



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 - Holidays with Pay

FULL BENCH:
PRESIDENT WESTWOOD
DEPUTY PRESIDENT JOHNSON
COMMISSIONER LEARY

HOBART, 10 December 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 9.35am

PRESIDENT: Before you commence, Mr Baker, I think it's appropriate that I should make note of the fact, on the record, that this is the first occasion upon which Commissioner Pat Leary has sat
5 as a member of the Tasmanian Industrial Commission.

As you probably know, Commissioner Leary was appointed to the Tasmanian commission on 25 June this year. She has been and still is a member of the Australian Industrial Relations Commission having been appointed to that body in 1984.

10 Commissioner Leary is the first member of the Australian Industrial Relations Commission to be appointed to the Tasmanian commission in a dual capacity and I should make note of the fact that Deputy President Johnson, who is also sitting on this bench, as you know, previously was a member of the federal commission and I'm also a
15 member of the federal commission in a dual capacity.

So this occasion is significant in that it is the first time that a member of the Australian commission, holding a dual commission with the Tasmanian body, has exercised that commission and it's also significant, and I'm embarrassed to mention it, that Commissioner
20 Leary is the first female to be appointed to the Tasmanian Industrial Commission and so it's the first time a woman has sat as a member of this body.

So having said those few words we'll now take appearances.

MR P. BAKER: Mr President and members of the bench, I appear on
25 behalf of the applicant organisation - P. BAKER.

PRESIDENT: Yes, thank you, Mr Baker.

MR J. O'NEILL: Mr President and members of the bench, if it
pleases the commission, I appear on behalf of the Tasmanian Chamber
of Commerce and Industry - O'NEILL J.

30 PRESIDENT: Good. Thank you, Mr O'Neill. You've got some reporting to make, Mr Baker.

MR BAKER: I have but before I do so, it would be remiss of me not to
welcome Commissioner Leary to the commission.

35 COMMISSIONER: Thank you. I hope the last comment by the president is pretty obvious actually.

PRESIDENT: I'm prone to making obvious comments. Yes, Mr Baker.

MR BAKER: Yes, and I suppose in one way I'm perhaps disappointed
that I haven't got a meaty subject for your consideration this morning.
However, I do have some good news. I have had two discussions with

Mr O'Neill from the TCCI concerning the application before us this morning and I can report that we have - I'll rephrase it - there is a degree of understanding as to a) where our application is going - well, I'll rephrase it again - our application in so far as this award is concerned is at a stage where I believe that Mr O'Neill and myself can in fact present to the commission a document which in fact will go to the concerns which we raised when this matter was before yourself, sir, at an earlier time.

Perhaps by way of explanation I would take the commission to Clause 17 - Holidays with Pay.

PRESIDENT: Yes, Mr Baker.

MR BAKER: And this application originally arose as a consequence of what appears in line three of paragraph (a) where it makes reference to Anzac Day and it makes a comment *where it falls Monday to Friday inclusive*.

PRESIDENT: Yes.

MR BAKER: And indeed there were discussions prior to when this matter was previously before the commission, and again at the commission hearing, that by a simple reading of it inferred that in fact Anzac Day where it fell on a Saturday or Sunday was in fact not a public holiday for the purposes of the award.

Having considered the clause in its totality and having spoken to Mr O'Neill, our submission today would have been twofold to you had in fact the opposition to the position been maintained, is that it is our belief that the comment *where it falls Monday to Friday inclusive* is in fact directed to the provision of the rostered day off in paragraph (c). One really needs to read paragraph (c) prior to reading paragraph (a).

And if you read it in the context with which Mr O'Neill and I believe we've read it, the intention of the clause is in fact not to remove the public holiday provision for Anzac Day when it falls on a Saturday or Sunday but rather if Anzac Day falls on a Saturday or Sunday then the rostered day off - you do not get an extra day if the RDO falls on the weekend. And that's what we believe the intention of the clause is.

So it is our submission this morning, Mr President and members of the bench, that Mr O'Neill and I leave these proceedings this morning and at our leisure, if I may use that expression, draft a new holidays with pay provision which clearly spells out the intention of the clause, and that is, that the holidays as indicated in paragraph (a) of the award are in fact the holidays of the award, that -

PRESIDENT: With - retaining those words in brackets?

MR BAKER: Well, I'm not sure about that.

PRESIDENT: I mean they're crucial aren't they?

MR BAKER: Oh, yes. Yes. But the intention needs to be clearly defined, and that is, is that all those public holidays apply but where Anzac Day does fall on a Saturday or a Sunday you do not get an extra day if the RDO falls on them.

PRESIDENT: Yes.

MR BAKER: What it needs to show is that people are entitled to eleven public holidays.

PRESIDENT: Yes. So really if you excluded the words *where it falls on a Monday to Friday inclusive* and retain paragraph (c), that's all you need to do, isn't it, to achieve your objective?

MR BAKER: I had in fact prepared a draft order showing that but I was a little concerned that it may have been slightly over simplistic.

PRESIDENT: Yes. All right. Well, I won't take the discussion any further on that point but I'll allow you to complete your submission.

