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## **TRANSCRIPT OF PROCEEDINGS**

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O/N 0530

### **TASMANIAN INDUSTRIAL COMMISSION**

**COMMISSIONER J.P. McALPINE**

**T No 11518 of 2004**

### **CHILD CARE AND CHILDRENS SERVICES AWARD**

**Application pursuant to the provisions of  
section 23(2)(b) of the Industrial Relations Act 1984  
by the Australian Liquor, Hospitality and  
Miscellaneous Workers Union, Tasmanian Branch  
to vary the above award re clause 4 superannuation**

**HOBART**

**11.30 AM, TUESDAY, 8 JUNE 2004**

**This transcript was prepared from tapes recorded  
By the Tasmanian Industrial Commission**

PN1

MR P. TULLGREN: I appear for the applicant in these proceedings.

PN2

MS J. THOMAS: I appear for the Tasmanian Chamber of Commerce and Industry Limited.

PN3

THE COMMISSIONER: Okay. Mr Tullgren?

PN4

MR TULLGREN: Thank you, Commissioner. This matter is an application simply to vary the superannuation clause in the Child Care and Children's Services Award to amend the definition of eligible employee in the manner that is contained in the draft order. The variation arises as a result of discussions between the parties. We submit that the Commission can vary the award in the terms sought. I would indicate formally for the record that it is our position and would be our position if it ever came in dispute that this amendment does not seek to absolve any employer prior to the operative date of the order from having to pay superannuation for employees. If the Commission please.

PN5

THE COMMISSIONER: Thank you. Ms Thomas?

PN6

MS THOMAS: Yes, if it pleases. I believe a minor amendment needs to be made to the reference of subclause (b) in the application. That in fact should read subclause (d) with a definition of eligible employee appearing at that subclause. In terms of the operate date sought and specified in the order I unfortunately had only picked up the significance of that today and the parties are apart on that issue in terms of operative date. Certainly, the parties - we put forward a proposal to vary the award on 1 April to the union and a response from the union on 28 April indicated that the union agreed to our proposal to vary the award.

PN7

Some weeks after that I had had the file on my desk and was wondering about why we hadn't received a notice of hearing so I sent a short note to the union querying why an application hadn't been made to vary and that was done on 26 May and I think Mr Tullgren perhaps may have drawn the view that they thought we were going to lodge the application and we were thinking they were going to lodge the application and so there was some confusion there. Obviously, the Commission can award a past-operative date but that is only in special circumstances. We would agree that the employers in the industry that haven't been making contributions in accordance with this provision shouldn't be penalised by the fact that we had some confusion over who was going to lodge the application.

PN8

I think it would be fair and reasonable that the employers in the industry be required to comply with this provision effectively from this month so an operative date of today's date would be more appropriate in the circumstances with June being the first fund billing statement month where this provision would have effect. So if it pleases the Commission, otherwise we are in agreement other than on the issue of operative date.

PN9

MR TULLGREN: Well, we oppose the application. We think it is outrageous and we think it is outrageous at this short notice. This draft order has been around for a period of time. To come along on the morning and be told that there is opposition to the date, the operative date, is just a bit rich, in our respectful submission. The fact is that the date that is sought is the date that is in the draft order and was proposed by Ms Thomas to us in the terms of the variation and in fact on 28 April we advised that we accepted the terms of the order. Now, if it is now proposed to seek to vary part of the terms on the basis that there was no advice then we think that that is a serious matter.

PN10

We also say that it makes no sense to have a term in the award which says that payment - that nothing will be - effectively that this variation doesn't seek to reduce anything that occurred on 15 April and then have a prospective date. It just makes no logical sense to do that and we think that that would cause confusion. My friend says that it would be unfair in relation to employers who haven't paid. Well, if they haven't paid they are in breach of the award because the award we say is very clear and if this operative date is accepted as an attempt to try to protect some employers who may be in breach of the award we say that is an improper purpose; the Commission can't agree to that. We also say that if the attempt is to have effectively a prospective date for other reasons then those reasons are not provided and there has been no cogent submission made.

