TASMANIAN INDUSTRIAL COMMISSION
Industrial Relations Act 1984

T No. 6540 of 1996

IN THE MATTER OF an application by the Chief Executive, Workplace Standards Authority for an interpretation of the Restaurant Keepers Award

re clause 9 - Annual Leave - `continuous service' and its application to workers' compensation absence

PRESIDENT

HOBART, 22 May 1997
continued from 7/11/96

TRANSCRIPT OF PROCEEDINGS

Unedited

PRESIDENT: I've been directed by a full bench of the commission to re-hear this particular matter de novo, as cited in the decision of that full bench dated 14th April. Can I have appearances of those in this matter.

MR G.J. WILLIAMS: If it please the commission, WILLIAMS, G.J., appearing for Workplace Standards Authority.

PRESIDENT: Yes, thank you, Mr Williams.

MR S.J. GATES: If it pleases the commission, GATES, S.J., from the Tasmanian Chamber of Commerce and Industry.

PRESIDENT: Thank you, Mr Gates.

MR S. COOPER: My name is COOPER, sir. I'm a legal practitioner and I seek leave to appear on behalf of both the Australian Liquor, Hospitality and Miscellaneous Workers' Union and the Trades and Labor Council.

PRESIDENT: Yes. I see. Is there any objection to that application?

MR WILLIAMS: I don't have any objection.

PRESIDENT: No objection.

MR GATES: I have no objection today, president.

PRESIDENT: Very good. Very good. Your application to be granted leave to appear on behalf of those organisations is granted, Mr Cooper.

MR COOPER: If it please you, sir.

PRESIDENT: Well, Mr Williams, your original application?

MR WILLIAMS: Thank you, Mr President. Mr President, this application seeks, pursuant to section 43 of the Industrial Relations Act, for an interpretation of the Restaurant Keepers Award in respect to clause 9 Annual Leave.

Mr President, I intend to proceed with this matter by outlining the circumstances of an actual case in which I will detail the agreed facts and in turn relate them to the award.

The procedure I will be adopting will be to follow the guidelines for interpretation set out in T.30 of 1985, T.91 of 1985 and T.530 of 1986. I'll table an extract from those decisions which sets out clearly the qualifications to be applied in such matters.

PRESIDENT: We'll mark this exhibit W.1.

MR WILLIAMS: The document, Mr President - the first two pages are from T.30. That's pages 3 and 4. Pages 10 and 11 are from T.91 and page 6 is from T.530.

PRESIDENT: Yes. Are you going to apply all of them?

MR WILLIAMS: Completely. Mr President, our application is that you declare retrospectively how the provisions of the Restaurant Keepers Award is to be interpreted in respect to the clause on annual leave and with particular reference to subclauses (a) and (c).

PRESIDENT: Thanks. Do you want this marked as an exhibit, Mr Williams?

MR WILLIAMS: Yes, Mr President.

PRESIDENT: Exhibit W.2.

MR WILLIAMS: Mr President, I would like to draw your attention to clause 9 on what is listed as page 20 of the document and in particular 9 (a) Period of Leave which reads:

> *A period of 28 consecutive days' leave shall be allowed annually to an employee on weekly hire after 12 months' continuous service (less the period of annual leave).*
>
> *By agreement between the employer and the employee annual leave may be taken in more than one period.*

And in (c):

> *Proportionate Leave on Termination of Service*
>
> *Where an employee on weekly hiring is engaged for a period of less than 12 months or whose employment is terminated within the period by the employer through no fault of the employee, or the employee lawfully leaves the employment, the employee shall be paid at the ordinary rate of wage as follows:*
>
> *twelve and two thirds hours for each completed month of continuous service.*

This application for interpretation came about by both the employer and the employee approaching the authority for a determination in relation to the pro rata annual leave entitlement for an employee who was on workers' compensation for the last 21 months of employment.

The termination of employment came about when the employee accepted a lump sum settlement in lieu of future workers' compensation entitlements. The authority, in considering the question, was not able to determine conclusively the meaning of continuous service and it is on that basis that we seek an interpretation.

If I could now document the employment details of an employee.

PRESIDENT: We'll mark your exhibit W.3.

MR WILLIAMS: In this case, the employer was Pasta Resistance Too Pty Ltd Trading as Pasta Resistance Too. The directors were Robert Lee Wood and Julienne DeJonge and their address of business was 23 Quadrant Mall, Launceston. The employee was Mrs Lana Noelene Thomas (nee Martin), whose address was 3 Bill Grove, Mowbray.

The award application was the Restaurant Keepers Award as the business is an unlicensed restaurant/take away food outlet. The classification of the employee was adult full time Food and Beverage Service Grade 2 paid the award rate of pay. On termination the award applicable was $374.90, which is No. 6 of 1995 Consolidated.

The employee commenced on 5 March 1991 and was on workers' compensation - she received a back injury whilst lifting a 25 kg bag of flour on 25 March 1994. The period of workers' compensation was from 25 July 1994 to 18 April 1996. Lana Thomas signed a release on 24 April and accepted $25,000 in settlement of her workers' compensation claim.

The termination was a result of the employee accepting a workers' compensation settlement and it is agreed that the employee lawfully left the employment.

I will now turn to the possible mathematical calculation as to the employee's entitlement at termination. First, I will submit a copy of the annual leave taken by the employee during her employment which totals 13 weeks.

PRESIDENT: Exhibit W.4.

MR WILLIAMS: I would now submit that the two possible interpretations you may declare as follows and I've attached them with the calculations -

PRESIDENT: You are limiting me to only two options are you, Mr Williams?

MR WILLIAMS: I would never limit you, Mr President, but I put forward that these two options may well assist you.

PRESIDENT: Yes. Exhibit W.5.

MR WILLIAMS: The first page is, With Workers' Compensation being classed as 'continuous service', and on our calculations the entitlement would have been seven weeks 12.6 hours due on termination. The basis of that is that during that period between commencing and termination, the accrual on each year is listed as four weeks. The last one is 12.2/3 hours as pro rata, gave 20 weeks 12.66 hours less the 13 weeks annual leave that has already been taken, would give an entitlement of 7 weeks 12.66 hours.

The second page is, With Workers' Compensation NOT being classed as 'continuous service'.

Again, the same mathematics on the top there, with the only addition being from 5/3/91 to 25/7/94 a period there which gave the total of 13 weeks 12.66 hours less the 15 weeks already been taken, leaving a balance of 12.66 hours due on termination.

I'll now turn to the award and considering the words of the clause singularly, I wish to tender extracts from the Macquarie Dictionary on the words of 'continuous', 'service' and 'employment'.

PRESIDENT: Exhibit W.6.

MR WILLIAMS: And the reference which I would particularly draw your attention to in - on page 1 there, under 'continuous' is number 2. These definitions are taken from the Macquarie Dictionary:

> *uninterrupted in time; without cessation*

And to page 2, to service, in particular 6 and 7: In 6:

> *the performance of duties as a servant; occupation or employment as a servant.*

And 7:

> *employment in any duties or work for another, a government, etc.*

And to page 3, employment, 2:

the state of being employed; employ; services.

PRESIDENT: That's the definition of employment? Right. Okay.

MR WILLIAMS: Yes. In addition to these words of continuous service, I've sought and put from a number of sources and these I will submit to you. I would submit that in interpreting the matter you will need to consider whether 'service' is the same as 'employment' and it is to both these question that I will be addressing.

In relation to the words 'continuous service', they can also be found in three other clauses of the Restaurant Keepers Award and these are clauses 25 Parental Leave, Definitions, clause 32 Sick Leave and 34 Superannuation. I'll move back to that, Mr President, if I may, at a later time as I've jumped a page here.

PRESIDENT: I won't say a thing, Mr Williams.

MR WILLIAMS: No. To give a general outline of the concept of continuous service, I quote from the Australian Labour Law Reporter on Annual Leave page 29,144 and I wish to tender that as an exhibit.

PRESIDENT: Yes. We'll mark this exhibit W.7.