MR BAKER: Yes. So that's really the extent of the discussions that Mr O'Neill and I had this morning and last night - yesterday, I should say. So with the concurrence of the bench and subject to any comments that Mr O'Neill may care to make, it would be our submission that these proceedings be adjourned to allow the parties to prepare a draft order consistent with the comments that I have made this morning and that in fact would ultimately close the file.

PRESIDENT: Yes, I understand. Thank you. Mr O'Neill.

MR O'NEILL: Thank you, Mr President. Firstly, I would also like to welcome Commissioner Leary to the Tasmanian commission on behalf of myself and the TCCI.

Mr Baker and myself have had discussions regarding this matter. I perhaps have a slightly different view, however I concur with certain points that he made.

I indicated to Mr Baker this morning that I believe this matter could be resolved without any further assistance of the commission by simply going to the industry and putting the position to them that where Anzac Day falls on a Saturday or a Sunday that the provisions - or people that work on those days receive the public holiday penalty, okay, so that they're not disadvantaged.

I must outline that Mr Baker didn't mention it in these proceedings this morning but did indicate to me that no other award of this commission had that provision or excluded that provision.

Now I'd like to point out this morning that the Shellfish Industry Award does have that same exclusion where Anzac Day falls Monday - sorry - where the words *where it falls Monday to Friday inclusive*. So I certainly wouldn't see it, as Mr Baker and myself discussed, as a drafting error. One would need to look at the intent of the parties when those two awards were drafted and in fact it may well have been that there could have been some other offsets that had occurred at that time. Now they're certainly not evident and I certainly don't have those but I just think one needs to be a little bit careful in simply saying that when Anzac Day falls on a Saturday or a Sunday that the public holiday provisions apply.

On a strict interpretation of the award, it would be our view that where Anzac Day falls on a Saturday, as it did this year, that the normal Saturday rates would apply - the Saturday overtime rates or penalty rates would simply apply.

What I'm saying is, is that I believe that in discussions with the industry - because I believe the industry would have simply paid the penalty payment in accordance with the public holiday because the matter certainly wasn't -

COMMISSIONER: As a public holiday.

MR O'NEILL: Yes. The matter certainly wasn't raised with the TCCI as an issue of concern. As I understand one employer - I'm not too sure whether they were our members or not - approached the union with the question, saying, well, you know, what penalty do I apply for employees that worked on the Saturday.

PRESIDENT: Yes.

MR O'NEILL: So what I'm saying is that I request that the commission direct the parties to go away and look at the issue and I believe that the issue can be satisfactorily resolved re an exchange of letters between the parties that that would occur in the future. I'd be reluctant to have the commission rule on the matter or that an order be put without information before this commission indicating why it was so specific, not just in one award but in two awards within the industry.

PRESIDENT: Yes. Before you go on, can you - do you know off the top of your head whether or not the Shellfish Industry Award was made at the same time as the Fish, Aquaculture?

MR O'NEILL: No, I don't. Perhaps Mr Baker may be aware of that but I'm certainly -

MR BAKER: I understand they were made together. There were two new awards created; there was the Shellfish and there was the Fish, Aquaculture and Marine Products Award.

PRESIDENT: That's what I thought, yes.

MR BAKER: And they grew out of an old award.

PRESIDENT: And there might have been some common drafting in the preparation. Yes. Sorry, Mr O'Neill.

5 MR O'NEILL: Yes, so -

PRESIDENT: So are you saying then that this matter shouldn't proceed in its current form?

MR O'NEILL: Yes, that would be my submission.

10 PRESIDENT: Because you want to resolve it by way of an exchange of letters.

MR O'NEILL: Yes. I thought that's the most appropriate - unless Mr Baker can bring information to this commission indicating that there weren't such offsets.

15 PRESIDENT: I mean it's his application and he can continue with it if he wishes.

20 MR O'NEILL: Yes, I appreciate that and perhaps in conversation this morning - we have discussed the matter but perhaps I didn't make myself clear in the fact that I felt that this could be handled if I went to the industry and I asked Mr Baker if I could have perhaps, considering the Christmas period, to about the middle of January to consult with the industry, to advise them what's happened with these applications and what in fact the implications are.

PRESIDENT: What day does 25 April fall on next year - is it a Sunday?

25 COMMISSIONER: Is it then proposed that you seek to vary the awards by consent, eventually?

MR O'NEILL: Well, no.

30 COMMISSIONER: Aren't there some difficulties if you leave the provision in the award and then you're seeking, as I understand it, that the industry not comply with the award but treat the Anzac Day, if it falls on Saturday or Sunday, as a public holiday?

MR O'NEILL: Commissioner, I believe that the industry - I mean I need to consult with them. I really need to find out how they've been treating it.

35 COMMISSIONER: Yes, I understand that.

MR O'NEILL: Perhaps once that information - if it was found that they were treating it as a Saturday well then it may well be that we would need to come back and the award would need to be varied and Mr Baker would most likely take up that application at that point in time. If it's found that the industry is simply paying it - that their interpretation of the award was such that it is the public holiday, then I mean why are we - if that's the interpretation of the award by the industry why are we sort of making application to vary?

