent matter. We've spoken to our members in those particular industries about this matter but we haven't approached it on the basis of a fully blown test case that may or may not have application to all  
285 awards of this commission.

We believe that the application doesn't offend the public interest tests or the Wage Fixing Principles of the commission and on that basis we consent to the variations from the date of decision. If it pleases.

290 PRESIDENT: Thank you. Did you want to address the test case issue?

MR KLEYN: Just the issue about member of household.

PRESIDENT: The definition of household, yes.

MR KLEYN: Mr Watson and I have discussed that at some length  
and whenever you start drafting clauses and have nominated classes  
295 of persons, you're always going to get into some difficulty with  
definition but the federal commission deliberately did not define a  
member of immediate household on the basis -

PRESIDENT: That's why I was asking whether you were going to.

MR KLEYN: No, and for the same reason that they didn't, in the fact  
300 that we don't believe that it's appropriate for people to have to divulge  
their relationships.

PRESIDENT: Each individual circumstance will be looked at on its  
own merit.

MR KLEYN: Yes, but the other thing, apart from same sex couples,  
305 taking up what the federal commission said, our view is, it should be  
read broadly. Certainly, aboriginal communities, the notion of blood  
relative or kinship ties or something should be considered in a positive  
light as well.

PRESIDENT: That's a cultural-type approach.

MR KLEYN: Yes. In terms of the test case, I accept that this is not a  
310 test case. We've applied to amend our awards and we will clearly be  
seeking to amend our remaining awards but we did it by way of a full  
bench, as a matter of expeditiousness, I suppose, in a sense that we  
could do a whole number of awards in one go.

315 PRESIDENT: Yes, that's expeditious.

MR KLEYN: Thank you.

PRESIDENT: Thanks.

COMMISSIONER SHELLEY: I do have one question. You did say that  
320 one of the reasons for these amendments was to make them consistent  
with the carer's leave clauses.

MR KLEYN: Yes.

COMMISSIONER SHELLEY: The last time I looked at the Dentist  
Award, it didn't have the carer's leave clause within it. Is that going to  
be fixed.

325 MR KLEYN: It is. In fact, we've got a few awards that don't have the  
carer's leave and, yes, it is going to be fixed.

COMMISSIONER SHELLEY: We can expect those applications soon?

MR KLEYN: In the near future, very soon, yes.

330 PRESIDENT: They can be dealt with expeditiously. Can I say that we don't have any difficulty with the application and we can indicate to you that we will be approving, certifying, registering - I'm just covering every option, the application and we will of course issue a formal decision in due course. We will make it operative from the first full pay period on or after today's date and that issue will be forthcoming.

335 MR KLEYN: Thank you.

PRESIDENT: Thank you for that. This matter is adjourned.

**HEARING CONCLUDED 9.53am**