MR WILLIAMS: From the middle of the page, where it says, Definition of 'continuous service':

> *Many cases have considered the meaning of the expression 'continuous service'. Most of these are peculiar to their facts so they cannot be given great weight. However, for the purposes of general guidance reference should be made to Bermington v. Francis 1975 AILR 796. In that case, the President of the Queensland Industrial Court, Matthews J., said that 'continuos service' meant service which is given in accordance with the contract of service without interruption and, if the service required was rendered for the requisite period and continued throughout that period it could not be said that there was any relevant interruption of it.*
>
> *His Honour went on to draw a distinction between a 'period of employment' and a period of 'service' - i.e. employment with an employer may be continuing even though service has been interrupted.*

I contrast those findings with another case where the effects of strike action had on annual leave accrual. I quote from ALLR on page 29,151.

PRESIDENT: Thank you. Exhibit W.8.

MR WILLIAMS: And I quote from that reference:

> *The wording of the relevant award may determine whether employees are entitled to claim leave in respect of time spent on strike. It was crucial in Australian Journalists Association v. Advertiser Newspapers Ltd. 1982 AILR 444. The award in question (the Journalists' (Metropolitan Daily Newspapers) Award, 1974) provided for an annual leave entitlement calculated by reference to '52 weeks of employment'. Parties to the award sought an interpretation of this provision, under sec. 110 of the conciliation and Arbitration Act 1904 (Cth.). It was contended for the employer that time which had been spent on strike did not count towards the calculation of '52 weeks of employment'. The employee organisation put the opposite point of view.*
>
> *Evatt J. Upheld the submissions of the employee organisation:*

"I am clearly of the view that if, at the time when the subclause was drafted in 1974, the draftsman intended that the entitlement of full annual leave accrued only after the completion of continuous service for the full period referred to, then he would have used the expression 'after 52 weeks of continuous service' - an expression then well-known and used in industrial agreements and in certain awards - or a similar phrase."

The decision highlights the practical difference between the terms 'continuous service' or 'continuous employment' or for '(a period of) employment' (depending upon the jurisdiction in which the award was made). A requirement of 'continuous service' may not, unlike '(a period of) employment ' allow the inclusion of periods spent on strike.

I now turn to the case of F.C. Bermingham v. C.J. Francis, 1975, as reported in the Australian Industrial Law Review, 796.

PRESIDENT: Exhibit W.9.

MR WILLIAMS: The particular points that I'd wish to draw the president's attention to, in the middle of the page, under 796, which starts:

An employee who, for the most part, had been required to work only two days each week throughout the period of his employment with the employer, was held by the President to have had a period of continuous service for the purposes of s.17(2) of the Industrial Conciliation and Arbitration Act, governing long service leave entitlement.

His Honour held that 'continuous service' means service which is given in accord with the contract of service without interruption and, if, as was the position in the present case, the service required was rendered for the requisite period and continued throughout that period it could not be said that there was any relevant interruption of it.

In the third column, the second paragraph from the top, and I'll read:

His Honour said there was ample authority for the proposition that one should not substitute consideration of a period of employment for determination of the question of length or continuity of service. I would think that in many cases period of employment does coincide with the period of service but as was pointed out in 1950 (69 C.A.R. 108) service may cease but employment continue; the converse does not apply for service could not continue after employment ceased. For the appellant I was referred to decisions in Queensland which supported the proposition. In Richard Affleck v Evans Anderson Phelan Pty Ltd (57 Q.G.J.C. 408) it was pointed out by Hanger J., who was the then President of the Court that employment could and does continue although service may be interrupted.

The next decision which I believe would assist in the interpretation is a decision from Queensland of Richard Affleck v Evans Anderson Phelan Pty Ltd as reported in Q.G.J.C., the Queensland Industrial Gazette and it was also reported in the Australian Labour Law Reported on page 27,531.

PRESIDENT: We'll mark this exhibit W.10.

MR WILLIAMS: I wish to draw your attention to the second page of it, which is a better copy than the front one, although it states exactly the same matter. Under Court ruling on continuous service:

In Affleck's case (Q.G.I.G. 12/11/1964) MR Justice hanger, president of the Queensland Industrial Court, dealt with the matter of continuous service in upholding an appeal from a decision on an Industrial magistrate who awarded long service leave to an employee with exactly 10 years' employment. The employee was absent on numerous occasions with and without leave of the employer.

It was contended by MTIA on behalf of the employer than many of the absences, and particularly unpaid absences, should be deducted from the total period of employment when calculating the amount of continuous service.

The following extract from the judgment of Mr Justice Hanger deals with this matter:

For there are two particular qualities in his service that the respondent had to show: (1) that the service was 'continuous' as explained in the Act; and (2) that the period of service totalled at least 10 years. It should be noted at once that sec. 17 (of the Industrial Conciliation and Arbitration Act 1961) does not speak of a period of twenty years continuous employment with the same employer; it speaks of continuous service; the two are not the same; the employment may continue though the service may be temporarily interrupted. The distinction between the two is well recognised. (Not that sec 240 of the Industrial Relations Act 1990 also requires continuous service.)

The Act in sec. 17(3) sets out various matters which are not to interrupt continuity of service, one of which is '(a) absence from work on leave granted by the employer including such absence through illness or injury on leave so granted'. But while such an absence is not to break the continuity of service, nothing says that period of absence is to be treated as service. Putting aside the question in the instant case to whether the respondent's absences were such as to break the continuity of his employment, I am of the opinion that when the absences are considered merely on the question whether the length of time has been served, the respondent is far short of the ten year period.

Now, to where I was some minutes ago, Mr President.

PRESIDENT: Yes.

MR WILLIAMS: In relation to the words 'continuous service', they can also be found in three other clauses in the Restaurant Keepers Award.

PRESIDENT: Exhibit W.11.

MR WILLIAMS: I mention the other clauses in that - although we're only here today to interpret clause 9, it could be followed that the interpretation given could well have an effect on other provisions in awards and the ones I wish to draw your attention to is - just starting on page 32, which is clause 25 Parental Leave, Part A - Maternity Leave. Under Definitions, it defines 'Continuous service' but it also goes on to say that that's only in relation to this clause. So I won't dwell on that one any further, Mr President.

On page 53 Sick leave (a)(iv) - it says:

PROVIDED *that during the first 3 months of employment sick leave shall accrue on the basis of 6.33 hours for each completed month of service with the employer;*

And further, on page 55, clause 34 Superannuation, under (b):

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(i) Full-time and part-time employees;

(ii) an employee who immediately before the date of commencement of superannuation as provided in subclause (a) of this clause, has completed 4 weeks continuous service with the employer; or

(iii) an employee who subsequent to the date of commencement of superannuation completes 4 weeks continuous service with the employer;

Mr President, I would finally like to address section 43 of the act and in particular subsection (a), (1A) and (7). Subsection 1 sets out that the parties may make application for a declaration on how any provision of that award is to be interpreted.

43(1A) sets out what you must do. In particular, if you decide on para (a) you must declare how an award is to be interpreted.

Section 43(7) states that your declaration is binding on all courts. I therefore submit that the only legislation that can be interpreted by yourself in this interpretation is the award itself. I raise this now because I believe one of the other parties may wish to bring in references to the Workers' Rehabilitation and Compensation Act 1988 into this interpretation. We would submit that the only body to interpret an Act of Parliament is the Supreme Court and that authority is not delegated to you in the Industrial Relations Act.

What I'm submitting, Mr President, is that if section 42 of the act has effect on an award then it is under that legislation that a decision would need to be made as to the effect on the award and that you, Mr President, do not have the authority to make an interpretation on it.

I would therefore submit, Mr President, that the interpretation before you today is limited by the Industrial Relations Act to only the words contained in the award.

In summary, Mr President, I believe I've outlined the various options - possible interpretations of the award, the definitions from the Macquarie Dictionary, the general concepts of continuous service, a number of cases involving continuous services and other references in the award. I believe my submission today has been within the guidelines as set down by this commission.

Mr President, it's our application - our application is that you declare retrospectively how the provisions of the Restaurant Keepers Award is to be interpreted in respect to clause 9 - Annual Leave - with particular reference to subclause (a) and (c).