PRESIDENT: Well, if that's the interpretation then what's the problem with clarifying the award to make it clear in the award.

COMMISSIONER: And cover people legally then.

MR O'NEILL: I take your point.

COMMISSIONER: Yes.

MR O'NEILL: I would feel more comfortable that we consult with our members on the issue first because -

COMMISSIONER: To find out what the practice is.

MR O'NEILL: Yes, for sure.

COMMISSIONER: Yes.

MR O'NEILL: Because if there were offsets in their view well that would certainly change our position.

PRESIDENT: Yes.

MR O'NEILL: If there were no offsets we have no problem.

DEPUTY PRESIDENT: Perhaps your approach in that regard then should be to support an application, if Mr Baker were to make one, for these proceedings to be adjourned *sine die*.

MR O'NEILL: Yes, I'd be happy with that.

PRESIDENT: And what sort of time period do you think you might need to consult with your members?

MR O'NEILL: I'll be careful in what I say. The end of January.

PRESIDENT: Because it would need to be resolved well before 25 April.

MR O'NEILL: Yes, look, I've actually commenced this morning drafting a circular to the industry, so I mean that would most likely go out next week and with a reasonable period considering the Christmas

period to get responses back and advise Mr Baker, I would see the end of January being a reasonable time frame.

PRESIDENT: Yes. All right. Thank you for your submission, Mr O'Neill. Mr Baker.

5 MR BAKER: Just a couple of things. In so far as this matter is concerned, Mr O'Neill is quite correct. The application actually arose following a discussion that I had with an employer in the industry who rang me and simply said, what is the penalty for the public holiday. And I simply advised him it was double time and a half. And I thought
10 I'd better go and have a look at this just to make sure and that's when all this started. We then had a debate with the employer in fact as to whether or not the public holiday actually applied.

My view is that I concur with Mr O'Neill that he should consult with the industry as to what the practice is generally but at the end of the
15 day if agreement is not reached, but I'm confident that we can reach an agreement, if it's not we will be back to run an argument. And I am confident that we can sustain argument consistent with the commission's wage fixing principles that the public holiday should be extended to people who work on a Saturday or a Sunday. I don't
20 believe that it was ever the intention of those persons who drafted the award provisions as it currently stands to exclude people from the Anzac Day public holiday.

DEPUTY PRESIDENT: Of course determining the intentions of the people in the context of a consent award is a fairly tall order.

25 MR BAKER: I am well aware of that, sir, but as we all are aware sometimes people don't quite get it right and it's left to other people, some years later, to try and sort it out.

PRESIDENT: Well, look -

COMMISSIONER: ..(inaudible).. always in the detail.

30 MR BAKER: Yes.

PRESIDENT: Well, we've got a time constraint on us obviously. What do you want to do? Do you want to have the matter adjourned?

MR BAKER: My view is that the proceedings should be adjourned *sine die* as indicated by Deputy President Johnson and picked up by
35 Mr O'Neill. I think that's the proper way to go. That allows then for Mr O'Neill to discuss the issue with the industry and also allows us sufficient - or allows us the time to have discussions with Mr O'Neill concerning the application of the clause and I think arising out of those discussions two things will happen - my view two things will
40 happen: One is we will either come back to the commission by way of the current application before you, or, lodge a separate and fresh

application to alter the provision that currently is in the award so it's perfectly clear as to how it applies. Or, alternatively -

PRESIDENT: Well you can do that by way of this particular application in any event.

5 MR BAKER: Yes. Or, alternatively, we will come back and argue the matter and seek to vary it because obviously Mr O'Neill will argue that it shouldn't apply to people who work on a weekend.

PRESIDENT: Yes, well of course I thought that's what was going to happen today in any event.

10 MR BAKER: Well so did I. In fact my submissions are sitting in the office.

PRESIDENT: Yes. Well, thanks, Mr Baker. We have considered those views put by both you, Mr Baker, and you, Mr O'Neill. We are a bit concerned about a *sine die* adjournment because of the possibility that
15 at some time, probably after the end of January, you might come to us and say, look we need to have this matter resolved before 25 April. We won't be able to get bench together at short notice then the matter will be argued, a decision will have to be written and there will be pressures applied which are totally unnecessary. With that in mind we
20 think, Mr Baker, we ought to set a date in the first week of February to hear your report on progress or to argue the matter.

MR BAKER: Yes, that's quite satisfactory. I think it - yes.

PRESIDENT: Yes. Mr O'Neill.

MR O'NEILL: Yes, it certainly gives me plenty of time.

25 PRESIDENT: Yes. All right. Well, that concludes the matter at this point does it. Do you want to make any further observations?

COMMISSIONER: No, that's fine.

PRESIDENT: All right, well the matter will be adjourned until a date in the first week of February which you'll be advised of in due course.

30 So with those few words the matter is adjourned till then. Thank you.

HEARING ADJOURNED SINE DIE 10.55am