PN11

The Commission has got an onus to look at the agreement between the parties and on this basis seeking - the union advising that it was agreeing to the proposal which included 15 April certainly doesn't seek - is not for an improper purpose in itself. It doesn't seek to undermine the concept that the Commission may adopt from time to time in relation to operative dates and bearing in mind that this matter is in relation to superannuation and seeks to amend a definition of eligible employee it is in the - it would be in the public good, we respectfully submit, to have the operative date from the date that is set out in the order. So we would oppose the application for the reason - principally on the basis that this matter was entered into in good faith by the union then on the morning to be told, "Oh, no, no, we don't want to change the date," well that is just, with respect, not good enough.

PN12

If parties want to put a different position in relation to something like the operative date then they are required, we submit, as a matter of industrial form as well as common courtesy to actually make that view known well prior to the hearing on the basis of seeing whether the matter can be determined, not

effectively coming along - and I submit with the greatest respect attempting to ambush a party - and that is what has occurred in relation to us, so we would oppose the proposal to vary the operative date. We say that it should remain at 15 April.

PN13

THE COMMISSIONER: Ms Thomas?

PN14

MS THOMAS: Yes, thank you. There is certainly no proposal on our behalf to vary the reference to 15 April 2004 in that provision. At the time when we put our proposal to the union in a letter dated 1 April we had - well, we had proposed a prospective operative date to preserve the existing arrangements that applied for employees at that time and there is certainly no proposal to change that so that existing employees as at 15 April any more beneficial arrangement would be preserved because a lot of centres pay contributions on behalf of casual employees irrespective of their earnings. They are doing all sorts of things in the industry.

PN15

So there is certainly no intention to vary this provision but yes the provision is in the Industrial Act - and unfortunately I have committed the greatest sin of all and not brought my Industrial Relations Act - but there is a provision in there that goes to the retrospective issuing of orders and the Commission has certain powers in relation to that and can only award retrospectivity in cases where it feels that is warranted, especially where there is no agreement. Certainly in our proposal we put to the union on 1 April nowhere in that provision was the issue of operative date addressed. There is nothing in that proposal that goes to the operative date other than the preservation of more beneficial arrangements for employees employed as at 15 April which we are not intending to alter. If it pleases.

PN16

THE COMMISSIONER: Mr Tullgren, any response to that?

PN17

MR TULLGREN: Only to say that the order - the application was dated on 26 May and was facsimiled to the Commission on the same date and I understand that on the same or the following day the Commission notified the employers of the application including it. That is a couple of weeks ago and employers have got a responsibility to read the application and the order, as all the parties do, and not to say, "Well, we didn't read it," or, "It slipped by and then come along." We acted in good faith and we say that to alter the operative date would be unfair and unreasonable.

PN18

THE COMMISSIONER: Can we just go off record for a moment.

**OFF THE RECORD**

**[11.40am]**

**RESUMED**

**[11.50am]**

PN19

THE COMMISSIONER: Okay. Ms Thomas?

PN20

MS THOMAS: Yes, thank you for the opportunity of that discussion. I propose that the operative date be from 15 May 2004. I understand that might be the agreed position. If it pleases.

PN21

THE COMMISSIONER: Mr Tullgren?

PN22

MR TULLGREN: Yes, Commissioner, thank you. As a result of the discussion in conference we don't resile from our position in relation to what we have said. However, on the basis that this matter should go forward as quickly as possible we would be prepared to consent to the order being varied to provide that the operative date is from the first pay period to commence on or after 15 May 2004. If the Commission please.

PN23

THE COMMISSIONER: Okay, thank you very much. So I am comfortable to let this be approved and go ahead. Just as a matter of process though we did receive an apology from Michael Shorter, so that is on the record. Okay, thank you both very much.

**ADJOURNED INDEFINITELY**

**[11.54am]**