PRESIDENT: Do you have a preference as to how I should find or declare of two options -

MR WILLIAMS: The -

PRESIDENT: - given the - the cases you referred to?

MR WILLIAMS: - the research which I'd be able to find, Mr President, would tend to indicate that the result would be the 12 point - if I go to my mathematical calculations which - in number - in No.5, Mr President, would be where workers' compensation is not being classed as continuous service.

PRESIDENT: For periods of absence on workers' compensation would -

MR WILLIAMS: Yes.

PRESIDENT: - not be -

MR WILLIAMS: - classed as continuous service.

PRESIDENT: - included as service.

MR WILLIAMS: Yes - ....

PRESIDENT: All right. Okay. Thanks, Mr Williams. Who wants to - has there been a batting order declared?

MR COOPER: There was a batting order last time and if that's followed again I have no problem with that, sir, and that would put me up next.

PRESIDENT: Okay. All right.

MR COOPER: Thank you for that.

PRESIDENT: Yes - thanks, Mr Cooper.

MR COOPER: I think it's useful, sir, to deal with Mr Williams' last point first. If I understood his submission correctly, it was that only the Supreme Court of Tasmania has the power to - to interpret, I think, the Workers' Rehabilitation and Compensation Act and its provisions and that in some way the provisions of the Workers' Rehabilitation and Compensation Act are not matters that you would have regard to.

With the greatest of respect, that is not correct and can't be for a number of obvious reasons. The first is that clearly the jurisdiction of workers' compensation matters in this state does not less - does not rest in the Supreme Court per se. There's a tribunal that's established by the Workers' Rehabilitation and Compensation Act for the express purpose of dealing with those matters so that aspect of it is clearly wrong.

To submit that, as I understood it, you have no jurisdiction to have regard to the Workers' Rehabilitation and Compensation Act, and for that matter any other legislation of the parliament of Tasmania but for the Industrial Relations Act, also must be wrong and the answer to that is, and the support for the proposition I'm advancing, is to be found in section 42 of the Industrial Relations Act.

Now that's, I imagine, a section that's rather well known so much so that when this matter was originally before you - and I make reference only to that conscious that this is a hearing de novo, but I guess illustrate the difficulty of hearings de novo because there's an artificiality about it, you in fact -

PRESIDENT: I'll agree with that part.

MR COOPER: Oh -

PRESIDENT: Yes - sorry.

MR COOPER: It happens all the time, sir, I mean -

PRESIDENT: Yes.

MR COOPER: - you in fact raised the effect of section 42 of the act in relation to these proceedings and it's fundamentally obvious that it's got a role to play. Now section 42 of the act provides that an award has effect subject to the provisions of any act - and I emphasise that - any act - dealing with the same subject matter, and in particular - and there's some other matters that are articulated. Now the Workers' Rehabilitation and Compensation Act is not expressly spelled out but it is clearly an act. It is clearly an act of the parliament of Tasmania and it is an act which deals with the same subject matter. And it deals with the same subject matter of this award interpretation by virtue of two provisions of that act. Again, these were matters that were canvassed before you last time, and again I believe it was a matter that you raised and that relates to section 84 of the Workers' Rehabilitation and Compensation Act, and I'll come back to that.

And another section that wasn't articulated last time - or rather canvassed - and that's section 138A of the act. Now I'll deal with each in turn. Section 84 has something of a lengthy legislative history. It's predecessor legislatively was section 8 capital six of the Workers' Compensation Act 1927 which from my research apparently was added to the legislative framework in the mid fifties and that came about as a result of an unpleasant and unforeseen set of circumstances that arose from a High Court decision which isn't that common - it just says that history repeats itself - but this was the early fifties - and the section was carried forward into the 1988 legislation and then slightly modified but carried forward again into the existing framework and it provides that: If during a period for which compensation would otherwise be payable to a worker under this act there occurs any period during which the worker would be entitled under the contract service in force when the right to compensation occurred to be absent from his or her employment on annual recreational leave on full pay and then certain things occur.

Under the 1988 act the same provision pertained. Under the 1927 act from the mid fifties the same provision pertained. You raised on the last occasion the matter was before you whether there were any reported cases in relation to the interpretation of that section. There are, and I hand up two - the only two, I might add - the first is a decision -

PRESIDENT: Is that right? There are only two cases on it?

MR COOPER: Two only. The first is Cannon v. Coats Paton, a decision of His Honour Mr Justice Cosgrove, and the second, Foster v. Fonthill Pty Ltd, a decision of His Honour Mr Justice Cosgrove.

PRESIDENT: Yes, we'll mark the Cannon v. Coats Paton matter exhibit C.1 - and that's C.2, I believe.

ASSOCIATE: Oh, I'm sorry.

PRESIDENT: Yes. Are there copies for the other -

MR COOPER: They're in the appeal book.

PRESIDENT: Oh, all right. Does everybody have copies of the appeal book?

MR COOPER: They certainly do; they were given them last time.

PRESIDENT: Exhibit C.2 is the Foster -v- Fonthill matter.

MR WILLIAMS: Mr President, can I just ask you, is this a new hearing .... new matters. I mean what's happened in the past - I raise the point that any .... is

completely null and void and that .... it didn't exist. To raise references from other hearings which are of no basis

PRESIDENT: I don't think Mr Cooper is trying to do anything other than put the new material before me. I've listened to it on that basis. Yes - thanks, Mr Cooper.

MR COOPER: Now the first of those decisions that I've handed to you is a decision of His Honour - as I said - Mr Justice Cosgrove - Cannon v. Coats Paton. That was a decision under the 1927 legislation and indeed the second one is as well, and there's been nothing subsequent. And if I could draw your attention initially to the facts of that case which appear at page 158 - the top left hand corner.

The situation was that the plaintiff, who was a worker, was injured in 1970 and became entitled to workers' compensation in respect for a total incapacity. In 1974 the defendant -- who was the employer - terminated her employment and in 1975 stopped payment of workers' compensation. She did not receive the balance of her compensation entitlements until an agreement was reached in 1978 and that reserved the question of payments for annual leave. And finally the matter was determined by the Supreme Court in 1985 - 15 years after injury - 10 years after her entitlement to workers' compensation had been concluded and some eight years - seven or eight years after her entitlements had been finalised.

And His Honour found - and he was dealing with section 8C of the act which deals with this question of annual leave and whether it accrues during the period of workers' compensation - His Honour found at page 161 - and I quote:

> *This is an entitlement separate from and additional to the right to weekly payments. If that is so, then the Parliament intended the worker to be given on his return to work all the leave that would have accrued to him had he been at work during the period of his incapacity. But the paragraph goes on to say that he is entitled to that leave at the termination of his right to compensation if he does not then return to work. I conclude therefore that this lady was entitled at the termination of her right to compensation, to leave on full pay for a period equivalent to the leave she would have received had she been at work during the relevant period.*

It's relevant to note that she was employed under an award and His Honour observed that at the top of the paragraph I've just quoted from.

PRESIDENT: We don't know what sort of award or what the terms of the award were.

MR COOPER: No, we don't. I have no information about that. But the point of the matter is that His Honour has an award employee in front of him and he concludes on the basis of his construction of the then equivalent of section 84 that the employee was clearly entitled to continue to accrue long service leave while she remained entitled to workers' compensation - expressly.

So, in my respectful submission, that's effectively directly on point in relation to the matter that falls for determination today. The issue that you're being asked to decide is: what is continuous service within the meaning of a given clause in a particular award. As I submitted earlier, section 42 enjoins the commission to have regard to other acts that apply to the same subject matter. Section 84 specifically applies to the same subject matter, that is, annual leave, and whether or not periods of absence in relation to workers' compensation entitlements are to be included therein - and that decision and Cannon v. Coats Paton is directly on point and says that they are.

PRESIDENT: But does section 42 require the commission to word its awards to comply with all other legislation?

MR COOPER: Section 42, in my respectful submission, has to be read also by reference to section 32 which is the section that deals with the subject matter of awards. Now that section says that the commission has jurisdiction to make awards in relation to any industrial matter. One then has to have reference to the definitions section, section 3 of the act in relation to what an industrial matter is. In the definitions section of an industrial matter, workers' compensation matters are expressly excluded.

PRESIDENT: Exactly.

MR COOPER: It's self-evident and for obvious reason because there is a separate jurisdiction that's to deal with questions of workers' compensation entitlement.

PRESIDENT: Yes.

MR COOPER: And there would be difficulties in relation to whether or not -

PRESIDENT: So - so really the extension of that is that this commission cannot make any award which might go to workers' compensation at all.

MR COOPER: That's right.

PRESIDENT: It can't refer to it in fact.

MR COOPER: That's exactly right. That's precisely why there is reference in this award to paternity leave - or rather, parental leave -

PRESIDENT: Mm.

MR COOPER: - sick leave, long service - not long service leave - superannuation - and there are definitions of continuous service in those.

PRESIDENT: Yes.

MR COOPER: Because they're matters that the jurisdiction of the industrial commission extends to.

PRESIDENT: Yes.

MR COOPER: But that's why it's silent in relation to workers' compensation.

PRESIDENT: So how could this commission, as constituted interpret an award in relation to workers' comp?

MR COOPER: No, in my respectful submission you're not being asked to, nor ought you, interpret an award in relation to workers' compensation per se but there is a requirement - a statutory requirement - that you have regard to the effect of other legislative enactments where they apply to the same subject matter.

PRESIDENT: You see the - not the conclusion - but a conclusion might be that this is a matter that ought to be settled elsewhere.

MR COOPER: Well there's - one can never guard against that.

PRESIDENT: Mm?

MR COOPER: One can never guard against that, sir, in my respectful submission. But given the - given the following - given that this commission has jurisdiction clearly to interpret awards, you're being asked to interpret an award but in the interpretation of an award - awards generally - and this award in particular, you have to have regard to the fact or impact of other -

PRESIDENT: But when it's all concluded, no matter what I might interpret the award to mean the Workers' Compensation Rehabilitation Act - or whatever it's called now - will be enforced in another place - no what I determine.

MR COOPER: Yes that's - that's true - that's true - but the jurisdiction of this commission and the jurisdiction of the tribunal - the Workers' Compensation Tribunal don't overlap. They go close. They almost nudge up against one another in relation -

PRESIDENT: Yes, they do.

MR COOPER: - to this matter -

PRESIDENT: They do.

MR COOPER: - but they don't overlap. The workers' -

PRESIDENT: That's the point I'm making.

MR COOPER: Quite right - but the Workers' Rehabilitation and Compensation Tribunal obviously has jurisdiction to deal with all sorts of matters associated with entitlements to compensation. You're not asked to make a determination here in relation to entitlements to compensation. Amongst other things, the agreed facts that are before you indicate that those entitlements have been settled. You've been -

PRESIDENT: Yes.

MR COOPER: - without - and it's common ground - that the lady - the worker that's the subject of this application today executed the release and that determined her entitlements.

PRESIDENT: Yes.

MR COOPER: So, yes, it's got a workers' compensation component in the sense that you must view what happened against the factual background which was, amongst other things, she was on workers' compensation for a given period of time but you're not called upon - and it doesn't follow that you're obliged to make any finding in relation to her workers' compensation entitlements.

Now the situation would be different, in my respectful submission, if, for example, here entitlements to workers' compensation had not yet been determined. If, prior to the execution of the release that Mr Williams has told you about, this application had been brought, that would be different because in those circumstances you could be then be called upon to make a determination in relation to her entitlements, and, as you've rightly observed, workers' compensation - the Workers' Rehabilitation and Compensation Tribunal could say: well, so what, President Westwood's made this determination, well it matters not because it's got nothing to do with his jurisdiction and we're quite entitled to make a finding at odds entirely with that. But here it's different. The circumstances here are different because of the fact that the entitlement is being determined. That makes it, in my respectful submission, materially different and it means that there's no overlap of jurisdiction. It's an interesting one though, isn't it?

PRESIDENT: Mm. Yes, I'm not entirely convinced but I understand what you're putting.

MR COOPER: Mm.

PRESIDENT: I'll have to think about it.

MR COOPER: Now I was on Cannon v. Coats Paton -

PRESIDENT: Yes.

MR COOPER: - Foster -v. Fonthill is, as I indicated, a decision also of His Honour, Mr Justice Cosgrove. It's brought to your attention, sir, only by way of completeness, because it is the other decision that deals with the section and unsurprisingly His Honour concluded that he'd been right on the last occasion that he dealt with it and decided that he'd follow himself. But they're the only two reported decisions I've been able to find in relation to our legislation.

PRESIDENT: Yes. And we don't know what the terms of the award -

MR COOPER: Again, we don't.

PRESIDENT: - were in this instance either.

MR COOPER: No.

PRESIDENT: Yes.

MR COOPER: Now it's probably self-evident that the interpretation that I urge you to adopt is one that is most beneficial to the worker in this case. It follows that the interpretation, in my respectful submission, which you ought to adopt in relation to the meaning of continuous service in the clause that's under scrutiny is one that means that whilst absent on workers' compensation that period of absence counts towards the calculation of continuous service.

PRESIDENT: And I rely on Cosgrove J in those two matters.

MR COOPER: Expressly. But there are other matters that have been canvassed by Mr Williams that aren't particularly pertinent and the first is the reference to be made to an extract - I think it was from the 'Industrial Reporter' which was exhibit W.7 and stated:

> *Many cases have considered the meaning of the expression "continuous service". Most of these are peculiar to their facts so they cannot be given great weight.*

Again, in my respectful submission, that is probably the best one-sentence summary of the law in relation to this confusing area that there could be. There are literally dozens of cases in relation to whether continuous service means continuous employment, whether continuous employment and continuous service are the same thing or whether they're different. What can be drawn from some of them is the fact that unauthorised absences - absences on strike - and in one case it was referred to by Mr Williams just 'absences' - that apparently were not authorised by the employer.

And if one -

PRESIDENT: That strike action case is a different one again because the words used in that are 52 weeks of employment rather than continuous service.

MR COOPER: Well that's right. It's another - it's another example of the conundrum. But unauthorised absences, I would concede, could not, in the ordinary course, count towards continuous service. It would be doing violence to the language to reach a conclusion that was any different to that.

So the focus has to be upon whether or not in interpreting this idea of continuous service, whether it's been continuous, whether there's been service and if there's been any breaks in it - why, what the reason was and whether it's an authorised one.

Now I imagine Mr Gates will make submissions to the effect that one has to have regard to the terms of the contract of service and that in this case the contract of service is the award and that any absence that's not authorised by the award is one that is not to be had regard to when determining continuous service, and since this absence in this case was on workers' compensation and since there's no reference in the award to workers' compensation it's one that's not authorised by the award ipso facto you ignore it.

In my respectful submission, the flaw in that is that the contract of service is the award - true - but it is not the whole of the contract of the - of service. An implied term in this contract of service and indeed any other one is the requirement that the employee - that the employer - have in place a policy of workers' compensation. It follows that in this state under every state award, every employee has, as part of his or her contract of service, an implied term that there be in place workers' compensation. Any absence therefore on workers' compensation is absence that has been and must have been recognised as likely to occur and within the terms of the contract of service otherwise the situation is personal. The best illustration of it is this: someone is injured or someone is ill; they submit - and they require a week off work on any view of it. They submit a medical certificate and whether or not their service - or their absence whilst ill or injured for five days - for five working days - is to be counted towards their service is determined by having regard to the type of medical certificate that's submitted.

So in other words, if I'm crook and I need some time off from work, I hand in the Workers' Rehabilitation and Compensation Act prescribed medical certificate and the time that I have off doesn't count towards my continuous service whereas if I'd chosen to hand in a different type of medical certificate - the normal one as it were - then my absence from work counts towards my continuous service. It illustrates the fallacy of any submission that in some way an absence on workers' compensation or pursuant to entitlements to workers' compensation -

PRESIDENT: Might it also indicate a poorly constructed award?

MR COOPER: It may. It may. But the point I'd make is this again: there can't be anything in the award about workers' compensation because it's not an industrial matter - it's expressly excluded. So it illustrates -

PRESIDENT: A number of awards do.

MR COOPER: Do they? About workers' compensation?

PRESIDENT: Refer to absences on workers' compensation.

MR COOPER: Well, it would be an interesting argument if one of those was here.

PRESIDENT: Well, we wouldn't be here if we were dealing with one of those awards.

MR COOPER: No, well we probably wouldn't be but it's - as an aside it appears to me if - certainly if this argument that I'm advancing is correct and any reference to workers' compensation entitlements of any type in an award -

PRESIDENT: The purists have been having a go at it for a long while.

MR COOPER: Yes.

PRESIDENT: And there are those who say anything that's precluded there should be no reference at all -

MR COOPER: They should be struck from it, arguably.

PRESIDENT: - to - yes. But then there are others who say, well the award is - is something to signal to employers what they have to observe and if the award simply makes a reference to the requirement to comply with the Workers' Compensation Act or that certain absences on workers' compensation will attract award entitlements then that's better for everybody. It's then clear for all parties.

MR COOPER: Well -

PRESIDENT: You see some of them - some of the awards have a limitation on the amount of absence that can attract leave.

MR COOPER: Oh, well in fact I started off by saying I'd come back to section 138A of the Workers' Rehabilitation and Compensation Act and it might be a useful time to come to it now because that's particularly relevant in relation to what you've just been raising. 138A was slipped into the legislative scheme -

PRESIDENT: We're talking now about the Compensation Act?

MR COOPER: I am sir, yes.

PRESIDENT: And when did that go in?

MR COOPER: In August, '95.

PRESIDENT: Right.

MR COOPER: It was inserted by section 70 of the Workers' Rehabilitation and Compensation -

PRESIDENT: Thank you.

MR COOPER: - Reform Act that provides that if a worker is incapacitated by reason of an injury in respect of which an employer is liable to pay compensation in accordance with the act - or rather, this act - the employer must for a period of twelve months following the day on which the worker became incapacitated, make available to the worker the employment in respect to which the worker was engaged immediately before becoming incapacitated.

In subsection (2) is a 'get out clause' as it were, to enable that obligation to be avoided in certain circumstances, but that is by the by. Section 138A supports the proposition that it was envisaged by parliament that employment and service would continue for, in that case, a finite period of time.

PRESIDENT: Well it doesn't say service, does it?

MR COOPER: No it doesn't. It doesn't. But it's making a requirement - it's placing a requirement on the employer to do a certain thing with respect to continuity of employment.

PRESIDENT: Yes.

MR COOPER: And -

PRESIDENT: Well to make it available.

MR COOPER: - make it available.

PRESIDENT: What does that mean?

MR COOPER: Well there is no law on that yet.

PRESIDENT: So to make available -

MR COOPER: To the worker -

PRESIDENT: - to the worker the employment in respect to which the work was engaged. Yes, I see. So does that mean no matter how incapacitated?

MR COOPER: It seems to.

PRESIDENT: Okay.

MR COOPER: It seems to. Yes. All right.

PRESIDENT: I agree. That's what it seems to say.

MR COOPER: It's not been tested any where. I know there is one waiting - waiting to go - but I mean that is of little or no help in these circumstances. But what it does illustrate, I'd suggest, is that there's an intention on the part of parliament to preserve a period of continuity - it's implicit in it - because the employer is liable to prosecution if it breaches that section in relation to the preservation of continuity and availability.

PRESIDENT: Yes, it's more to make sure that at least up to twelve months' work is provided once a person has taken advantage of the Workers Compensation Act.

MR COOPER: Quite.

PRESIDENT: So I presume it's more a measure against victimisation.

MR COOPER: Possibly. A measure against people being disadvantaged because they had accessed or taken advantage of the statutory entitlements or rights.

PRESIDENT: Mm.

MR COOPER: But, as I say, it's relevant because it illustrates an intention on the part of the parliament to preserve a measure of continuity for a given period of time.

I don't think that I can usefully advance the matter. They're the submissions that I wish to make. If it please the commission.

PRESIDENT: Yes, all right. Thank you, Mr Cooper. Mr Gates.

MR GATES: Back again, president.

PRESIDENT: Back on earth?

MR GATES: Yes. My submissions will probably take thirty to forty five minutes. I was wondering, Mr President, would it be possible to have a brief adjournment?

PRESIDENT: Yes.

MR GATES: Just so -

PRESIDENT: No objection to that from anybody?

MR COOPER: No, sir.

PRESIDENT: Ten minutes?

MR GATES: That's ample.

PRESIDENT: Yes. All right.

SHORT ADJOURNMENT

PRESIDENT: Mr Gates.

MR GATES: Yes thank you, president. Thank you for that brief adjournment.

In the course of my submissions I propose to address you to seven matters and in my summary to guide you in the course of my submissions. I propose to deal with the first area and that is the words 'continuous service' and how they differ in the expression 'continuous employment' which in some way has been addressed by my colleague from the Workplace Standards Authority.

The second is that the words 'continuous service' that are used in the award are clear and unambiguous. Thirdly, that 'service' must in fact be 'actual service' and that during a period of employment there may be less service than there is a duration of employment. The fourth is that an 'absence from service' will do one of two things, it will either break or it will suspend the service, the continuity of it. The fifth is that an absence on account of workers' compensation will not count as service. Six, that other clauses in the award clearly support the service as being something less than employment and lastly that section 84 and section 138A of the Workers' Rehabilitation and Compensation Act of 1988 are not relevant to the issue of whether the service is or is not continuous and that it does not create an entitlement to annual leave outside of the terms of the award.

I'll deal with the first point and that is that the words 'continuous service' not 'continuous employment' are in fact different. You were tendered a case for Bermingham and Francis which is W.9 - I won't labour the point. In essence the case concerned a part-time employee who only worked two days a week throughout the duration of his employment and the question arose as to was the person entitled to long service leave. His Honour in that case held that 'continuous service' means service which is given in accordance with the contract of service without interruption. Hence the employee was ready, willing and able to work and provide actual service in accordance with the contract that he was under, and they found that was sufficient. His Honour succinctly and clearly draws the distinction between a period of employment and a period of continuity of service. He says, `One should

not substitute consideration of a period of employment for determination of the question of service, service may cease but employment continues.' And he refers to two other cases which I'll simply refer to as Affleck and Evans and the Boilermakers Society of Australia versus Evans Deakin & Co.

If I take you to a second case and this case, to date, has not been tendered and I will tender it.

PRESIDENT: Exhibit G.1.

MR GATES: The case, Mr President, is The Australian Rope and Cordage Workers Union versus A. Forsyth and Co. Pty. Ltd. It's found at 51 Commonwealth Arbitration Reports 794. This case concerned an interpretation of the award and whether an unauthorised absence affects continuous service for the purposes of annual leave. The award provided for seven consecutive days' leave to be awarded annually to employees after twelve continuous months - sorry, twelve months' continuous service less the period of annual leave. The also had a further provision saying: service shall be deemed continuous notwithstanding certain absences. So in that regard it is slightly different than the matter currently before you, but the principles, we submit, are valid. He says, `The provisions are clear that service is not synonymous with employment in the sense of engagement.' He further says in reference to the words `twelve months continuous service' is to be less the period of annual leave, that there would be no need to insert those words into the award if continuous service was to mean the same as continuous employment in the sense of engagement.

The Restaurant Keepers Award, in the matter currently before you, contains the same reference of twelve months' continuous service being less the period of annual leave. And as such we say continuous service is not continuous employment, and the two are fundamentally opposite.

The next case that I would draw your attention to, president, which I have an exhibit for -

PRESIDENT: This one went to appeal anyway, didn't it?

MR GATES: Yes.

PRESIDENT: Yes. Yes, thanks. Exhibit G.2.

MR GATES: The case tendered as G.2 is referred to as Wire Workers Wire Fence and Tubular Gate Workers Union of Australia versus Rylands Bros. (Aust.) Pty. Ltd. and others. It's found at 53 Commonwealth Arbitration reports at 180. On page 182 and 183 the last paragraph just under Full Court it says:

> *The general practice followed by this Court in giving effect to the decision of the Full Bench in Federated Storemen and Packers Union of Australia v G. Adams Pty. Ltd. and others has been to make the benefit of a period of paid annual leave dependent upon an antecedent period of continuous service. Where continuity of service is intended to be preserved despite absences from work owing to sickness or accident or causes for which the employee should not be regarded as responsible, specific provisions have been included in order to express the intention.*

Now that is fundamental. Where the intention is to preserve it it must be specified. And I will note, at this point in time, there is no preservation in any form under the Restaurant Keepers Award in relation to annual leave.

He then goes on:

> *It has been held that unauthorized absences on the part of an employee break the continuity of service for the purposes of qualification for annual leave. And it has been pointed out that continuity of service is not synonymous with continuity of engagement or with subsistence of the contract of employment.*

This decision very clearly states the general principles of continuous service. That is that firstly it is not the same as employment. And secondly that unauthorised absences affect it in so far as they break continuity. And thirdly that the award must preserve absences in order to have them counted as continuous service. But if no provision exists then absences will either break or suspend continuity. It is that straightforward.

The next case which I will refer you to, which has already been tendered as an exhibit as W.10, is the case referred to as Chard Affleck versus Evans Anderson Phelan (Pty.) Limited.

In this case it also dealt with the issue of employment and service and the distinction being well recognised. The president then dealt with the issue of absences including an absence through injury or illness and said that whilst the act preserved continuity it said nothing about the treating it as service. He then declines to award long service leave by excluding from service such absences. So what he has done, he has said that it won't affect continuity but it won't be counted, and that's a logical extension because he refused long service leave. The last case which I will refer you to, which I have an exhibit for, is the case referred to as the Australian Journalists Association versus Advertising Newspapers Limited. It is found -

PRESIDENT: Exhibit G.3.

MR GATES: - it is found in the 1982 Australian Industrial Law Review, at 449.

PRESIDENT: 449?

MR GATES: I'm sorry, 444. What I will take you to is the second - sorry - by way of overview it concerned employees who refused to provide all or certain services to the employer or otherwise engaged in strike action. And again there was a reference to annual leave but under the New South Wales Holidays Act - I'm sorry - just under the Journalist Metropolitan Daily Newspapers Award and it was a federal jurisdiction not New South Wales.

If I take you to the second column at the top, the first underlined provision, it says:

> *(a) subject to the provisions hereinafter contained, in every 52 weeks of employment -*

Now that's referring to the entitlement for annual leave. But the important point is that the - just under the section which is titled reasons for judgment, and it's quite important, he says:

> *His Honour rejected a submission on behalf of the respondent that the word "employment" in the clause meant "service", agreeing with the submission on behalf of the applicant that if the draftsman had intended that only actual performance of work and payment for that performance would constitute employment for the purposes of accruing annual leave, there was then a clear and unambiguous form of words such as "of continuous service" which would have given effect to that intention and that that form of words was well*

recognised and understood in industrial jurisprudence at the time of the making of the award.

So it is very clear from that that 'continuous service' must be the actual performance of work. If the draftspersons of the Restaurant Keepers Award had wanted to express that then it was so open to them. They chose 'continuous service' not 'continuous employment'.

The next point that I will take you to is that the words 'continuous service' are clear and unambiguous and that regard ought only be had to the context of the words as they appear. In the previous matter and indeed in this matter, I will refer you to the Oxford - The Shorter Oxford English Dictionary. And in that regard, president, I have a further exhibit which I will seek to tender.

PRESIDENT: Exhibit G.4.

MR GATES: On page 382 which has a heading in its top right hand corner of 'continuous', if I take you to the far right hand column to the very bottom, it defines the word 'continuous' and you ought see .... a `1' appearing there. The first word which is relevant is continuous of service and it says:

Characterized by continuity; extending in space without a break; having its parts in immediate connexion; connected, unbroken -

And then goes on:

- Uninterrupted in time, sequence, or essence; going on without interruption.

Now it is clear 'continuous' will not incorporate any period that is broken or interrupted and that is simply by definition. If it is broken and interrupted then it cannot be 'continuous'.

If you then turn the page - two pages - to the page 1850 with 'service' in the top right hand corner, you will see a five appearing at the very top of the far right hand column, and if defines the relevant points of service at 2, and it says:

Performance of the duties of a servant; attendance of servants; work done in obedience to and for the benefit of a master. An act of serving; a duty or piece of work done for a master or superior.

Then at 5A, which is two or three centimetres down, it says:

- ready to obey his commands.

Then down the page to roman numeral IV, which is 6, in the far right hand column, it says:

The action of serving, helping, or benefiting; conduct tending to the welfare or advantage of another. Chiefly in to do, render.

Then at VII, it says at 5:

Serviceableness.

Then at 6:

At one's disposal, ready or available for one to use.

The question as to what is 'serviceable' as is bought into that definition, is found over the page on page 1851. And you will see in the far left hand column a third of the way down 'serviceable' and it says:

Ready to do service; willing to be of service; active or diligent in service -

PRESIDENT: Where is the word 'serviceable' in the previous definition you wanted me to have regard to?

MR GATES: Sorry. Well if you went back to 'service' on 1850 -

PRESIDENT: Yes.

MR GATES: - it's four fifths of the way down the page. It's part of roman numeral IV and it is in 5 of that provision, it says: 'Serviceableness'.

PRESIDENT: 'Serviceableness' as distinct from 'Serviceable'.

MR GATES: Well 'serviceableness' is part of, as you will see at the end of it, 'serviceable'. Now it says, at 1 in 'serviceable':

Ready to do service; willing to be of service; active or diligent in service -

And further on:

- expressing readiness to serve -

Then it becomes pertinent to complete the circle as to what is 'served' and that is found on page 1849. And you will see in the far right hand column just over - or two thirds of the way down the page, it says 'serve' and it's underlined in the fourth line of that, it says:

- to perform the duties of a servant.

And then 'servant', if we go up to that, in that same column at 2 and 3, it says:

- one who is under obligation to work for the benefit of a superior, and to obey his (or her) commands.

Further it says:

One who is under the obligation to render certain services to, and to obey the orders of, a person or a body of persons, esp. in return for wages or salary.

From those definitions, president, we say it is clear that service must be actual service to the employer and that an absence is not service. And indeed, in our respectful submissions, the authorities which we have previously taken you to also support that as an ordinary and customary usage of the words.

The next point that I will take you to, president, is the words used in the award to say that their meaning is clear and unambiguous and it is clearly something other than 'employment' and it is in fact 'service'.

If I could first take you to - and this is from No. 2 of 1996 (Consolidated) Restaurant Keepers Award - to clause 7 - I'm sorry - clause 7 subclause (a) Definition of Introductory Level. You will see in the third line - you will see in the third line that it says:

Provided that an additional 494 hours may be served at this level -

So they're talking of the concept of 'served' as actual physical service that you must serve an additional or you may serve an additional 494 hours. So that in that context it is service that is actually being performed, not a subsuming of the underlying contract of employment which wouldn't require actual service to meet that provision.

The next clause that I will take you to -

PRESIDENT: But what's that got to do with the annual leave clause?

MR GATES: Well, what I would say is that it is putting into context what is the terms used of 'serve' and 'service' and 'served' in the award as being something with a connotation of actual physical service rather than something which can be satisfied by not being served; a person who in the performance of some duties, but having an overlying contract of employment there.

The next clause that I will take you to, president, is clause 9 (a), which is Period of Leave. And that simply says that the qualifying period for annual leave is after 12 months' continuous service (less the period of annual leave). The clause (a) is saying that you will accrue annual leave (less the period of leave). Now if you are on workers' compensation how can it be less the period of annual leave because you are never going to take it whilst you are absent. So it is clearly the intention of the draftsperson that 'continuous service' would be 'actual service' and that you would in that twelve months actually physically take your annual leave. The intention of the draftsperson was not to say `twelve months 'continuous employment' but rather 'actual service'.

In subclause 9(c) which is proportionate leave on termination, it talks of a few matters and it says:

> *Where an employee on weekly hiring is engaged for a period of less than 12 months -*

So in that context they're talking about engaged - engaged as being the contract of employment, and then it goes on to say if they leave they will accrue annual leave on the basis of $12^{2}/_{3}$ hours for each completed month of service.

The draftsperson used the words carefully 'engaged for a period of less than 12 months'. He also then carefully uses the words 'completed service' for the basis of accrual.

Now that lends support to the argument that whilst employment may be for 12 months that there may be periods of absence and that your accrual for annual leave if you leave will not include those periods of absence because it will not be service.

He's talking about employment in the overall context and then he talks about period of service as being something less than that - and that's quite clear.

If we then go down to subclause (g) of 9 which is Pro rate for Part-time Employees on Termination, again it's using this term 'service' there, and it uses it in the calculation method. The calculation method is:

$$\frac{\text{average number of hours worked each week in the accrual period}}{38} \times 12^{2}/_{3} \text{ hours for each completed month of service}$$

It is clear that the draftsperson clearly intended from that that it must work - it must be the actual performance of work for they used the words 'average number of hours worked each week in the accrual period'. And then the next one they say '$12^{2}/_{3}$ hours for each completed month of service'; not $12^{2}/_{3}$ hours for each completed month of employment - but service.

If we then proceed to 20(a) of the award which is hours of work, it provides a clue as to what may constitute - or sorry - what will constitute service for a full-time employee and it simply says it will be an average of 38 hours per week to be worked on the following basis.

Now obviously if you don't work 38 hours as a full time employee you don't fulfil, I suggest clause 17 of the award in that you have not provided a service which is continuous. And clearly, when you're on workers' compensation, one does not work and therefore you are not performing service and therefore you're not entitled to it.

There are other provisions which appear in the award and I'll briefly take you to those for completeness' sake. Parental leave defines it but it simply defines it to that part of the award so I will not address you as to that.

There's a reference in sick leave under the award which is clause 32 and you will see it appearing at (a)(iv) and it says:

> *PROVIDED that during the first 3 months of employment sick leave shall accrue on the basis of 6.33 hours for each complete month of service with the employer;*

Now again you're hitting the similar connotation that the draftsperson has put it in. There's an overall period of employment but you only get it based on actual service. So he's saying that it's - that service is something less than actual employment.

Superannuation also has the reference to it and, you know, it would say for example, a full time employee completes four weeks' continuous service before there is an entitlement to superannuation. It's not talking about employment, it's talking about actual service.

So what we would say from all of that, president, is that there is a very clear and consistent line all of the way through. The use of the words 'continuous service' is not unclear nor is it ambiguous. It's very clear that there is a very clear distinction between continuous service and continuous employment and continuous service will never exceed continuous employment but will, if anything, be less.

The authorities clearly support that as a very clear distinction. The common and ordinary usage of the words 'continuous service' means an unbroken period of actual service to the employer. The award in its terms clearly draws a distinction. The award - and this is in line with other cases that we've put to you - will need to specifically deem in absences to be part of continuous service before those absences are counted. The award does not do that. It does not bring in - deem in - any absences being part of continuous service.

PRESIDENT: Does that mean sick leave?

MR GATES: That's the point I was going to address you to -

PRESIDENT: Right.

MR GATES: - president. It raises the question: what absence is in and what absence is out. The award doesn't define what occurs with continuous service when the employee is absent, that is, that the person is not providing service to the employer.

We say it can be dealt with in several ways. Where there is an absence from service which is paid under the award - and that's annual leave, sick leave, public holidays, carers leave, compassionate leave, rostered days off - these do not break continuity of service because the award will specifically recognise that as an absence and the draftsperson would have included that as part of continuous service. Unpaid absences such as unpaid leave or extended leave with the express authorisation of the employer would not break continuity but would not count as part of the service as it is a mutual variation to the requirement to work actual service for a period of time.

Terminations, strikes or other unauthorised absences would break continuity as no agreement exists with the employer to not provide service.

A workers' compensation absence is not part of the service to the employer, but we say it does not break the continuity but it will not count as part of service and would obviously be resurrected when service recommenced.

The question -

PRESIDENT: So if that's the case, the workers' compensation absence does not break continuity and annual leave is available after 12 months of continuity, does that mean that workers' comp counts?

MR GATES: No, because - well, I mean the words will have to be expressed. I mean it's either going to be - well, I must say, I would - I see there is being two elements to it; one is continuous and one is service. Now something can be continuous but not actually be service. Something could service but could not be continuous. So in that regard I would see it as being two elements which both must be satisfied. If I address you to section 84 -

PRESIDENT: Yes, I'm particularly interested in section 84.

MR GATES: - and section 138A. Now this will somewhat dispersed; I'll cover it now and then I'll seek to recover it later as well. It is my respectful submission that it is not for the commission to interpret the provisions of the Workers' Rehabilitation and Compensation Act, but I will say that section 84 does not create an entitlement to annual leave for a worker, nor does it deem workers' compensation absences to be service, rather, it is simply a provision pertaining to the taking of annual leave by an employee who is entitled to annual leave - nothing more than that and it puts in place a number of provisions and it says they can take it within three months of return to work, by arrangement they can take it during the workers' compensation absence and the employer will not cause or require the worker to take annual leave during of incapacity.

PRESIDENT: How does that statement sit with the decisions of -

MR GATES: Well I have -

PRESIDENT: - Cosgrove J?

MR GATES: Yes - in Coats Patons? Yes, I have a specific reference I'll take you to in those cases. It refers in section 84 to something which says a contract of service.

Now I know we aren't interpreting it, but for the fullness I would say that - no .... - I won't take that any further.

If I take you to the specific case of Cannon v. Coats Paton, I'll draw your attention to certain things. The first is, that that case was decided under an obsolete provisions of the act. It was not decided under the new act, and the new act is different, the new act has a different intent.

The second point that I'd like to address you to -

PRESIDENT: And where are the words different - can you help me on that?

MR GATES: Well it includes, from memory, different subclauses - has different subclauses (a) and (b) - and (c) from memory - and it also refers in the opening paragraph to - it says: under the contract of service in force when the right to compensation occurred - well under the old act it was when the right to compensation accrued. So there's some differences to it. The current act - well, anyway, I'll keep pressing on - it will become clear as we go.

PRESIDENT: I hope so.

MR GATES: No, it will. That act simply looks at the question as to whether an employee during a period of incapacity is entitled to annual leave. It's fairly straight forward. It found that there was an entitlement to leave in addition to weekly payments which is - comes from a High Court case. There was no consideration given as to the exact basis for the entitlement, nor was there consideration given as to the specific award provisions, words and restrictions. That case is not authority as to what constitutes continuous service for the purposes of accrual of annual leave. That case is not authority to say the act will entitle an employee to annual leave if the contract of employment - sorry - sorry - I'll reclarify that. The case is not authority to say that the act will entitle an employee to annual leave if the contract of employment says they are not going to get annual leave. And so for example, if I had - well, if I was award free and the contract with me said for example you will not get annual leave if you're on workers' compensation, that act will not create an entitlement for me to get the annual leave. So it's the terms of the contract and it's the terms of the award which create the entitlement to the leave. If they do no create the entitlement then the act in section 84 will not apply and won't create the entitlement. That's quite clear.

What is also interesting in that case is the judge who decided it - and who decided the case of Foster and Fonthill says clearly by default -

PRESIDENT: Clearly, does he, by default.

MR GATES: Yes - well let me clarify it. He says clearly by - well - he says clearly by saying the opposite - let me put it to you that way because he says he may not have been correct in his original finding encountered in Cannon and Coats Patons but because no-one has appealed me I'll assume that it's correct. So he -

PRESIDENT: That's not a bad yard stick.

MR GATES: - well that's what he says in Foster and Fonthill. He says well no-one has appealed so I must be right - I'll go on the same basis. Now, you know, by default he is saying I may not be correct in what I say. Now -

PRESIDENT: That's a bit of a leap, I think.

MR GATES: Well I don't think it's an extraordinary leap - I mean it's quite consistent. But I say, even he was right then it doesn't go past this creation of entitlement. It doesn't create the entitlement; it is the award that creates the entitlement or the contract that creates the entitlement. Those must be analysed and that is what we are analysing. So will the term 'continuous service' give an entitlement to annual leave during the period of incapacity whilst on workers' compensation.

My submissions in relation to Cannon and Coats Paton just simply applies to Foster and Fonthill.

By way of more submissions in response to that of Mr Cooper, the references to the history of section 84 and section 138A are outside the terms of an interpretation of this commission and involves the introduction of extraneous material which is not required as the words are clear and unambiguous as to their intent. And further, we are not interpreting the Workers' Rehabilitation and Compensation Act.

The issue as to jurisdiction - if that hasn't already been resolved I'll certainly throw my two bob's worth in -

PRESIDENT: You should cover everything you think is - it's necessary to cover.

MR GATES: All I would say is, that I would support in essence what Mr Cooper said, and that is, that the issue of determination of annual leave is clearly within your jurisdiction and that it would not be within your jurisdiction if you dealt with the issue of whether there was an entitlement to workers' compensation - and I believe that's quite clear by the definition of industrial matter in subclause 3 of the Industrial Relations Act. So I would say you do have jurisdiction to determine this entitlement based on the award.

Furthermore, Mr Cooper's - and this is on a separate issue - Mr Cooper's reference to what the provision ought mean is not a matter allowable in the rules of interpretation and I would specifically refer you to the second ground in T.30 of 1985.

As to his assertion that the award is the contract of service, perhaps I should have foreseen that this matter would come up and I would have brought the case with me. I would refer you, with respect, to a recent case of the High Court of Australia which everybody knows as simply .... v. Australian Airlines. Now - and I'll go from the top of my head on this matter - .... is authority to say that an award is not necessarily part of the contract of employment - and they're very clear on that - unless it is expressly implied and incorporated into the contract of employment. Now we have no way of knowing that before us today. What they did say in Byrne and Frew was that an award is a part of the industrial regulations applying to the employment relationship. So it's just there. It's not part of the contract though. So I wish to clarify that.

And that also applies to the Workers' Compensation Act. Mr Cooper said that he's .... into the contract of employment. Well the Workers' Rehabilitation and Compensation Act is similarly one of those regulations that the High Court was talking about, and that is, it will apply to the relationship but it's not part of the contract. If it were part of the contract people could sue for breach of contract. Now there's no evidence to say that act is part of this person's contract.

PRESIDENT: Okay - what forms the contract of service then in your opinion - just - just for fun.

MR GATES: Just for fun. Okay. The contract of employment will include things which are both expressly and impliedly imported into the contract.

PRESIDENT: Such as the terms of an award.

MR GATES: Well the terms of the award aren't necessarily part of the contract - if you adopt Byrne and Frew - if there was an express intent to import that provision into the contract of employment, then yes, it can be part of the contract.

PRESIDENT: Yes.

MR GATES: But if it's not it isn't; it's simply industrial regulation which applies to an employment relationship - nothing more.

PRESIDENT: We'll have to bone up on Byrne and Frew.

MR GATES: Well - well I'll give you some more information: Byrne and Frew - the reason that it went originally was the expression 'harsh, unjust and unreasonable' and it was - it appeared in the award. The employees were trying to sue the employer for breach of contract by saying that that expression - harsh, unjust and unreasonable - was part of their contract of employment and the High Court found that it wasn't. They said it is simply an industrial regulation which applies to the employment relationship - it doesn't form part of it.

PRESIDENT: Yes, but if the matter had been dealt with in the Industrial Relations Commission then that would have - they would have found that that was part of the contract of service - the award was part of the contract of service. And that's the whole purpose of the award.

MR GATES: But what the award does, it creates an enforceable statutory right -

PRESIDENT: Now if you're - yes - if you're talking about -

MR GATES: - it is not necessarily -

PRESIDENT: - enforcing a contract for damages in another court that might be different.

MR GATES: Well, perhaps it's' a matter that we all bone up on Byrne and Frew and Australian Airlines.

PRESIDENT: Yes.

MR GATES: But I don't accept what you say, president, with respect.

PRESIDENT: Yes, all right.

MR GATES: Furthermore, the example that Mr Cooper of sick leave versus an absence on workers' compensation and whether or not it's part of the service is irrelevant - absolutely irrelevant - as it is the words which are used in the award which are solely relevant to the determination of this matter - nothing more.

If a conclusion is reached which may seem a bit strange or inconsistent - that doesn't matter. The words if they are clear and unambiguous are given their meaning and they applied in that context and as such the example is meaningless.

The same which we've said about section 84 applies to section 138A of the Workers' Compensation Act and it doesn't assist this commission in determining what is or

what is not continuous service as defined under the award. If it pleases the president.

PRESIDENT: Yes, all right. Thanks, Mr Gates. Look, at the risk of extending the issue far too long, does anybody want to respond to any particular issues that have fallen? Mr Williams, have you any summing up comments?

MR WILLIAMS: Probably by way of - I beg your pardon?

PRESIDENT: Any summing up comments.

MR WILLIAMS: Well in response to comments that have been made, if I may, Mr President, on the point of the workers - and I - simply my earlier comments about - in respect to the Workers' Compensation Act - but I - it was mentioned by Mr Cooper - the changes - and I think it's important that you have the full information on this matter, Mr President, but there were two changes to the act which varied from the 1927 act and in fact there was a change taking place during the employee's period of workers' compensation. So not only do you have a change from the '27 act, you've got another change during the employment and I think it's important that you have that documentation ....

PRESIDENT: Have you got the '27 act provision?

MR WILLIAMS: I have the '27 act.

PRESIDENT: Because that's the - that's the one under which Judge Cosgrove made his decision.

MR WILLIAMS: That's right. And I've got the '27 act, I've got the '88 act and the 1995 act. Do you want them all?

PRESIDENT: Well don't bother about the 1995 or the 1988, but I'm particularly interested in the 1927 act.

MR WILLIAMS: Yes, I can - I'm happy to - but as I say, those changes took place during the time.

PRESIDENT: Have you got copies for everybody else?

MR WILLIAMS: I certainly have, Mr President - yes, I have plenty of copies.

PRESIDENT: Okay. We'll mark this document and I'll give everybody the opportunity to comment on it -

MR WILLIAMS: And the final -

PRESIDENT: - exhibit W.12.

MR WILLIAMS: And the final comment is in relation to the decision of Coates Patons and its effect on the federal Department of Industrial Relations because it was a federal award which was before the - the matter at that time. The federal department's advice to me on this matter is on the - on the - is at - that those departments only give advice and enforce what is contained within their awards and if any other legislation may give an increased entitlement then the authority that administers that legislation would be responsible and not the federal department. So the federal department in response to that decision in relation to the .... award at the time it had no effect.

PRESIDENT: The what award?

MR WILLIAMS: It was called the - the full title and I think was the Textile Industry Woollen and Worsted Section Award of 1968.

PRESIDENT: I see. Yes - because the federal act - the federal Conciliation and Arbitration Act at the time had the power to deal with workers' compensation didn't they? Or had it - was it passed to the state?

MR WILLIAMS: I don't have any comments to the add to the president's -

PRESIDENT: No - no, all right. No, I think - I think - well, I think workers' comp was virtually ceded to the state - yes.

MR WILLIAMS: But the ....

PRESIDENT: All right. Now do you want to make any comment, Mr Cooper, on -

MR COOPER: One matter only, Mr President, and that is this, that it was asserted by Mr Gates that regard ought not be had to the decisions of His Honour Mr Justice Cosgrove for a couple of reasons, one of which was that it was a decision based upon repealed legislation. The fact of the matter is that apart from the replacement of the word, I think, 'occurred' - sorry - 'accrued' with the 'occurred', the provision is identical in relation to the operative part that was under consideration. That's all. It's the only distinction and it's of no relevance here.

And secondly, the observations made in relation to Mr Justice Cosgrove apparently saying 'I must have been right because nobody appealed me' is a quantum leap in logic that I'd ask you to entirely disregard. It's irrelevant and not helpful. But apart from that I think the issues as clear as they can be. If it please.

PRESIDENT: Yes. Thank you very much. All right. Nothing further? Well, I appreciate your attention to the matter this morning and I'll endeavour to produce an interpretation in writing in due course. Thank you very much.

HEARING CONCLUDED